

# LEGAL SERVICES ACT 2007

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 4: Regulation of Approved Regulators**

##### **Background**

122. As already stated in the background section to the Legal Services Board,<sup>1</sup> Sir David Clementi's 2004 independent review of legal services referred to observations that the current regulatory arrangements resembled a "maze" and stated that he agreed with the Government's earlier statement<sup>2</sup> that the existing regulatory system for legal services was "outdated, inflexible, over-complex and not accountable or transparent enough". He proposed that an independent oversight regulator be established to simplify regulation and ensure that the system was clear to consumers. The Government's White Paper, *The Future of Legal Services: Putting Consumers First*,<sup>3</sup> set out how it was envisaged that this oversight regulator should operate: it should authorise approved regulators to carry out day-to-day regulation, and it would also need to be able to act if these approved regulators failed.
123. The White Paper stated that in most cases, the Board would want to work alongside regulators to help them improve where areas of weakness have been identified. However, where a regulator continued to fail, the Board would be able to remove authorisation in a particular area or areas of regulation, and either identify an alternative regulator, or carry out the regulatory functions itself.

##### ***Section 27: Regulatory and representative functions of approved regulators***

124. This section defines what is meant by the regulatory and representative functions of an approved regulator under the Act.

##### ***Section 28: Approved regulator's duty to promote the regulatory objectives etc***

125. When discharging its regulatory functions, an approved regulator will be under a duty to act in a way that is compatible with the regulatory objectives so far as it is reasonably practicable to do so. In addition, the approved regulator must have regard to principles of best regulatory practice.

##### ***Section 29: Prohibition on the Board interfering with representative functions***

126. This section provides that the Board is not authorised to exercise its functions in relation to any representative function of an approved regulator. However, the Board is authorised to take action for the purpose of ensuring that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions, and

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<sup>1</sup> Clementi, 2004

<sup>2</sup> Department for Constitutional Affairs 2003

<sup>3</sup> Department for Constitutional Affairs, 2005

that decisions are taken independently of each other in relation to the regulatory and the representative functions.

***Section 30: Rules relating to the exercise of regulatory functions***

127. This section requires the Board to make rules setting out requirements to be met by approved regulators for the purpose of ensuring that their regulatory and representative functions are appropriately separated (“internal governance rules”). The rules must include provision which ensures that persons exercising regulatory functions can, independently from any representative functions, make representations to the Board, the Consumer Panel, the OLC and other approved regulators (including notifying the Board if they feel that their independence or effectiveness is being compromised), and that they are appropriately resourced to carry out their functions.

***Section 31: Performance targets and monitoring***

128. The Board may set, or direct an approved regulator to set, performance targets relating to the performance of the approved regulator’s regulatory functions, as defined in section 27. For example, where an approved regulator is failing to deal with misconduct cases quickly enough, the Board may set targets in relation to how long consideration of a misconduct case should take. [Section 31\(2\)](#) sets out the thresholds that must be met before the Board can exercise this power, and in considering whether it is appropriate to take action, the Board must consider the impact of taking action on the other regulatory objectives.

***Section 32: Directions***

***Section 33: Directions: procedure***

***Section 34: Enforcement of directions***

129. Under section 32 the Board may use its power of direction where any of the threshold conditions in [section 32\(1\)](#) is satisfied, including that the Board has considered the impact of taking action on the other regulatory objectives.
130. In such circumstances, the Board may direct the approved regulator in question to take steps to remedy any failure or counter any adverse impact, mitigate its effect, or prevent its recurrence. It must publish any direction that it issues to a regulator.
131. [Section 32\(4\)](#) sets out the scope of a direction. A direction may only require an approved regulator to take steps which it has power to take, and it may require the regulator to take steps with a view to the modification of any part of its regulatory arrangements in order to achieve the desired effect.
132. The Board can monitor compliance with a direction, and it may revoke a direction by giving notice to the regulator, and publishing the notice.
133. Under section 33, when the Board gives a direction to a regulator to take specific steps, the procedure set out in [Schedule 7](#) will apply. Schedule 7 includes requirements for giving notice to the approved regulator, for consulting with the Lord Chancellor, the OFT, the Consumer Panel and the Lord Chief Justice, and for making representations.
134. Under section 34, where an approved regulator has failed to comply with a direction, the Board may make an application to the High Court. Upon such an application, if the High Court agrees that the approved regulator has failed to comply with the direction, it may make an order requiring the approved regulator to take such steps as it considers appropriate in order to ensure that direction is complied with.

***Section 35: Public censure***

***Section 36: Public censure: procedure***

135. [Section 35](#) sets out the threshold conditions which must be met before the Board can exercise this power, including the requirement for the Board to consider the impact of taking action on the other regulatory objectives. [Section 36](#) sets out the procedure that must be complied with before a statement of censure can be issued, and requires the Board to give prior notice of the terms of the proposed statement and other matters, and to consider any representations which are duly made before publishing the statement.

***Section 37: Financial penalties***

***Section 38: Financial penalties: procedure***

136. [Section 37\(1\)](#) sets out the threshold conditions that must be met before the Board can exercise its power to impose financial penalties. The Board is required to make rules by statutory instrument (subject to the negative resolution procedure – see [section 206\(6\)](#)), prescribing the maximum amount of the penalty that may be imposed and the Lord Chancellor's consent to these rules is required. [Section 38](#) sets out the procedure that applies to the imposition of financial penalties.

***Section 39: Appeals against financial penalties***

137. This section makes provision for an approved regulator to appeal against a financial penalty on the grounds set out at [section 39\(2\)](#).
138. The appeal is by way of application to the High Court (to be made within three months of notification of the decision appealed against). The High Court can quash the penalty, substitute a different amount or, where the penalty is payable by instalments, vary the time by which the penalty must be paid ([section 39\(4\)](#)), and may make an order as to interest on any substituted penalty ([sections 39\(5\) and 39\(6\)](#)).

***Section 40: Recovery of financial penalties***

139. Where an approved regulator has not paid a financial penalty, the Board has the power to recover the penalty, and any interest, as a debt payable to the Board ([sections 40\(3\) and 40\(4\)](#)). If all or part of a penalty is not paid by the time specified, the unpaid balance carries interest ([section 40\(1\)](#)). Where an appeal is made by an approved regulator against a financial penalty, the penalty does not have to be paid until the appeal has been determined or withdrawn.

***Section 41: Intervention directions***

140. This section defines an intervention direction, and provides for the scope of such directions and the conditions under which the Board can impose such directions on an approved regulator in relation to its regulatory functions. An intervention direction ([section 41\(2\)](#)) is a direction that the Board, or the Board's nominee, will exercise one or more of the approved regulator's regulatory functions. Where the Board exercises its powers under an intervention direction, it will be able to nominate a person or persons to carry out the regulatory function. The Board may also require the approved regulator to comply with any instructions set by the Board or the nominated person.
141. [Section 41\(1\)](#) sets out the threshold conditions which must be met before the Board can issue an intervention direction, which mirror those in [section 31\(2\)](#), including the requirement for the Board to consider the impact of taking action on the other regulatory objectives. [Section 41\(3\)](#) additionally provides that the Board must not give an intervention direction unless it is satisfied that the approved regulator's act or omission cannot be adequately addressed by the exercise of the powers available under [sections 31 to 40](#).

142. *Section 41(4)* refers to **part 1 of Schedule 8**, which sets out the procedure for giving an intervention direction. This includes procedures for giving notice to the approved regulator, for consulting with the Lord Chancellor, the OFT, the Consumer Panel and the Lord Chief Justice, and for making representations.

***Section 42: Intervention directions: further provision***

143. Where an intervention direction has been made and is in effect in relation to a function of an approved regulator, the approved regulator must give the Board, or a person nominated by the Board, all such assistance as it is reasonably able to give, to allow the Board, or nominated person, to pursue the direction through the exercise of the function to which the direction relates. Under *section 42(3)*, the Board, a person nominated by the Board or any such person's appointee may apply for a warrant authorising them to enter and search the approved regulator's premises and to seize the records it finds. *Section 42(6)* requires the Lord Chancellor to make regulations prescribing the criteria that will apply when deciding whether to issue a warrant.

***Section 43: Intervention directions: enforcement***

144. This section makes provision for the enforcement of intervention directions by way of application to the High Court.

***Section 44: Revocation of intervention directions***

145. *Section 44(1)* provides that an intervention direction has effect until such time as it is revoked by the Board. *Section 44(2)* refers to **Part 2 of Schedule 8**, which contains the procedure for revocation of an intervention direction. This includes procedures for giving notice to the approved regulator, for consulting with the Lord Chancellor, the OFT, the Consumer Panel and the Lord Chief Justice, and for making representations.
146. **Paragraph 13** of the Schedule provides that where an intervention direction has effect in respect of a regulatory function of an approved regulator, the regulator can apply to the Board for the Board to revoke the direction, or the Board can give notice to the regulator that it intends to revoke the direction.

***Section 45: Cancellation of designation as approved regulator***

147. The Lord Chancellor may, by making an order, cancel a body's designation as an approved regulator in relation to one or more of the reserved legal activities for which it is designated (*section 45(1)*). But the Lord Chancellor may act only on the recommendation of the Board (*section 45(2)*).
148. Under *section 45(3)*, if a body applies to the Board to have its designation as an approved regulator cancelled, and the Board is satisfied that the rules that it has set for this process have been met, then the Board must make such a recommendation to the Lord Chancellor.
149. The Board may also recommend that a cancellation order be made if it is satisfied that the conditions listed in *section 45(5)* (including the requirement for the Board to consider the impact of taking action on the other regulatory objectives) have been met and that the matter cannot be adequately addressed by the Board exercising its powers under sections 31 to 43. The Board must specify the reasons for suggesting cancellation when making its recommendation.
150. **Schedule 9**, introduced by this section, applies where the Board considers that it may be appropriate for it to make a recommendation under *section 45(5)*. It requires the Board to notify the body of the proposed recommendation, and to seek advice in respect of the recommendation. This Schedule sets out the procedures for giving notice to the approved regulator, for consulting with the OFT, the Consumer Panel and the Lord Chief Justice, and for making representations.

***Section 46: Cancellation of a designation: further provision***

***Section 47: The Board's power to recommend orders made under section 46***

151. **Section 46** allows the Lord Chancellor to make transfer arrangements by order when a body has its designation in relation to one or more reserved legal activities cancelled. The Lord Chancellor may make such an order only on the recommendation of the Board, and only in substantially the same form as recommended by the Board (**section 46(7)**). **Section 47** sets out the procedure that the Board must follow when making a recommendation for the cancellation of an approved regulator's designation. This procedure requires the publication of a draft recommendation and order, and that the Board take account of any representations made. It also provides for re-publication of the recommendation and order, if the Board makes any amendments which it considers material after the initial publication.
152. The purpose of section 46 is to minimise disruption to the regulation of authorised persons following the cancellation of an approved regulator's designation. It allows for regulatory responsibility for the authorised persons concerned to be transferred to another approved regulator (assuming that the regulator in question consents to assuming such responsibility) or, where no suitable alternative approved regulator has been identified, to the Board, in its capacity as an approved regulator.
153. Where such a transfer takes place, the relevant regulated persons will be subject to the regulatory arrangements of the new regulator, or the Board, as appropriate.
154. **Section 47** also allows money raised from practising fees and held by the old regulator (or a part of the money so held) to be paid to the new regulator and treated in the same way as if the money had been raised by the new regulator by way of practising fees.

***Section 48: Cancellation of designation: powers of entry etc***

155. This section applies where an approved regulator has had its designation removed. The old regulator must give reasonable assistance to the new regulator and Board for the continuation of regulation.
156. A person appointed by the Board to act on its behalf may apply to a judge of the High Court, a circuit judge or justice of the peace for a warrant authorising that person to enter and search the premises of the old regulator, and to take possession of written or electronic documents found there. The person may take copies of records found on a search, and the Board must make rules as to the persons it may appoint for these purposes.
157. A warrant may not be issued unless it is necessary or desirable for the purpose of continuing regulation. The Lord Chancellor must make regulations specifying any further matters that the judge or justice of the peace must be satisfied of or have regard to before issuing a warrant, and regulating the exercise of a power conferred by the warrant. The regulations must be made in accordance with a recommendation of, or following consultation with, the Board. The regulations must in particular make provision as to the circumstances in which documents may be copied or must be returned.

***Section 49: The Board's policy statements***

***Section 50: Policy statements: procedure***

158. **Section 49** requires the Board to prepare and issue a policy statement concerning its functions under sections 31, 32, 35, 37, 41, 45 and 76. The Board may also issue a statement of policy with respect to any other matter, where it considers it appropriate. In preparing a statement, the Board must have regard to the principle that its principal role is the oversight of approved regulators, and that it should not exercise its powers unless



the act or omission of an approved regulator was unreasonable. The statement must take account of the desirability of resolving informally matters between the Board and the approved regulators, and specify how the Board will comply with the requirements of section 3(3). Any policy statement may be amended or replaced from time to time, and the Board must publish the new or amended statement. The Board must have regard to any relevant policy statement in exercising, or deciding whether to exercise, any of its functions (see [section 49\(8\)](#)).

159. Before the Board issues a policy statement, it must publish the proposed statement in draft, and allow representations to be made about it. Section 50 outlines the procedure for making policy statements.

### ***Section 51: Control of practising fees charged by approved regulators***

160. This section requires the Board to make rules setting out the purposes for which practising fees payable under the regulatory arrangements of approved regulators may be applied. These rules must allow for practising fees to be applied for the purposes set out at [section 51\(4\)](#). This provision further provides that a practising fee charged by an approved regulator to the persons it authorises will only be payable if the Board has approved the level of the fee. The Board must also make rules setting out how it will deal with applications for the approval of practising fees.

### ***Section 52: Regulatory conflict with approved regulators***

161. This section deals with the possibility that conflicts between regulatory arrangements may arise where an approved regulator regulates entities comprising persons authorised by different approved regulators – for example, solicitors and barristers. Regulators of such entities will be required to take steps to prevent conflicts of this type in their rules, as set out at [section 52\(1\)](#). In the event that a conflict does arise between the regulator of the entity, and another approved regulator who authorises persons practising within the entity, the conflict is to be resolved as set out at [section 52\(4\)](#).

### ***Section 53: Modification of provision made about regulatory conflict***

162. To counter any imbalance arising from the outcome of the provision in section 52(4), section 53 provides that approved regulators whose members are affected by the rules of another approved regulator may ask that the Board exercise its powers under section 32 to direct that the approved regulator take steps to address the offending provision in its regulatory arrangements. [Section 53\(3\)](#) requires approved regulators to consider any request from persons authorised by them or a manager or employee of such persons to make such an application to the Board. The Board must consider representations from both regulators, and may consult others as appropriate, before making a decision over whether or not to modify the rules (see [section 53\(5\)](#)).

### ***Section 54: Regulatory conflict with other regulatory regimes***

163. This section places approved regulators under an obligation to make provision in their regulatory arrangements to prevent and resolve regulatory conflicts with external regulators, as well as to avoid unnecessary duplication of regulation. This applies to approved regulators who regulate entities involving persons regulated by an external, non-legal services regulator, for example, the Financial Services Authority. The Board must provide guidance to approved regulators on dealing with external regulatory conflicts. With the Board's consent, the approved regulator's regulatory arrangements may provide for the Board to act in the resolution of conflicts between the approved regulator and relevant external regulators.

***Section 55: Provision of information to the Board***

***Section 56: Enforcement of notices under section 55***

164. **Section 55** confers power on the Board to require an approved regulator, by notice, to provide such information or produce such documents in such form, within such period and to such person nominated by the Board, as the Board specifies in the notice. **Section 56** provides for enforcement in the event of an approved regulator failing to comply with such a notice. Enforcement is by way of application to the High Court for an order requiring the approved regulator to comply with the original notice that was issued by the Board.

***Section 57: Reports by the OFT***

***Section 58: The Board's response to OFT report***

***Section 59: Referral of report by the Lord Chancellor to the Competition Commission***

***Section 60: Duties of the Competition Commission***

***Section 61: Lord Chancellor's power to give directions***

165. These sections make provision conferring investigation powers and duties on the OFT and the Competition Commission in respect of regulatory arrangements of approved regulators where they in effect prevent, restrict or distort competition within the market for reserved legal services. Under **section 57**, the OFT may prepare a report if it believes that an approved regulator's regulatory arrangements (or any part of them) have this effect, or are likely to do so. The section also sets out the matters which the OFT's report should cover. It further provides that such reports attract absolute privilege for the purposes of the law of defamation.
166. **Section 58** details how the Board should respond to a report from the OFT. It provides that the Board must allow at least 28 days for the approved regulator to make representations to the Board regarding the OFT's report. **Section 58** further allows for the Consumer Panel to give such advice to the Board as it considers appropriate and requires the Board to have regard to any such representations and advice before informing the OFT what action (if any) it proposes to take.
167. **Section 59** and **section 60** provide that, in the event that the OFT believes that the Board has not given the OFT's report full and proper consideration, the OFT may give a copy of the report to the Lord Chancellor, who must, in turn, give a copy of the report to the Competition Commission. The Competition Commission must then investigate the matter and make its own report (unless it judges that this would serve no useful purpose). Under **section 61**, the Lord Chancellor has the power to direct the Board to take action in connection with any matter raised in the OFT's report. Before giving a direction, the Lord Chancellor must consider any report given by the Competition Commission under **section 60**. Any direction given under **section 61** must be published

***Section 62: The Board as an approved regulator***

***Section 63: The Board's designation under section 62(1)(a)***

***Section 64: Modification of the Board's functions under section 62(1)(b)***

***Section 65: Cancellation of the Board's designation under section 62(1)(c)***

***Section 66: The Board's power to recommend orders made under section 62***

168. This group of sections make provision for the Board to be able to act as an approved regulator in relation to any one or more of the reserved legal activities. Section 62 provides that the Lord Chancellor may, by order:
- designate the Board as an approved regulator in relation to one or more reserved legal activities;
  - modify the functions of the Board, with a view to enabling the Board to discharge its functions as an approved regulator effectively and efficiently; and
  - cancel the Board's designation as an approved regulator in relation to one or more reserved legal activity.
169. Such an order may also modify other legislation as appears necessary or expedient to the Lord Chancellor (see [section 62\(5\)](#)). If the Board is designated by such an order, it must take the necessary action to ensure an appropriate financial and organisational separation between its functions as approved regulator and its other activities.
170. The Lord Chancellor's power to make such an order is exercisable only if the Board has made a recommendation for such an order; and it may not be used so as to make an order which differs materially from that recommended ([section 62\(2\)](#)). Section 66 makes provision about the Board's recommendations for orders under section 62. The Lord Chancellor is not bound to accept a recommendation, but must provide the Board with a notice stating reasons for refusal and must publish that notice ([section 62\(3\)](#)).
171. [Section 63](#) provides that the Board may be designated as an approved regulator only in instances where an approved regulator's designation has been cancelled, or where the activity in question is a new reserved legal activity. By virtue of [section 63\(3\)](#), the Board may be designated as an approved regulator in advance of either of these eventualities. The order designating the Board must also ensure that the Board acting as approved regulator is separate from the Board acting in its "general" capacity so that the Board as approved regulator may only make or modify its regulatory arrangements with the approval of the Board in its general capacity.
172. [Section 64](#) specifies some of the powers that may be conferred on the Board by an order made under [section 62\(1\)\(b\)](#) modifying the Board's functions in order to enable it to fulfil its role as an approved regulator more effectively.
173. [Section 65](#) makes provision regarding the cancellation of the Board's designation as an approved regulator. In such cases, sections 46 and 47 which provide for "transfer arrangements") will apply in relation to the Board and persons authorised by it as they apply to an approved regulator whose designation is cancelled under section 45, and to persons authorised by that regulator.
174. [Section 66](#) sets out the procedure that the Board must follow before making a recommendation for an order under section 62.

***Section 68: Regulatory conflict and the Board as approved regulator***

175. This section sets out how regulatory conflict will be resolved in instances where the Board acts as an approved regulator. It provides for requests to be made to the Board



(in its capacity as an approved regulator) for it to reconsider the provision made by its regulatory arrangements, so as to prevent a conflict with another approved regulator. Such a request may be made by an approved regulator (on its own initiative) or following a request by an affected person (as defined by [section 68\(11\)](#)). Such a request may also be made by a person authorised by the Board (in its capacity as an approved regulator) to carry on a reserved legal activity or a manager or employee of such a person. Such a person may also apply to the Board in its capacity as an oversight regulator, requesting that it exercise its powers under section 32 to direct the approved regulator to take the appropriate action in respect of regulatory arrangements to resolve a regulatory conflict.

***Section 69: Modification of the functions of approved regulators etc***

***Section 70: Procedural requirements relating to recommendations under [section 69](#)***

176. [Section 69](#) confers the power on the Lord Chancellor to make an order modifying or making other provision in relation to the functions of an approved regulator or other body other than the Board. Such an order may only be made following a recommendation by the Board, and such orders may only be made to achieve the purposes specified in [section 69\(3\)](#), namely:
- to enable a body to become an approved regulator or licensing authority in relation to one or more reserved legal activities;
  - to enable a body to regulate different categories of legal persons;
  - to enable a body to carry out its role as an approved regulator/licensing authority more effectively or efficiently;
  - to enable a body to become a qualifying regulator for immigration services; or
  - (where the body is already a qualifying regulator) to enable it to authorise persons to provide any additional advice or services which amount to immigration advice or services.
177. Furthermore, the Board may only make a recommendation that such an order be made with the consent of the approved regulator to which the recommendation relates. Section 70 sets out the procedural requirements relating to the making of such recommendations.