

Title: Impact Assessment for The Legal Services Act 2007 (Warrant) (Approved Regulator) Regulations 2015 IA No: MoJ 048 Lead department or agency: Ministry of Justice Other departments or agencies: Legal Services Board	Impact Assessment (IA)		
	Date: 26/01/2015		
	Stage: Final		
	Source of intervention: Domestic		
	Type of measure: Secondary legislation		
Contact for enquiries: Nalini Deen Nalini.deen@justice.gsi.gov.uk			
Summary: Intervention and Options		RPC Opinion: Not Applicable	

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out? Measure qualifies as
£0 million	£0 million	£0 million	No zero net cost

What is the problem under consideration? Why is government intervention necessary?

Under the Legal Services Act 2007 ("the 2007 Act"), the Legal Services Board ("the LSB") is granted the power to apply, in specified circumstances, for a warrant to enter and search the premises of an approved or a former regulator to take possession of any written or electronic records. Such a warrant can be applied for when an intervention direction has been issued or an approved regulator has had its designation cancelled. The 2007 Act provides that the Lord Chancellor *must* make regulations concerning the circumstances in which warrants can be issued, and regulating the exercise of powers conferred by warrants, so the LSB can utilise this power if required.

What are the policy objectives and the intended effects?

The main objective is to ensure the efficient functioning of the regulatory system in particular circumstances of regulatory failure by an approved or former regulator. These regulations control the issue and exercise of a search warrant and therefore provides clarity, consistency and protection to legal services consumers, providers and regulatory bodies. The intention is to protect approved regulators from the overuse of search warrants, or from overly intrusive search warrants, without disproportionately hampering the intention behind search warrants: allowing the LSB access to information in a specific set of circumstances.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)

Implementing the regulations is the only option considered, assessed against a base case of 'do nothing'.

The Legal Services Act is clear that regulations must be made relating to application for, and exercise of search warrants. Doing nothing would result in the LSB not being able to apply for search warrants and could potentially hamper its enforcement powers. Therefore implementing the regulations is the chosen option.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: from end 2015					
Does implementation go beyond minimum EU requirements?				N/A	
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		Micro N/A	< 20 N/A	Small N/A	Medium N/A
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)				Traded: £0m	Non-traded: £0m

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister:

..... Edward Faulks Date: 26/01/2015

Summary: Analysis and Evidence

Policy Option 1

Description: Make warrant regulations

Price Base Year	PV Base Year	Time Period Years	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: NQ

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low			
High			
Best Estimate	NQ	NQ	NQ

Description and scale of key monetised costs by 'main affected groups'

It has not been possible to quantify the costs associated with this proposal.

Other key non-monetised costs by 'main affected groups'

This option would involve minor costs for the LSB (or person appointed to exercise a warrant), the court service relating to the application for a warrant, and for the LSB when carrying out searches and handling records thereafter. Given these powers are expected to be used very rarely, in aggregate these costs are expected to be negligible. Searches are also likely to impose some minor costs on the regulators being subject to search in terms of time, inconvenience and pose reputational damage, due to this being part of an enforcement measure to address regulatory failure. Regulators may indirectly face additional compliance costs in response to the deterrent effect of improved enforcement. These costs would eventually be passed through to the consumers of legal services.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low			
High			
Best Estimate	NQ	NQ	NQ

Description and scale of key monetised benefits by 'main affected groups'

It has not been possible to quantify the benefits associated with this proposal.

Other key non-monetised benefits by 'main affected groups'

This option will allow the LSB, or a person appointed by it, to apply for a warrant as part of its enforcement strategy, enabling the LSB to assume effectively the functions of the approved regulator. This will ensure an efficient functioning of the regulatory system, providing benefits for consumers of legal services. The existence of regulations covering the issue and execution of an enter and search warrant also has the potential to act as a deterrent against poor regulation and to improve the standard of regulatory practice by the relevant bodies. Overall this has the potential to improve market confidence and benefit consumers and providers of legal services.

Key assumptions/sensitivities/risks

Discount rate (%)

It is assumed that any costs imposed on regulators would eventually be passed on to legal professionals and in turn on to consumers of legal services in the form of higher fees. This impact is not expected to be significant – a warrant will only be applied for in extreme cases of regulatory failure on application to a judge and it is assumed that the power to apply for a warrant will be used very rarely. Any benefits in the form of improved regulatory oversight would also ultimately feed through to consumers.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: £0m	Benefits: £0m	Net: £0m	No	Zero net cost

Evidence Base (for summary sheets) – Notes

References

No.	Legislation or publication
1	<u>The Legal Services Act 2007</u>
2	Legal Services Board Consultation on its statement of policy on its intervention powers can be found at: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm
3	Legal Services Board Statement of policy on its use of intervention directions and cancellation of designation http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm

Evidence Base (for summary sheets)

1. Introduction

Background

- 1.1 The Legal Services Act 2007 (“the 2007 Act”) established the Legal Services Board (“LSB”) as the new oversight regulator of legal services. The LSB oversees the regulators of legal services known as “approved regulators”.
- 1.2 Under the 2007 Act, approved regulators are under a duty to act in a way that is compatible with the regulatory objectives set out in section 1 of the 2007 Act.¹ Where acts or omissions of an approved regulator are likely to have an adverse impact on these regulatory objectives, the LSB is equipped with a range of enforcement powers that it can exercise to address them including issuing performance targets, directions, public censure and imposing financial penalties. Where an approved regulator’s acts or omissions are sufficiently serious, the LSB can also issue an intervention direction – providing for certain functions of the approved regulator to be exercised by the LSB or a person nominated by it – or it can make a recommendation that the Lord Chancellor cancel the approved regulator’s designation.
- 1.3 The LSB can only consider issuing an intervention direction or recommending cancellation of an approved regulator’s designation if its other enforcement powers would not adequately address the issue. This is intended to ensure that these powers remain reserved for the most serious or persistent infractions. These safeguards ensure that the LSB will take a proportionate approach to the exercise of its powers and it is envisaged that intervention directions or recommendations for cancellation of designation will be used sparingly. It is hoped that matters will never proceed to this stage.
- 1.4 In order to provide continuity of regulation in these circumstances the LSB (or a person nominated by it) can apply for a search warrant, which would allow a specified person to enter the premises of an approved regulator and take possession of written or electronic documents. The 2007 Act provides that a High Court judge, Circuit judge or justice of the peace can only issue a warrant where necessary or desirable for the exercise of an intervention direction, or where necessary or desirable for continuing regulation in the case of cancellation of an approved regulator’s designation.

Problem under consideration

- 1.5 Sections 42(6) and 48(6) of the 2007 Act state that the Lord Chancellor must make regulations specifying further matters that a judge or justice must be satisfied of or have regard to before issuing a warrant in relation to an intervention direction or cancellation of an approved regulator’s designation. The regulations must also regulate the exercise of a power conferred by warrant and make provision concerning when documents can be copied or must be returned.
- 1.6 The Lord Chancellor must make regulations and therefore the LSB (or a person nominated or appointed by it) will not be able to apply for a warrant until regulations are made. The LSB became operational and gained the ability to exercise its enforcement powers on 1st January 2010. Intervention directions and cancellation of designation will only be relevant in severe cases of regulatory failure and there are a number of processes that the LSB must go through before either can materialise. These processes include statutory time limits that mean it will take a number of weeks for an intervention direction or cancellation of designation to take effect. However, it is

¹ 1 The regulatory objectives

(1) In this Act a reference to “the regulatory objectives” is a reference to the objectives of—

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of services within subsection (2);
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen’s legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

important that regulations are made so that the LSB can exercise its full range of enforcement powers to address regulatory failure.

Economic rationale

- 1.7 The conventional economic approach to Government intervention is based on efficiency or equity arguments. Government intervenes if there is a perceived failure in the way a market operates (“market failures”) or if it would like to correct existing institutional distortions (“government failures”). Government also intervenes for equity (“fairness”) reasons. In this case, intervention would be justified primarily on efficiency grounds.
- 1.8 The regulations apply in instances where the regulatory system covering the provision of legal services has broken down. Allowing searches will ensure that the required level of regulatory oversight can quickly be re-established, ensuring that legal services are regulated effectively. This will provide economic welfare gains to consumers of legal services.
- 1.9 The regulations may also provide a deterrent effect which would increase the standard of regulatory oversight overall. This would provide further benefits for the consumers of legal services. Improved market confidence may also benefit the providers of legal services.

Affected stakeholder groups, organisations and sectors

- 1.10 Regulations made by the Lord Chancellor under sections 42 and 48 of the 2007 Act concern applications for search warrants by the LSB or a person appointed by the LSB. These warrants can be exercised over the approved regulators. Under the 2007 Act there are currently 11 approved regulators:
 - Law Society;
 - General Council of the Bar;
 - Master of the Faculties;
 - Institute of Legal Executives;
 - Council for Licensed Conveyancers;
 - Chartered Institute of Patent Attorneys;
 - Institute of Trade Mark Attorneys;
 - Association of Law Costs Draftsmen;
 - Association of Chartered Certified Accountants;
 - the Institute of Chartered Accountants of Scotland; and
 - the Institute of Chartered Accountants in England and Wales.
- 1.11 If the LSB recommends, the Lord Chancellor can designate other bodies as approved regulators in the future.
- 1.12 It is currently estimated that the approved regulators authorise around 158,000 legal professionals to practise (this includes some professionals who are authorised by more than one approved regulator). However, it is not envisaged that these individuals or the businesses and bodies within which they work will be directly affected by a warrant for search and entry or regulations concerning this. A warrant only authorise the LSB to take possession of documents already in the possession of approved regulators and not directly from professionals or businesses. Such documents may relate to the individuals and entities that the approved regulators are or were regulating. However, the intention in exercising a warrant under either section 42 or 48 will be to provide continuity of regulation. Therefore there should be no direct impact on legal practices or legal professionals resulting from the LSB’s exercise of a warrant for search and entry.
- 1.13 Similarly, the content of regulations regarding a search warrant will have no impact on legal professionals or practices. The regulations will cover matters that a judge or Justice of the Peace must be satisfied of or have regard to before issuing a warrant and will also regulate the exercise of a power conferred by warrant. The regulations will therefore primarily impact the LSB, any person that it specifies or appoints to carry out a search, and the approved regulators. There will also be some impact on the judiciary and the courts.
- 1.14 In assessing costs on the LSB and approved regulators it should be noted that both are funded primarily by a levy. The LSB is funded by a levy on the approved regulators, who in turn recoup the costs of this levy, along with their other operating costs, largely from charging practising fees to the persons that they authorise to practise. Therefore any costs that are imposed on either the LSB or

the approved regulators will eventually fall to legal professionals, and potentially to consumers through increased fees. Improved standards of regulatory oversight could in turn benefit consumers of legal services and boost market confidence.

2. Costs and benefits

- 2.1 This Impact Assessment identifies impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However there are important aspects that cannot sensibly be monetised. These might include how the proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.

Option 0: Base case (do nothing)

- 2.2 The 2007 Act makes it clear that regulations must be made regarding applications by the LSB (its nominee or appointee) for search warrants. Until regulations are made, the LSB will not be able to apply for a warrant. The 'do nothing' option is therefore presented as a hypothetical option only.
- 2.3 Because the do nothing option is compared against itself its costs and benefits and necessarily zero, as is its Net Present Value (NPV).²

Option 1 – Make warrant regulations

Description

- 2.4 The approved regulator regulations have been the subject of two consultations with regulatory stakeholders (the LSB and all of the approved regulators/licensing authorities). Firstly, the draft regulations were the subject of a consultation from 10 July to 24 July 2012. Secondly, in 2014, given the changes to the draft approved regulator regulations, the fact that new approved regulators and licensing authorities had been designated since 2012, and the fact that the licensing authority regulations had since been drafted, both sets of regulations were subject to a further technical consultation with stakeholders (from 24 October to 14 November 2014). The draft regulations have been amended in line with responses where appropriate.
- 2.5 Regulation 2 (conditions for issuing a warrant) lists matters that a judicial officer must be satisfied of before a warrant can be issued. A judicial officer must be satisfied that reasonable attempts have been made to obtain the desired documents by other means, or if not, that attempts to obtain the information by other means would result in the material being removed, hidden, tampered or destroyed. These factors are seen as an important safeguard to ensure that warrants remain reserved for use as a last resort, therefore preventing unnecessary incursions on the premises of approved regulators. There is also a requirement that a warrant may only be issued if no judge has refused to issue a warrant based on an application that is in substance the same, thus preventing repeat applications which are substantively identical if a warrant application has already been refused.
- 2.6 Regulation 3 lists safeguards and procedural requirements relating to the execution of warrants, including that a warrant must be executed within one month from the date of issue and at a reasonable hour, unless the purpose of entry would otherwise be frustrated; requirement for the officer or agent to identify themselves; and requirements in connection with endorsing the warrant with results of a search.
- 2.7 The regulations also prescribe the circumstances in which possession can be taken of records and when these must be returned to the approved regulator. Regulation 4 provides that the powers conferred by a warrant must not be exercised to take possession of or copy items subject to legal

² The Net Present Value (NPV) shows the total net value of a project over a specific time period. The value of the costs and benefits in an NPV are adjusted to account for inflation and the fact that we generally value benefits that are provided now more than we value the same benefits provided in the future.

privilege (within the meaning of section 10 of the Police and Criminal Evidence Act 1984). Any privileged items taken in error must be returned, and copies destroyed, as soon as they are identified as privileged.

- 2.8 Regulation 5 (notice and return of records) prescribes when records must be returned to the approved or former regulator. In respect of warrants issued under section 42, the documents must be returned within 7 days of receipt of a request by the approved regulator stating that the record that is needed to discharge a regulatory function; or when the intervention direction is revoked under section 44 of the 2007 Act. If neither of these apply, records must be returned within 3 months of the date on which the officer or agent took possession of them. This is subject to the approved regulator agreeing otherwise in writing. In respect of warrants issued under section 48, neither regulation 5(b)(ii) or (iii) are relevant, so the requirement is for records to be returned within 3 months unless the former regulator agrees otherwise in writing. Regulation 5 also provides that the person who exercises the warrant must provide the approved regulator with a list of all of the records that have been taken within a reasonable time, which must be no longer than 21 days after the record was taken.
- 2.9 Regulation 6 makes provision for the copying of records. Regulation 6(3) provides that where a record has been copied in error, any copies taken of that record must be destroyed, as soon as it has been identified that there has been an error or failure to comply with this regulation.
- 2.10 Regulations 7 and 8 deal with giving notice of copies and retention of copies.

Costs

- 2.11 There may be some minor one-off adjustment costs for the LSB and regulated bodies relating to familiarisation with the new regulations. These costs are not expected to be significant and have not been monetised.

LSB

- 2.12 There would be some minor ongoing costs to the LSB (or the person who the LSB has nominated to exercise a search) in terms of time and resource when making applications for and carrying out searches. Further costs may be incurred when records must be copied and returned. None of these costs are expected to be significant in total, given searches are expected to be rarely used. Neither are the costs per case expected to be significant.

HM Courts and Tribunal Service (HMCTS)

- 2.13 In the event of an application for a search warrant being made, there would also be some cost imposed on the court service. However, given that the expected volume of such applications is low, and that the design of procedural requirements aims to minimise the burden placed on the court system (see above), these costs are not expected to be significant. In any case, HMCTS operate on a cost recovery basis so court fees should cover costs, hence there should be no net financial impact on HMCTS as a result of the proposal.

Approved regulators

- 2.14 As these powers are expected to be used only in extreme cases of regulatory failure and very rarely, costs are expected to be negligible in aggregate. However, on a case by case basis any approved regulator facing search would face some costs in terms of time, inconvenience and reputational damage, due to this being part of an enforcement measure to address regulatory failure. The costs are expected to be passed to consumers of legal services.
- 2.15 The fact that the LSB is able to carry out searches that would result in reputational damage should provide a deterrent against poor regulatory practice by all approved regulators. In response to this threat, approved regulators may incur some additional compliance costs. These would only be to the extent of ensuring compliance with their existing remit – no additional requirements would be placed on approved regulators.

Providers of legal services

- 2.16 Any additional LSB costs would be passed on to legal service providers, who in turn would be expected to pass on these costs to consumers in the form of higher fees. We do not expect these costs to be significant, as set out above. However, in theory the higher fees may result in a reduction in the demand for legal services overall.

Consumers of legal services

2.17 Any costs imposed by the LSB or on approved regulators may eventually be passed on to legal service providers in the form of higher regulatory fees, and in turn to the consumers of those legal services. However, as outlined above the proposal is not expected to impose significant costs. The consumers of legal services are therefore not expected to face significant additional costs as a result of the proposal.

Benefits

Providers of legal services

2.18 Increased protection for consumers and any perceived increase in regulatory effectiveness could boost consumer confidence in the legal services market which could increase levels of activity, to the benefit of legal service providers.

Consumers of legal services

2.19 The proposal would allow the LSB, or a person appointed by it, to apply for warrants as part of its enforcement strategy, enabling it to assume effectively the functions of an approved regulator that is failing. This should ensure the smooth functioning of the regulatory system in such cases, ensuring protection for the consumers of legal services.

2.20 As outlined above, the proposal should provide a deterrent effect. The strength of the deterrent effect is uncertain, but any resulting improvement in the regulatory oversight of regulators would further benefit the consumers of legal services.

Wider social and economic benefits

2.21 The proposal relates to ensuring that efficient regulatory oversight is maintained in the market for legal services, and as such is expected to deliver (regulatory) efficiency benefits. A indirect effect of this is that the underlying behaviour of legal service providers may improve, leading to further efficiency benefits in the legal services market.

2.22 In principle, this could also generate equity (fairness) benefits if the consumers of legal services are afforded better protection as a result, and that providing this protection is valued by society.

Summary of key assumptions and risks

2.23 It is assumed that any costs imposed on regulators would eventually be passed on to legal professionals and in turn to consumers of legal services in the form of higher fees. This impact is not expected to be significant - warrants will only be applied for in extreme cases of regulatory failure and it is assumed that the power to apply for a warrant will be used very rarely. Applications must also be approved by a judge.

2.24 In the absence of search warrant powers, it is possible that the LSB might engage in other activities which deliver an equivalent level of consumer protection, but which would be more impose greater burdens on legal service providers and approved regulators. If so, the proposal would not generate increased protection, but would deliver cost reductions, to the benefit of both the providers and consumers of legal services.

Summary of One In Two Out position

2.25 This option is out of scope of the One In Two Out rule as it relates to specific enforcement action.³

Summary of impact on business

2.26 It is considered there will be no direct impact on business from the introduction of the regulations, primarily as the changes proposed by this policy will directly affect regulators of businesses rather than businesses themselves. It is anticipated that any subsequent (indirect) impact on business will be minimal based on the following observations:

³ For further, details, see Paragraph 1.1.5 of HM Government One-in, Two out (OITO) Methodology (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211981/bis-13-1038-better-regulation-framework-manual-guidance-for-officials.pdf).

- i) The expected impact on approved regulators is small: the warrants will only be used in very rare instances and the changes do not impose any additional requirements on legal services regulators.
- ii) There are a large number of legal service providers regulated by individual regulators, meaning when any potential cost increases for the regulator are passed on to legal service providers, this would represent a very small cost per firms.
- iii) In any case, we would expect firms to pass on any additional costs to their consumers, and in the long run to adjust to any change in the level of demand. We would therefore expect the ongoing impact on businesses to be neutral.
- iv) The proposal might also boost levels of consumer confidence, to the benefit of legal service providers.

3. Enforcement and Implementation

- 3.1 Applications for warrants will be heard by HMCTS. An application for this type of warrant will be dealt with by a Judge of the High Court, Circuit Judge or Justice of the Peace, who will be responsible for authorising the issue of the warrant.
- 3.2 The LSB, or person appointed by it, will be responsible for implementing searches in instances where it is deemed appropriate to do so.

Monitoring

- 4.1 The Ministry of Justice plans to evaluate the impact of the regulations within three years of their implementation, in consultation with the LSB and approved regulators. In particular, the number of instances the warrant power is used will be recorded by the LSB. This information will form one part of the wider set of information upon which the evaluation of the regulations will be based.

Equality Impact Assessment

- 4.2 The initial screening stage of an Equality Impact Assessment has been completed. As the proposals should have no impact on equality, a full assessment is not considered necessary.