

LEGAL SERVICES CONSUMER PANEL



Mahtab Grant
Legal Services Board
7th Floor, Victoria House
Southampton Row
London WC1B 4AD

Legal Services Consumer Panel
Legal Services Board
7th Floor
Victoria House
Southampton Row
London WC1B 4AD
T 020 7271 0050
F 020 7271 0051

www.legalservicesboard.org.uk

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Dear Ms Grant

I am writing as Chair of the Legal Services Consumer Panel, in response to the Legal Services Board (LSB) consultation on '*Compliance and Enforcement – Statement of Policy*'. As the Panel is not yet formally constituted, this response should be taken as a personal view.

Overall, the proposed Statement of Policy on compliance and enforcement is supported. The proposed approach appears to align with the penalty principles and associated framework recommended in the 2006 Macrory Report,¹ and should assist in developing consumer confidence in the LSB appropriately addressing non-compliance. It is particularly pleasing to note that the Statement explicitly recognises consumer outcomes as a primary focus in the delivery of the LSB's compliance and enforcement strategy.

Whilst there are no objections to the proposals, comments on a number of specific aspects of the Statement are provided below.

Approach to Compliance and Enforcement Action (Q2-4)

It is noted that the LSB intends to gather information about Approved Regulators compliance from a range of sources. In particular, it is noted that the views of the community and other stakeholders, as well as the Consumer Panel, are to be included as information sources. Such inclusions are strongly supported and should allow the Panel to share with the LSB its knowledge of consumer experience, as well as relevant advice received from consumer organisations.

In relation to the matters the LSB proposes to take into account when deciding whether action is appropriate, the range of factors (including the impact on

¹ Professor Richard Macrory (2006) Regulatory Justice: Making Sanctions Effective, Final Report, November 2006, <http://www.berr.gov.uk/files/file44593.pdf>

consumers) appear to be sensible. Adverse impact on consumers can be measured in at least two ways: a small impact on a large number of consumers, which when aggregated causes significant harm; or a significant impact on a small number of consumers. Enforcement action could be justified in both of these circumstances. As a further comment, whilst it is clear that the LSB may take into account some or all of the matters listed, it is less clear whether there is a hierarchy amongst these factors, and if so, which are considered to carry more weight in the decision-making process.

The intention to use informal resolution where possible is also noted and supported, particularly if it is able to result in a satisfactory outcome for consumers more quickly than formal enforcement actions, as intended by the proposal. Given the importance of consumers being able to see that that an issue has been recognised, as well as responded to, in an effective and timely manner, the LSB expectation that all communications should be made public, except in the most exceptional circumstances, is supported. It may also be necessary in some cases for there to be targeted communication with specific consumers and/or broader publication of information on informal resolution activities, to both illustrate the action that has been taken and to facilitate a clear understanding of the LSB's approach to non-compliance.

Enforcement Powers (Q5-8)

The LSB's stated aims in using each of the enforcement tools are sensible. It is noted that the LSB will have a range of mechanisms of varying severity for undertaking enforcement action. The ability to apply these both independently and together is likely to provide a sound basis for the LSB to take flexible enforcement action, which can be proportionate to the degree of regulatory non-compliance.

That said, it does appear that the consultation and other procedural requirements that the LSB must follow before using a penalty are onerous. Whilst there is nothing that the LSB can do about this, as these requirements are prescribed by the Act, there would appear to be a risk that enforcement action will be dragged out, or the LSB will be dissuaded from acting at all. It will be important for the LSB to review its experience of using its enforcement toolkit and to press for legislative changes to the procedures should such problems arise.

In using its enforcement toolkit, the overriding aim should be to improve outcomes for consumers, including where possible, to restore the harm caused to consumers. In this context, the proposal in paragraph 3.26 to use directions as a means to require Approved Regulators to spend money on a particular issue, for example on public legal education, is supported. This restorative justice approach is consistent with the Macrory principles.

Maximum Financial Penalties (Q10-14)

The availability of a significant maximum penalty within the LSB's enforcement action options is strongly supported. Financial penalties can change the behaviour of the offending party and serve as a deterrent to all regulated entities against future non-compliance. As the consultation document notes, it is important that those who pay practising fees should be able to influence the Approved Regulator's behaviour, and so it is appropriate that members should be asked to contribute towards the payment of a fine.

The complexities of legal services regulation make the task of setting a maximum amount of financial penalty a challenging one. In this context, the flexibility of the proposed maximum penalty formula is supported, as it ensures that the different sizes and accounting structures of Approved Regulators will not inhibit the LSB's scope to apply a significant, yet proportionate, financial penalty, should it be warranted. However, whilst the formula is supported, the basis for the proposed figures in the formula and the rules would benefit from clearer explanation. It would be useful if further detail regarding the derivation of these numbers could be provided to ensure transparency in relation to the LSB's financial penalty regime. In particular, it is important that the maximum penalty level reflects the worse-case scenario in terms of harm caused by non-compliance, and allows consumers to be confident that the level set will be a strong deterrent for regulatory non-compliance by all Approved Regulators.

Impact assessment (Q20)

It is noted that both Impact Assessments state that whilst the costs of this policy are not expected to add to the overall costs of compliance by approved regulators, if a penalty is imposed, it may be passed through to those that the Approved Regulator regulates. Whilst such pass through may be appropriate, we would be concerned if this was then passed through to consumers via increases in professional fees or costs, resulting in consumers ultimately paying for non-compliance by an Approved Regulator. It would be useful if the risk of such situations arising, and its permissibility, could be clarified.

Thank you for the opportunity to comment of this document. Should you require further information on any of the above comments, please contact Alanna Linn (Consumer Panel Associate) on 020 7271 0076.

Yours sincerely

A handwritten signature in cursive script that reads "Dianne Hayter".

Dr Dianne Hayter
Chair, Legal Services Consumer Panel