EXPLANATORY MEMORANDUM TO

THE LEGAL SERVICES ACT 2007 (WARRANT) REGULATIONS 2010

2010 No. [DRAFT]

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument regulates the issue of warrants to allow an officer or agent of the Legal Services Board ("LSB"), or a person specified by it under section 41(2) of the Legal Services Act 2007 (referred to, together with the LSB, as a "specified person" in this document and the instrument itself), to enter the premises of an approved regulator and copy or take possession of documents or electronic information. Warrants can only be granted to assist a specified person to exercise a function of an approved regulator following the issue of an intervention direction under section 41 of the Legal Services Act 2007 ("2007 Act"), or in the interests of continuing regulation following the cancellation of an approved regulator's designation under section 45 of the 2007 Act.

2.2 The instrument sets out the matters which a judge of the High Court, Circuit judge or justice of the peace ("judicial officer") must have regard to or be satisfied of before issuing a warrant under sections 42(3) or 48(3) of the 2007 Act. Specifically it:

2.2.1 requires an application to be supported by the intervention direction or order cancelling the regulator's designation and to specify factual information which will assist the judicial officer in considering the application (such the address of the premises to be searched, what information the applicant requires, how many entries are being sought, the applicant and the name of the officer who would execute the warrant and why a warrant is necessary).

2.2.2 specifies that a judicial officer must be satisfied that reasonable attempts have been made to obtain the required information by others means, or that the relevant documents would likely be removed, hidden, tampered with or destroyed if such efforts were made.

2.2.3 requires that the judicial officer must also be satisfied;

- that each officer who may execute the warrant has been approved, and authorised in writing, by the specified person as fit and proper to execute warrants; and
- that another judicial officer has not previously refused an application that is in substance the same.

2.2.4 prohibits warrants being issued where the records sought are subject to legal professional privilege where the regulator has the benefit of that privilege.

2.3 The instrument prescribes the content of a warrant so that the extent of the warrant powers are clear to all and may only be exercised within the limitations set out in the warrant. It requires that any warrant issued by a judicial officer must contain:

- the address of each set of premises to be searched;
- the material sought under the terms of the warrant (insofar as is practicable);
- how many entries it permits;

- the name of the officer duly appointed and authorised by the specified person to execute it;
- the date of the warrant (from which the time for execution of the warrant runs); and
- the legislative power under which the warrant has been issued.

2.4 This instrument also makes provision as to how, when and by whom the warrant may be executed. Specifically it:

2.4.1 limits execution of the warrant to officers or agents authorised in writing by a specified person as fit and proper (having undergone training and having the necessary experience);

2.4.2 requires a warrant to be exercised at a reasonable hour and within one month of issue;

2.4.3 limits the search to the purposes specified within the warrant;

2.4.4 provides that the officer or agent must adhere to the following procedural protocols:

- he must present the warrant, along with documentary evidence of his identity, to the occupier (or a person who appears to be in charge of the premises) and provide a certified copy of the warrant;
- where there is nobody present at the premises who appears to be in charge of them, he must leave a certified copy of the warrant in a prominent place in the premises;
- he must make an endorsement on the original copy of the warrant for each of the premises searched, stating whether any of the records that were sought were found, whether any records were copied or taken possession of and whether he has taken possession of any items subject to legal professional privilege (a regulator's records are likely to include documents protected by legal professional privilege but in respect of which the client has waived the privilege to assist the regulator's investigation – such information will need to be handled very carefully by the officer or agent).

2.5 Finally, the instrument regulates the copying and retention of seized records, as follows:

2.5.1 it makes clear that copies can be made of all written or electronic records for which a warrant authorises a search (this includes the power to request that electronic records that are accessible from the premises are to be produced in a form in which they are legible and can be copied);

2.5.2 it provides the power for the regulator to request a list of what has been copied and seized under warrant (the list to be provided within a reasonable time);

2.5.3 the officer or agent who has taken possession of any written or electronic records must copy and return them as soon as possible. The regulator may also request the return of specific records within 7 days, if the records specified are required to discharge a regulatory function;

2.5.4 the regulations state that seized items must be returned prior to the revocation of an intervention direction; and

2.5.5 the instrument provides that these duties to return do not apply if the regulator has provided written agreement.

3. Matters of special interest to the Joint Committee on Statutory Instruments

None.

4. Legislative Context

4.1 This instrument is made under sections 42(6) and (7), 48(6) and (7) and 204 of the 2007 Act. These provisions state that the Lord Chancellor must make regulations:

- specifying matters which a judicial officer must be satisfied of, or have regard to, before issuing a warrant;
- regulating the exercise of a power conferred by a warrant (whether by restricting the circumstances in which a power may be exercised, specifying conditions to be complied with in the exercise of the power, or otherwise);
- making provision as to the circumstances in which written or electronic records of which a person has taken possession by virtue of a warrant may be copied or must be returned; and
- may make incidental, supplementary and consequential provision when making a regulations under these powers.

4.2 The 2007 Act received Royal Assent on 30th October 2007. It equipped the LSB with a number of enforcement powers, including the power to issue an intervention direction under section 41 of the 2007 Act or to recommend that the Lord Chancellor cancel an approved regulator's designation under section 45 of the 2007 Act. These powers were commenced on 1st January 2010 by the Legal Services Act 2007 (Commencement No.6, Transitory, Transitional and Savings Provisions) Order 2009. However, the LSB will not be able to apply for warrants to enter and search the premises of approved regulators in connection with the exercise of either of these powers until regulations are made under sections 42(6) and 48(6) of the 2007 Act.

4.3 Before making regulations under these sections, the Lord Chancellor is under a duty to consult the LSB under sections 42(8)(b) and 48(8)(b) of the 2007 Act. This duty has been discharged through a full public consultation, to which the LSB responded.

4.4 Section 206(4)(c) and (f) of the 2007 Act provide that these regulations are subject to affirmative resolution.

5. Territorial Extent and Application

This instrument applies to England and Wales.

6. European Convention on Human Rights

The Parliamentary Under Secretary of State, Bridget Prentice, has made the following statement regarding Human Rights:

"In my view the provisions of the Legal Services Act 2007 (Warrant) Regulations 2010 are compatible with the convention rights."

7. Policy background

- ***What is being done and why***

7.1 The 2007 Act reforms the way in which legal services are regulated in England and Wales. The aims of the Act are to simplify the existing regulatory framework by establishing an oversight regulator - the LSB - and to improve consumer confidence and the way in which complaints are

dealt with by establishing an independent complaints handling body - the Office for Legal Complaints.

7.2 The LSB has oversight of the "approved regulators" of legal services. The 2007 Act set out the bodies that would become approved regulators when the LSB assumed its functions at Part 1 of Schedule 4 (the Law Society, the General Council of the Bar, the Master of the Faculties, the Institute of Legal Executives, the Council for Licensed Conveyancers, the Chartered Institute of Patent Attorneys, the Institute of Trade Mark Attorneys and the Association of Law Costs Draftsmen). The 2007 Act also provides that NEW regulators can be added to this list and so far the Association of Chartered Certified Accountants and the Institute of Chartered Accountants of Scotland have also become approved regulators.

7.3 Approved regulators are under a duty to promote the regulatory objectives that are set out in section 1 of the 2007 Act. If any of the approved regulators are found to be failing in their regulatory duty, the LSB has been given a range of powers to allow it to take the action that it deems appropriate to address the failing and ensure that any potential adverse impact on the regulatory objectives set out in the 2007 Act is avoided or corrected. Its powers range from setting targets to more severe action, which can result in an intervention direction or a recommendation that an approved regulator's designation be cancelled.

7.4 These most severe powers can only be exercised if the LSB is satisfied that an issue cannot be adequately addressed using any of its other enforcement powers. There are also a number of procedural safeguards built in to the 2007 Act which the LSB must adhere to, which ensure that these powers are only exercised where absolutely necessary.

7.5 When an intervention direction has been issued or an approved regulator has had its designation cancelled, the LSB or a person that it has nominated will assume some or all of an approved regulator's functions. In order to assist with a smooth takeover of these functions, the LSB (or nominated person) may apply for a warrant to enter and search the premises of the approved regulator in order to obtain records which would be needed for another person to assume the regulatory functions to which the direction or cancellation relate. Such warrants can only be issued once the Lord Chancellor has made rules under sections 42(6) or 48(6) regarding the operation of these warrants.

7.6 The LSB was given a range of enforcement powers by the 2007 Act to address any regulatory failure and guard against consumer detriment and it is important that it is able to exercise all of its powers as soon as possible. It is for this reason that regulations have been laid at this point, to come into force in March 2010. The sixth 2007 Act commencement order came into force on 1 January 2010 and the LSB became operational on this day. There are a number of procedures that the LSB must adhere to before issuing an intervention direction or recommending cancellation, which would mean that neither power could be exercised before March at the earliest.

7.7 The only criteria set out in the 2007 Act regarding the issue of warrants are that a 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. Beyond this, the Lord Chancellor must make regulations specifying further matters that a judge or justice of the peace must be satisfied of or have regard to before issuing a warrant. 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.

7.8 The content of the regulations was consulted upon, based on proposals that were informed by prior legislation dealing with search warrants in other fields and with particular reference to the Compensation (Claims Management Services) Regulations 2006. The proposals were developed in line with responses to the consultation to create the final Regulations. These will protect approved regulators from over use or overly intrusive search warrants, without disproportionately hampering the LSB from accessing records that are required for it, or another body, to assume the functions of the approved regulator.

- ***Consolidation***

7.9 This instrument does not raise any issues relating to consolidation.

8. Consultation outcome

8.1 Under sections 42(8)(b) and 48(8)(b) of the 2007 Act the Lord Chancellor is under a duty to consult the LSB before making regulations under sections 42(6) and 48(6) respectively. This duty was discharged by conducting a 12 week public consultation from 29th October 2009 to 21st January 2010.

8.2 Eleven responses were received to the consultation, including six responses from the representative and regulatory arms of the approved regulators, two from judicial bodies and one from the LSB. The consultation proposed principles that should be reflected in regulations and the responses were largely supportive of these. However, the original proposals have been amended in line with responses in certain instances. These include the following provisions:

- An application for a warrant must be supported by a copy of the intervention direction given under section 41 or a copy of the order cancelling a body's designation under section 45 of the 2007 Act (regulation 2(1)).
- A warrant is only valid for one month (regulation 5(2)).
- An occupier of premises will be able to request a list of what has been copied or seized during a search, which the executing officer will have to provide within a reasonable time (regulations 6 and 8).
- An occupier will be able to request the return of specific seized records that it requires to discharge remaining regulatory functions and this request must be adhered to by the executing officer within seven days (regulation 6).

8.3 The original consultation paper and the response to this are available on the Ministry of Justice website (http://www.justice.gov.uk/consultations/consultations.htm).

9. Guidance

9.1 Guidance will be produced by the Ministry of Justice for Her Majesty's Court Service, to explain the regulations and the instances in which a warrant may be applied for.

9.2 The LSB has consulted upon its enforcement strategy and published a statement of policy on its use of intervention directions and cancellation of designation. It has also made rules under sections 42(10) and 48(9) of the 2007 Act concerning the persons it may appoint to execute warrants. This information is available on the LSB's website (http://www.legalservicesboard.org.uk).

10. Impact

An Impact Assessment is attached to this memorandum. It identified benefits associated with the proposals, which would allow the LSB to exercise its full range of enforcement powers to

maintain and improve the standard of regulation to the benefit of consumers. There were some small costs identified to the LSB, approved regulators and the court system. In light of the fact that warrants are expected to be applied for extremely infrequently, if ever, it was not possible to monetise the costs and the impact was not assessed to be significant. Overall, the impact assessment found that the benefits of the Regulations outweigh the small costs.

11. Regulating small business

The legislation applies to the LSB and the approved regulators. It does not apply to small business.

12. Monitoring & review

In addition to the LSB's ongoing monitoring of the regulation of legal services, the impact of this instrument will be reviewed by the Ministry of Justice within three years of its implementation.

13. Contact

Chris Nichols at the Ministry of Justice, tel: 020 3334 4263 or email: Chris.Nichols@justice.gsi.gov.uk can answer any queries regarding the instrument.

Summary: Intervention & Options

Department /Agency:	Title:	
Ministry of Justice	**Impact Assessment of Regulations concerning Legal Services Board's warrants for search and entry under Legal Services Act 2007**	
Stage: Implementation	**Version:** Final	**Date:** 3 February 2010
Related Publications: Legal Services Act 2007 (Warrant) Regulations 2010		

Available to view or download at:
http://www.justice.gov.uk

Contact for enquiries: Chris Nichols **Telephone:** 020 3334 4263

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

Under the Legal Services Act the Legal Services Board ("LSB") is granted the power to apply for warrants, in restricted circumstances, to enter and search the premises of approved regulators. The Lord Chancellor must make regulations concerning the circumstances in which warrants can be issued and regulating the exercise of powers conferred by warrant.

What are the policy objectives and the intended effects?

These regulations control the issue and exercise of search warrants. They will protect approved regulators from over use or overly intrusive search warrants, without disproportionately hampering the intention behind search warrants: allowing the LSB access to records that are required for it, or another body, to assume the functions of the approved regulator.

What policy options have been considered? Please justify any preferred option.

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. The regulations were composed and finalised following a twelve week public consultation. They have been informed by existing legislation dealing with similar powers. The costs and benefits of the proposal are analysed in this impact assessment.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The policy will be reviewed within three years of implementation.

Ministerial Sign-off For implementation stage Impact Assessments:

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:

Bridget Prentice

.....Date: 08/02/10

Summary: Analysis & Evidence

Policy Option: 1	Description: Make regulations under section 42 and 48

COSTS

ANNUAL COSTS	Description and scale of **key monetised costs** by 'main affected groups'
One-off (Transition) **Yrs**	
£ N/A	
Average Annual Cost (excluding one-off)	
£ N/A	**Total Cost** (PV) **£ N/A**

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) and the court service relating to the application for warrants, and for the LSB when carrying out searches and handling records thereafter. These costs are not considered to be significant. Searches are also likely to impose some minor costs on the regulators being subject to search in terms of time, inconvenience and reputational damage.

BENEFITS

ANNUAL BENEFITS	Description and scale of **key monetised benefits** by 'main affected groups'
One-off **Yrs**	
£ N/A	
Average Annual Benefit (excluding one-off)	
£ N/A	**Total Benefit** (PV) **£ N/A**

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

This option will allow the LSB, or a person appointed by it, to apply for warrants 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 possibility of being searched may also provide a deterrent effect, improving the standard of regulatory oversight in the legal services market. This would provide additional benefits to the consumers of legal services.

Key Assumptions/Sensitivities/Risks Warrants can only be applied for in extreme cases of regulatory failure. It is hoped that the power to apply for a warrant will never be exercised by the LSB and that regulations will in practice never be relied upon. On this basis, the identified impacts are not expected to be significant.

Price Base Year	Time Period Years	**Net Benefit Range** (NPV) **£ N/A**	**NET BENEFIT** (NPV Best estimate) **£ N/A**

What is the geographic coverage of the policy/option?				England and Wales
On what date will the policy be implemented?				March/April 2010
Which organisation(s) will enforce the policy?				The judiciary
What is the total annual cost of enforcement for these organisations?				£ N/A
Does enforcement comply with Hampton principles?				Yes
Will implementation go beyond minimum EU requirements?				No
What is the value of the proposed offsetting measure per year?				£ N/A
What is the value of changes in greenhouse gas emissions?				£ N/A
Will the proposal have a significant impact on competition?				No
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large

Are any of these organisations exempt?	No	No	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices) (Increase - Decrease)

Increase of £ N/A Decrease of £ N/A **Net Impact** **£** N/A

Key: **Annual costs and benefits: Constant Prices** **(Net) Present Value**

Background

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 will oversee the existing regulators of legal services and any other bodies who are designated by the Lord Chancellor as fit to regulate legal services; the "approved regulators".

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. In order to provide the LSB with all of the appropriate tools to address regulatory failure, parliament agreed that its powers should include 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.

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. There are also a number of procedures that the LSB must go through to attempt to resolve an issue by other means – 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.

4. Where an intervention direction is made or an approved regulator's designation is cancelled, the LSB or a new regulator will assume some or all of the approved regulator's functions. In order to provide continuity of regulation, in these circumstances the LSB (or a person nominated by it) can apply for search warrants, which would allow a specified person to enter the premises of an approved regulator and take possession of written or electronic documents. The only criteria set out in the 2007 Act are that a judge or justice 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.

Need for government intervention

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

[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.

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.

6. The Lord Chancellor must make regulations and therefore the LSB will not be able to apply for warrants 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 though 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 important that regulations are made as soon as possible so that the LSB can exercise its full range of enforcement powers to address regulatory failure.

Economic rationale

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.

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.

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. Given the costs imposed by the policy are expected to be minimal, this suggests that the net impact of the policy should be positive.

Scope of proposals

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 10 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, the Association of Chartered Certified Accountants and the Institute of Chartered Accountants of Scotland), although if the LSB recommends, the Lord Chancellor can designate other bodies as approved regulators in the future.

11. As of April 2009 it was estimated that the approved regulators authorise about 135,600 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 practise will be directly affected by warrants for search and entry or regulations concerning this. Warrants 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 warrants 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.

12. Similarly, the content of regulations regarding search warrants will have no impact on legal professionals or practices. The regulations will cover matters that a judge or justice 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 upon the LSB, any person that it specifies or appoints to carry out a search and the approved regulators, as well as having some effect on the judiciary and courts.

13. 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 consumers to some degree through increased fees.

Cost Benefit Analysis

Do nothing option

14. The 2007 Act makes it clear that regulations must be made regarding applications by the LSB for search warrants. Until regulations are made, the LSB will not be able to apply for warrants.

15. If the LSB does not have the option to apply for a search warrant to obtain information that may be needed to exercise a function of an approved regulator, this could deter the LSB from exercising its powers. These powers will only ever be used as a last resort and hopefully they will never be exercised. However, in extreme circumstances that satisfy the criteria and safeguards set out in the 2007 Act for the use of these powers, it is clearly undesirable that a further barrier should be placed in the LSB's way in the form of inability to take possession of vital documents that it will need to exercise a function of an approved regulator.

16. No costs or benefits have been scored against the do nothing option.

Option 1 – Make regulations under sections 42 and 48

Description

17. Following public consultation, to which the LSB, approved regulators and a number of other bodies responded, regulations have been drafted.

18. The regulations were informed by prior legislation concerning entry and search warrants in other fields of regulation and law enforcement. In addition, a significant proportion of the proposals concern simple procedural matters concerning applications for warrants that will have little impact on the LSB, the approved regulators or the courts. Consideration of the main points that may have a bearing on any of these three parties follows.

19. The General procedural requirements included in the regulations are in the most part drawn from prior legislation. They ensure, amongst other things:

    - that a judge or justice of the peace has enough information before them, from an application, to make a reasoned decision on whether a warrant should be granted. The requirements for prior information place a small burden on the person applying for a warrant which is seen as proportionate given the importance that applications receive meaningful judicial oversight. There are also significant benefits of this approach in terms of increased efficiency in the use of a judge's time and the court's time in ensuring that applications contain certain vital information;

    - that applications can be made "without notice", or in other words in the absence of the party to whose premises the warrant would apply. This is another measure to

reduce the burden on the court system. It is the default position regarding applications for warrants in other regulatory fields and it is deemed necessary in these circumstances also;

- that the person exercising a warrant adheres to certain procedures designed to limit the impact on the approved regulator. Providing that the person executing a search should present a warrant with certain information on it to the person occupying the premises, as well requiring them to make an endorsement on the warrant detailing whether any records have been copied or seized, are sensible safeguards in this respect that are easily adhered to by the person executing the search but will make a significant difference to the approved regulator that is the subject of a search.

20. The proposals also list a number of matters that a judge must be satisfied of before a warrant can be issued. Again, it is usual procedure for legislation to set out what factors a judge must consider when faced with an application for a warrant. A judge must be satisfied that reasonable attempts have been made to obtain the desired documents by other means. Failing this, a judge would have to be satisfied that attempts to obtain the information by other means would result in the material being removed, 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 cooperative approved regulators. On the other hand, there is an exception that a judge can consider, which should help to prevent the standard from hampering necessary searches.

21. In relation to the exercise of powers conferred by warrant, limits on the time within which a warrant can be exercised, and on the documents that can be taken possession of are essential safeguards for approved regulators.

22. The regulations also prescribe the circumstances in which possession can be taken of records and when these must be returned to the occupier of the premises from which they were taken. Seized records must be copied and returned “as soon as possible” or within 7 days if the occupier of the premises makes a request for a record that is needed to discharge another regulatory function. Similarly, an occupier of premises can request a list of all of the documents that have been copied or seized and the person who exercised the warrant would have to provide this within a reasonable time. The burden that this would place on the LSB or the person appointed to exercise the warrant is justified in the interests of ensuring that an approved regulator would be able to monitor where its records are and access those that it still requires to exercise any of its functions.

23. In certain circumstances approved regulators may be in possession of records relating to correspondence between third parties and their lawyers. The common law principle of Legal Professional Privilege (“LPP”) prevents the disclosure of such information. A warrant would allow the person executing it to access to LPP information that is in the possession of an approved regulator, if necessary for exercising the functions of the approved regulator. It would remain subject to the same restrictions on its onward disclosure as it would be in the possession of the approved regulator. For these reasons, the impact of allowing access to this information will be minimal.

Costs

24. 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. There would also be some minor costs to the LSB in terms of time and resource when making applications for, and when carrying out, searches. Further, the final part of the proposals, concerning the circumstances in which records can be copied or must be returned, could potentially result in additional cost to the LSB (or the person who the LSB has nominated to exercise a search).

25. The regulations are drafted to encourage the person executing a search warrant to take copies of documents during a search rather than taking possession of them. This would mean that in most cases the approved regulator would retain the originals, which it might still need for other purposes. It would also reduce the risk of any originals being lost, damaged or destroyed. However, it would result in a longer search and potentially larger costs in terms of equipment to take copies with. These costs would be borne by either the LSB directly or the person who it has appointed to conduct the search.

26. Where it is not practicable to take copies of records on-site, for example in cases where there are a large quantity of relevant documents which would take an impractical amount of time to copy, the regulations provide that possession can be taken as long as copies are made and the originals are returned to the approved regulators as soon as possible.

27. If the specified person does take possession of documents which the approved regulator may also still need access to, it will have to copy and return these within 7 days of receipt of a request by the approved regulator. This will allow the approved regulator to continue discharging any regulatory functions to which an intervention direction, or cancellation of its designation, do not relate. It is therefore necessary in the interests of continuing regulation. In addition any small costs or inconvenience that may be caused to the specified person in having to adhere to such a request are justified.

28. There is also a duty on the specified person to return all original documents still in their possession prior to the revocation of an intervention direction. In such circumstances the approved regulator would resume responsibility for the regulatory function to which the intervention direction related and would require possession of all of its documents. It is essential in the interests of continuing regulation that the LSB provides these documents in a timely manner. This should not cause significant costs.

29. 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), such costs are not expected to be significant.

30. Finally, searches would impose some costs (in terms of time and inconvenience) on the regulators being subject to a search. A search may also impose reputational damage on regulators for whom a search is deemed necessary.

Benefits

31. Option 1 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, providing benefits for the consumers of legal services.

32. Given a search would impose some costs on regulators, the regulations may also provide a deterrent effect. The strength of any possible deterrent effect is uncertain, but any resulting improvement in the regulatory oversight of regulators would again provide benefits for the consumers of legal services.

Net Impact

33. Making regulations would allow the LSB to assume effectively its full range of powers, but would impose some minor costs as set out above. It has not been possible to monetise the identified impacts, but the impacts are not expected to be significant. This is driven by the expected low volume of instances requiring the use of such regulations. The 2007 Act makes it clear that regulations must be made regarding applications by the LSB for search warrants. The benefits of doing so are considered to outweigh the costs.

Enforcement and Implementation

34. Applications for warrants will be heard by HMCS. The LSB, or person appointed by it, will be responsible for implementing searches in instances where it is deemed appropriate to do so.

Monitoring

35. The impact of the regulations will be evaluated by the Ministry of Justice 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.

Specific Impact Tests

36. A preliminary assessment has taken place in regard to all of the specific impact tests and we are satisfied that more detailed assessment does not need to take place in regard to any of these tests.

Competition Assessment

37. This option will have no influence on competition within the legal services sector or the regulatory sector.

Small Firms Impact Test

38. These regulations do not directly affect businesses of any size.

Legal Aid and Justice Impact Test

39. Applications for warrants will always be contested and so the costs of bringing an application will be borne by the LSB or the person it has appointed to do so. The Legal Aid budget will not be affected.

40. Applications that proceed to court will require court resources and judicial time. Applications will be extremely rare, indeed it is hoped that an application will never be made. Therefore the expected impact is not significant.

Sustainable Development/Carbon Assessment/Other Environment

41. This policy has no bearing on sustainable development, carbon emissions or other environmental concerns.

Health Impact Assessment

42. This Impact Assessment concerns an issue with no impact on health considerations.

Equality Impact Assessment

43. The screening stage of an Equality Impact Assessment has been completed. As this policy will have no impact on equality, a full assessment is not considered necessary.

Human Rights

44. The Parliamentary Under Secretary of State, Bridget Prentice, has made a statement to confirm that it is her view that the regulations are compatible with convention rights.

Rural proofing

45. There are no issues with rural proofing related to these regulations.

Specific Impact Tests: Checklist

Type of testing undertaken	*Results in Evidence Base?*	*Results annexed?*
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No