

Designating new approved regulators and approving rule changes

Bar Standards Board response

Introduction

1. The Bar Standards Board (BSB) welcomes the opportunity to comment on the consultation paper on the proposed approach to designation of new Approved Regulators and the approval of changes to the regulatory arrangements of Approved Regulators.
2. The BSB recognises that the LSB's suggested approach is tied to the terms of the Legal Services Act but is keen to ensure that the procedures, and particular those that relate to the approval of changes to the regulatory arrangements, are not unduly cumbersome or overly bureaucratic. Broadly the BSB believes that the LSB has struck the right balance with its proposed approval process. The process seems on paper to provide a quicker and more straightforward procedure than currently is the case.
3. The BSB does however have considerable concern that the wide application that the LSB has given to the definition of 'regulatory arrangements' in section 21 of the Act will mean that the Approved Regulators will be required to seek the LSB's approval in many more cases than is currently the case under the Courts and Legal Services Act 1990. As a consequence, not only is the LSB likely to be inundated with approval requests, but the Approved Regulators will have a further administrative hoop to go through in order for even minor changes to their arrangements to come into effect. This will have the impact of undermining the LSB's desire for a more streamlined and efficient approval process. The BSB will elaborate on its concerns when responding to the specific questions posed.

BSB response

4. The BSB response focuses on the proposed approach to the approval of changes to regulatory arrangements as this is the area where there is likely to be the greatest impact on its ability to act effectively as a regulator.
5. The BSB would suggest that, following this response, a meeting should be arranged with representatives from the LSB to discuss further our comments and to give a fuller picture of the likely detrimental effect that the current proposals will have on the operation of the BSB.

6. The rest of this paper addresses the specific questions raised.

Annex 1 - Designation of new Approved Regulators (Q1,2 and 3)

7. The BSB has no comments to make on either the rules relating to the approval of new Approved Regulators or the rules to allow Approved Regulators to seek to extend the range of reserved legal activities that they can regulate. The rules are in line with the regulatory objectives and the specific rules relating to designation of Approved Regulators as laid down in the Act. Further, they are consistent with the principles of better regulation and as such seem appropriate to the BSB to ensure that applications are handled effectively.

Prescribed fee (Q4, 5 and 6)

8. The BSB notes the various options proposed for setting the fee for new designation applications. Whichever option is chosen, it will be critical for the sake of transparency and accountability for the LSB to publish clear and detailed information on how the fee level has been reached (including what is meant by 'associated overheads'). Similarly, if appropriate, it must be clear how 'refunds' will be calculated. There should also be clarity over when external advisors will be used, what process will be undertaken to determine which advisors should be retained and what rate the LSB will pay them. It is arguable that, as Approved Regulators will be required to meet the cost of external advisors, they should have some input into their selection and should perhaps have the option of being able to put forward possible advisors for use by the LSB.
9. Having considered each of the options, the BSB has no strong view at this stage on which approach should be adopted. In the absence of the information outlined in the above paragraph and an idea of the level of the fee it is difficult to reach a firm conclusion on any preferred option. The BSB would be willing to give more definitive views once the LSB has provided more information on the likely level of the fee and how that level will be determined.

Form of representation (Q7 and 8)

10. The BSB believes that flexibility in the approval process is crucial. The LSB (or the Approved Regulator) should not be fettered by overly prescriptive or restrictive rules. The BSB therefore fully agrees that oral representations should be permissible as

required. There may be occasions when in person explanations of applications will speed up the approval process by providing an opportunity for the LSB to question the (prospective) Approved Regulator or to explore and seek clarification on a technical aspect of the application.

Criteria for determining applications (Q9)

11. The BSB has no comments on the proposed criteria. They are in line with the Act.

Annex 2 - Rules for rule changing applications

12. The BSB has serious concerns over the proposed scope of the LSB's approval process. The remit appears to extend beyond merely rule changing application, as the title of Annex 2 suggest, to changes to any regulatory arrangements of an Approved Regulator. The difference is significant and the impact considerable.
13. The BSB believes that the emphasis of the procedure should be on ensuring efficient and timely approval of substantive changes to the regulatory arrangements of Approved Regulators.
14. Under the current approval arrangements, as provided for by the Courts and Legal Services Act 1990, in broad terms, the only rules that require approval are those that relate to the ability of an authorised person to exercise a right of audience or to conduct litigation¹. Under the proposed LSB process, the net of the approval process is considerably wider and requires Approved Regulators to seek approval for all changes to its regulatory arrangements. The definition of regulatory arrangements is set out at paragraph 21 of the Act and appears to include, in addition to regulatory Codes of Conduct and practising rules, changes to disciplinary arrangements and qualification regulations. Moreover, it contains at 21(i) what could be construed as a catchall provision so as to include within the approval process any other rules and regulations (however described) and any other arrangement which applies to, or in relation to, the regulation of regulated persons. Given its widest interpretation this could require an Approved Regulator to seek the LSB's approval (or their confirmation that an alternation is 'exempt') for an extremely and, the BSB would argue, unnecessarily broad range of 'arrangements'. This could include changes to forms and guidance as

¹ See CLSA 1990 Schedule 4, part 1

well as minor tidying up changes to the Code of Conduct and other administrative rules, none of which require external approval under the current regime. Arguably it might also include changes to staffing or IT arrangements relating to the handling of regulatory matters. Changes of this nature are relatively frequent and could lead to the LSB's consideration of more substantive matters requiring approval being delayed. The BSB is not aware of any problems having arisen due to the absence of any external review of such arrangements.

15. On a fair reading, the BSB would suggest that, s21 of the Act is not intended to extend that far. Such a major extension of oversight regulation is not justified and would not meet the statutory requirements that regulation must be proportionate and targeted only at cases in which action is needed. A natural interpretation of the phrase 'rules or regulations (however they may be described) and any other arrangements' in s21(1)(i) would treat 'rules and regulations' as creating a genus, so that 'other arrangements' means arrangements similar in character to rules and regulations. In other words, the BSB would suggest that what Parliament sought to do was give the LSB an approval role over texts that form part of the Approved Regulators' substantive governance of the profession, not processes of internal administration. That, the BSB would argue, is consistent with the LSB's role as an oversight regulator.
16. The BSB would suggest therefore that the procedure should include a *de minimis* cut off with only those regulatory arrangements that are outside of this point requiring referral to the LSB. The BSB would welcome the opportunity to discuss with the LSB where that cut off point might fall. It could be, for example, that only published rules, regulations and procedures should require LSB approval. It would also be preferable for there to be clarity over the types of alteration/arrangements that would fall within the *de minimis* range.
17. Should the LSB decide to proceed as currently proposed, the BSB would expect there to be a greater level of definition over what would fall within 'regulatory arrangements'. As mentioned above, the Act defines the term widely. Approved Regulators would benefit from knowing what the LSB's interpretation of the definition is and from the provision, as far as possible, of a definitive list of the types of arrangements that require approval or exemption of their alteration.
18. The BSB would argue, however, that, given that this is a new procedure, the LSB should not look to impose such wide ranging rules from the outset. Instead, it would be

more appropriate to develop general principles for the approval process, complemented by guidance, with a view to reviewing the process once it has bedded down. Such an approach would be consistent with the requirements of the Act but would give the LSB greater flexibility at the inception of the new procedure which could be refined, as required and as the LSB gains greater experience of the range, type and number of applications that they receive from Approved Regulators. The BSB would be willing to explore such an approach in more detail with the LSB.

19. Turning now to the specific points raised in this part of the consultation paper:

Exempt alterations (Q10)

20. The BSB is broadly content with the procedure for dealing with exempt alterations (where rules fall sensibly within the parameters of the scheme). It would however suggest that the LSB should be able to deem an alteration as exempt even where there are representations upon it where for example, the alteration is non-material or the representations are unmeritorious. There should be sufficient flexibility in the procedures for the LSB to be able to exercise its own judgment. We would also suggest that there should be scope for the 28 day time period for comments on proposed alterations to be abridged. Where a minor change to regulatory arrangements is proposed, which is in line with the regulatory objectives and does not impact on any of the other Approved Regulators, it seems unnecessary to impose a period of this length.

Non-exempt alterations (Q11)

21. The BSB welcomes the LSB's intention to rely on Approved Regulator's consultations. If the consultations are comprehensive and the alterations based on the analysis of the evidence gathered it would be an unnecessary duplication of effort for the LSB to conduct its own investigation into the reasons for the change.

22. The BSB notes that the rules suggest that the onus will be on the Approved Regulator to demonstrate how the proposed alteration meets the regulatory objectives of the Act but also to set out why the LSB should approve the alteration. The BSB agrees that it should be the responsibility of the Approved Regulator to show how the objectives of the Act are met but believes that, once that has been satisfied, the onus should be on the LSB to justify any refusal to approve.

23. Given that the rules will need to cover a wide range of alterations ranging from a single small but material change to a rule to a major revision of the entire Code of Conduct, the BSB believes that there will need to be sufficient flexibility in the procedures to adapt accordingly. For example, where an Approved Regulator has submitted a major alteration for approval about which the LSB has concerns it should be possible to make changes to that alteration without the need to re-submit the application. The BSB is concerned that, as currently drafted, the rules at times are unduly prescriptive and restrictive not only for the Approved Regulator but also for the LSB in its operation of the approval process. Rule 14 in particular seems unnecessarily prescriptive. The BSB would suggest that detail of this nature is more suited to guidance than rules so as to provide the Approved Regulator and the LSB with a greater degree of leeway to agree on how best an alteration can be handled.
24. The BSB also notes that there is no suggestion in the paper that the LSB will comment on proposed alterations during the Approved Regulator's consultation stage. Whilst the BSB can understand why, generally, the LSB would not wish to respond to such consultations, it would suggest that, where the LSB has concerns about a particular alteration, it would be beneficial for those concerns to be raised at the earliest opportunity. This would enable the Approved Regulator to take steps to address any concerns before a formal approval application is submitted, thereby hopefully avoiding unnecessary delay at the approval stage.

Form of representations (Q12 and 13)

25. The BSB is content with the proposed arrangements for oral representations. As mentioned at paragraph 10 above, the BSB believes that there will be times where the LSB will benefit from taking oral evidence on applications. The absence of an ability to do so could well inhibit the LSB's proper consideration of an application.

Criteria for determining applications (Q14)

26. The BSB is content with the proposed criteria

Conclusion

27. The BSB welcomes the LSB's desire for prompt consideration of applications for the approval of alterations to the regulatory arrangements of Approved Regulators. It is particularly encouraging that the LSB does not propose to conduct its own investigation into the alteration where the decision making process of the Approved Regulator is deemed satisfactory and appropriate. However, the BSB has real concern that the current scope of the approval process is too wide and too prescriptive. The BSB does not believe that there is a need for an oversight regulator to approve all alterations, however minor, to the regulatory arrangements of a regulator. Such an approach is disproportionate and unwieldy. Moreover, in practical terms, there is a significant risk that the LSB will receive a greater number of applications than anticipated and delay in the approval process will inevitably follow.
28. In the light of this, the LSB is urged to reconsider its proposals to ensure a more streamlined and focussed approval procedure.
29. The BSB would welcome the opportunity to meet with the LSB to expand on the views set out in this paper and to provide a fuller picture of the range and number of likely applications that the LSB will receive should the current procedures be implemented

Bar Standards Board

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