

Proposed amendments to the Investigation, Disciplinary and Appeals Rules for approval by the Legal Services Board (LSB)

This application to amend regulatory arrangements is submitted by CILEx Regulation in accordance with:

- Part 3 of Schedule 4 of the Legal Service Act 2007 (Act);
- LSB Rules for Rule Change applications; and
- Guidance on Schedule 4, Part 3 Applications.

Documents accompanying this application are:

Annex 1 – Amended Investigation, Disciplinary and Appeals Rules (2015)
Annex 2 – Consultation Analysis

Any queries about this application may be made to:

Ms Saadia Siddiqui
Investigation Manager
saadia.siddiqui@cilexregulation.org.uk

Introduction

1. The Investigation, Disciplinary and Appeals Rules (Rules) outline how we deal with declarations of past conduct by our regulated community, and investigate allegations of misconduct. The Rules set out the disciplinary powers available to our Professional Conduct Panel, Disciplinary Tribunal and Appeals Panel.
2. This application is made under schedule 4, Part 3 of the Act, at paragraphs 20(1) and 23(3), and seeks approval of our proposal to amend the Rules.
3. We are applying to become a licensing authority under a separate application. For reference purposes we have included the proposed licensing changes in strike-through as it is recognised that these specific amendments to the Rules will be reviewed with our application for designation.
4. This application seeks approval of alterations to provide operational clarity and transparency to consumers, so they have clear information on the results that we as a regulator can achieve, to meet the regulatory objectives set out in the Act. We will implement amendments made to provide clarity to the investigation procedure immediately, subject to approval.

5. We have consulted on amending the Rules twice. The first consultation largely related to incorporating changes for our application to become a licenced body. This consultation closed in January 2016 and received one response. We consulted on the Rules in June 2017 which included the same changes that were consulted on in January 2016, but also included amendments to provide operational clarity and transparency. A total of 106 responses were received. We also carried out pre-consultation with our conduct panels prior to open consultation by way of early engagement to inform our proposals. The majority of responses focused on rule changes specific to licensing and there were no direct objections made to changes regarding operation clarity. 72% - 89% of those who responded agreed with our proposals. A more detailed analysis of responses can be found at Annex 2.

Nature and effect of existing arrangements

6. On 5 January 2015 the Rules were implemented following LSB approval to extend their application to entity regulation. The current version applies equally across all members of our regulated community, regardless of the type of work they do or the setting within which they practise. The Rules govern how we investigate allegations, how our Panels and Tribunals work, how matters of prior conduct and fitness to own are dealt with, and other matters such as publication.
7. The existing arrangements provide consistency of approach for the regulated community and consumers when taking enforcement action. This means that consumers can expect to have allegations, about individuals and firms, investigated using the same procedures to provide them with certainty.
8. Rules 11 and 12 provide the type of previous conduct that the regulated community and those seeking to join it are expected to declare, including the point at which they must do so. This includes additional requirements on firms to declare business related negative findings. This enables us to assess risk to consumers and professional standards.
9. Rules 15 to 20 provide the framework for how we investigate and put matters to our first-tier panel, in relation to individuals and firms. These include powers to deal with firm closure by way of practice management agreements.
10. Rules 21 to 37 provide the second and third stages of our enforcement function giving powers to our Disciplinary Tribunal to hear evidence and reach appropriate decisions on cases placed before them, and our Appeals Panel to decide on the fairness of first and second-tier decisions for the purpose of providing accountability in the decision-making process.
11. Rules 38 to 42 enable us to meet other regulatory objectives under the Act by providing the power to publish adverse findings. This is not only to protect the public but is also to provide awareness to the regulated community about the risks of certain behaviour within

the professional environment, and how their personal conduct can impact on their profession.

The proposed amendments

12. The proposed amendments fall into two categories. The first extend the Rules to include licensed bodies, their owners, managers, designated officers and employees, and refer to powers to be conferred to us under our Licensing Rules, subject to LSB approval. These amendments are in strike-through at Annex 1 and are being considered with our application to become a licensed body. As stated we do not require the LSB to consider the strike-through proposals as part of this application. We have not described in this application our reasons for requiring changes to the Rules in regard to our designation application.
13. This application focuses on the second set of Rule changes for which we seek approval. These are designed to achieve clarity in the investigation and disciplinary process two years on from initial implementation, and to provide more transparent information to consumers, where we make decisions in the public interest as distinct to the individual consumer interest. For instance, making earlier decisions on matters where the harm from, and the risk of repeating the conduct is low. This will allow for more proportionate, expeditious and outcomes focussed, decision making, while reducing the cost of regulation and maintaining public confidence in standards. This will also enable more dynamic decisions to be made where it is clear that the individual under investigation, who may be providing legal services to a small community, can continue working where it is safe to do so, either with conditions of practice or the provision of undertakings.
14. The following table provides details of the proposed changes.

Rule	Proposed changes
Note	Where amendments are tidying up existing wording they are not dealt with separately.
3	Changes have been made to: (1) consolidate the definitions section at the beginning of the Rules; (2) clarify the role of the Investigator; (3) tidy up definitions.
5	Wording at end of paragraph (2) removed to avoid confusion as to whether an address was maintained by CILEx or the regulator. Wording added to accommodate technology such as service by e-mail.
6	Clarifies the circumstances in which a Relevant Person can be prevented from terminating their membership.
8	Additional provisions to deal with the situation where a panel member drops out to minimise disruption to progress of matters. Requirement for reconsideration by an entirely new panel has been removed to increase flexibility. If a fairness issue arises on a case

Rule	Proposed changes
	this can be dealt with at the time. Also saving provision added in respect of the validity of appointment of members.
9(6) and 9(7)	First of a number of amendments where a provision for the regulator to attend a meeting is added. These are intended to address the situation where the regulator considers that oral representations should be made in the public interest but it has no right to do so. This has caused practical difficulties.
9(10)	Clarifying the role of the Clerk and the regulator.
10	Provisions added to clarify the evidential basis for Panel decisions to assist them where they are required to consider evidence such as Interim Orders. This has caused practical issues.
11(1)(g) and (h)	The reference to fitness to practise would arguably only include some types of professional disciplinary proceedings as it is not a test applied by all regulators. It has therefore been removed. Discretion has been provided at (h) to enable the regulator to consider matters which might ordinarily not have been declarable because no findings have been made due to a higher burden of proof but there is a risk to the public.
11(5)	Clarifying that judgment would include a court outside the UK.
14(1)	See 9(6) and 9(7) above.
14(3)(a)	Clarifies the circumstances in which the Panel can delegate to an Investigator the power to deal with subsequent prior conduct decisions where the same issues arise in relation to a Relevant Person under 13(1)(e).
15(2)	Adds discretion as to how an investigation is undertaken by replacing "must" with "may" and enabling an Investigator to have discretion as to what point in the investigation it is appropriate to seek a response from the Relevant Person. Provides clarity to the role of the complainant to differentiate them from being a party to the proceedings and manage their expectations of outcomes, while keeping them informed and involved in the process.
15(6)	Provides an investigator can direct an appropriate timescale for responses to enquiries, particularly where risks to the public are in the process of being identified.
17(5)	Amendment intended to deal with the situation where a Relevant Person admits allegations shortly after a referral is made and where it may be in the public interest to have a determination by consent. For example, where there is a conviction or where someone can continue in practice.
17(6)	See 9(6) and 9(7) above.
18	Clarifies the determination by consent procedure and that a sanction can be imposed which would be within the powers of the Tribunal.
19(2)	Amends the procedure for making Interim Orders to enable flexibility

Rule	Proposed changes
	particularly where orders need to be made urgently whilst preserving the need to act fairly.
19(4)	See 9(6) and 9(7) above.
19(6)	Inserts safeguards around the review and shelf life of Interim Orders to provide consistency with other regulators.
20(2)	Provides ability for the regulator to appeal decisions in relation to prior conduct.
24(5)	See Rule 8 above.
24(3) and (4)	Makes the primary obligation to serve proceedings on the respondent and lodge with the Clerk rather than the other way round.
25(1)	Clarifies that the Tribunal may make orders consequential on a failure to comply with directions.
26	Increases the flexibility of the Tribunal to deal with amendments to cases and for the regulator to withdraw allegations.
29(6)	Clarifies the types of courts and bodies in respect of which decisions can be adduced in evidence.
30	Amendments to clarify rule.
31	See changes at 20(2) above.
32	Amendments to clarify rule.
34(4)	Provision added to deal with service by email.
35(7)	Clarification of the powers of Appeal Panel when determining an appeal. These include the power to make an ancillary order for costs where the appellant withdraws their appeal after work has been undertaken by the regulator

Reasons for proposed change: operational clarity

15. We have updated our Rules after a period of operation to improve clarity and provide greater transparency to the public about our role as a regulator when considering allegations of misconduct. We have also made changes to provide further clarity to our conduct panels' powers.
16. We have made the definition of prior conduct clearer for the regulated community to assist those making declarations, and those seeking to be regulated by us. These changes also provide further protections to the reputation of the profession, the public and those who use the legal services of anyone we regulate.
17. Appeals under Rules 5, 7 and 8 of our Admissions and Licensing Committee Rules will introduce a formal appeal process under Part IV of the Rules, for matters decided by the Admissions and Licensing Committee. This will provide independent and impartial review of their decision, and deliver fairness to individuals.

18. Wording changes have been proposed to improve transparency to consumers and the community we regulate. These include simplifying language, making clearer the role of consumers who make allegations of misconduct during both investigation and proceedings, and to bring greater transparency to our outcomes focussed decision making. These changes aim to provide consumers, who have reported misconduct, with a role during investigations, while being clear that they are not a party to proceedings.
19. The proposed changes were approved from a governance point of view by the relevant CILEx Regulation Board portfolio holder on 22 June 2017 under powers delegated by our Board.

Consultation

20. We consulted during the period 9 June to 20 July 2017 and received 107 responses including from CILEx. We are pleased to say that our proposals regarding operation clarity were largely well received. Some comments were received during pre-consultation from our conduct panels and these were addressed prior to public consultation. CILEx also responded and raised queries about the scope of the prior conduct questions which we considered carefully. On balance it was decided that extending the scope of the prior conduct questions was appropriate in that there may be exceptional circumstances where a particular type of conduct should have been disclosed as it would be relevant to whether that person was a fit and proper person to be part of the regulated community. We will provide guidance to the regulated community to inform them when considering whether or not they should declare a matter.

Transitional arrangements

21. We are aware that any changes in the Rules may cause some confusion as to the point at which they should apply. We propose a transitional period where existing proceedings which have already been referred to the Professional Conduct Panel or the Disciplinary Tribunal will be dealt with under the existing Rules. All other cases will be dealt with under the new Rules. Anyone affected by this change will be notified in writing of the changes and how the change affects their matter.
22. We will update all our policies and guidance, and provide training to all our conduct panels and staff prior to implementation of the Rules. We will use this opportunity to review our public facing guidance material as a whole to find fresh ways of providing this information to our regulated community and to consumers.

Equality Impact Assessment

23. During the consultation process, no consultee raised the possibility that the Rule changes may have a discriminatory effect on BAME Relevant Persons, or consumers. We will however review this during our operation of the Rules. We would hope the changes to the

Rules will allow us the ability to decline to investigate at an earlier stage more easily where it is clear from the information being reported that there is no substance to the allegations.

The Regulatory Objectives

24. The Act sets out eight objectives we are required to promote. The following section identifies how our application for Rule changes supports these objectives where they impact.

Protecting and promoting the public interest and the interests of consumers

25. The changes in the Rules will promote the public interest by enabling us to make more flexible decisions to support our regulated community so they can continue to provide legal services within their locale if the risk is low. These changes will also provide greater transparency to consumers to manage their expectations where the public interest outweighs their individual rights. We have done this by making it clearer within the Rules that they have a valuable input during the investigation process but are not a party to the proceedings.
26. The reason for the change is because we became aware that consumers were communicating with us in a way that suggested we were a complaints handling service, which goes beyond our function as a regulator. These changes will also enable us to make timelier decisions for the benefit of consumers, for example where formal litigation may be appropriate in the first instance, or where the conduct referred to us is not a regulatory misconduct. We will continue to seek feedback at the conclusion of investigations which will allow us to analyse whether this new approach is achieving the desired outcomes.

Supporting the constitutional rule of law

27. The Rule changes, largely do not impact this regulatory objective. We have, however, included clearer junctures to assess the continuation of interim orders. These additional check points in the process supports the constitutional rule of law. An interim order will affect the regulated person or firm's ability to practise and provide legal services, or it can protect the public from exposure to the risk of substandard legal services. By providing a process to review the order, for example because of a change in circumstances, we have provided ourselves the ability to better scrutinise the effectiveness of interim orders and their fairness.

Improving access to justice

28. These Rule changes do not directly impact access to justice as we are not restricting individuals right to provide information about alleged misconduct. The changes however should minimise disruption to access to justice by allowing us to make decisions more quickly. This would enable the regulated person or firm being investigated to continue with

their work where there is no merit in investigating conduct further. It will also enable them to continue working if the risk to the public is low.

Promoting competition in the provision of services provided by authorised persons

29. Where our existing regulated community are employers, they can be assured that we are applying the same standards as other regulators, to encourage them to employ individuals that we regulate. Although this objective is specific to authorised persons it applies to anyone seeking to be regulated by us, as some are supervised in firms that we do not regulate. This approach also ensures that those who go on to become authorised are introduced early to the standards required of them to facilitate efficient transition to their desired authorisation status.

Encouraging an independent, strong, diverse and effective legal profession

30. The Rule changes do not directly impact on this objective.

Increasing public understanding of the citizen's legal rights and duties

31. We will update guidance and consumer specific guidance to ensure that there remains a clear and transparent path to providing information to us. Where the public raise with us an issue relating to the conduct of our regulated community we will evaluate the information to decide on an appropriate course of action.
32. We will also provide clearer guidance to the public on reporting alleged misconduct that they have seen that may not directly impact upon them. This will be balanced by our ability to assess early whether they have an avenue to report alleged misconduct either to us to another organisation.

Promoting and maintaining adherence to the professional principles

33. The proposed Rule changes are considered by us as to have a neutral effect on this objective. The regulated community is not asked to change the way it approaches adherence to the professional principles. They will still be required to consider the Code of Conduct and the Rules and how they apply to their daily provision of legal services.

Better Regulation Principles

34. CILEx Regulation proposed rule changes are consistent with the better regulation principles.

Proportionate

35. The changes to the Rules provide a proportionate approach to our enforcement function. We recognised, after a period of operation, that the Rules required some clarity in parts to effect the flexibility intended when the Rules were approved in 2015. For example a balance needed to be drawn between our ability to ensure a member of the public has the best opportunity to provide us with information about alleged misconduct and managing their expectations of the outcomes that can be achieved. We have made this clearer within the Rules. Other amendments to the Rules follow a similar theme of clarifying Rules specific to who will most apply them from our conduct panels, to Investigators. This approach will support our aims to make proportionate decisions in enforcement cases.

Accountable

36. The changes are proposed within the existing framework of the Rules; therefore the accountabilities that currently exist will apply to these changes as well. Where office decisions are made that require oversight, these exist within the Rules which give power to our conduct panels to approve them or not. Rights of appeal or review remain as now. We are also accountable to our Board and are aware that where our Rules are not fair or not applied fairly, a member of the public or profession can judicially review our processes.

Consistent

37. The Rules are consistent with our approach to outcomes-focused, risk-based regulation. The changes are to facilitate this approach.

Transparent

38. We have taken a transparent approach to these changes by alerting our members directly about the consultation seeking their views the analysis of which can be found at Annex 2. The consultation was also published on the CILEx Regulation website, and we are pleased we received a response from the professional body to our consultation.
39. We will revise our guidance and test their understanding with our conduct panels and staff prior to publication. All our updated guidance will be provided on our website and we will include further publicity on the changes for example using our Regulation Matters website and the CILEx Journal. We will provide training to our staff, conduct panels and to the relevant departments within the professional body to enable advice to be provided.
40. We will create additional policy where necessary to ensure that the changes to the Rules are clearly explained to all those to whom the changes affect.

Targeted

41. By providing clarity in the Rules we will be able to regulate targeted to the type of misconduct alleged, the aim being to enable our regulated community to continue to practise where there is no risk, or the risk can be managed with appropriate measures in place.

Impact on other approved regulators

42. No other approved regulators responded to the consultation. However the proposed changes are consistent with other approved regulators and we conclude the impact on them is negligible.