

Legal Services Board consultation on Proposed rules for applications to alter regulatory arrangements

Law Society response

July 2021



Executive summary

1. The Law Society is responding to the consultation in its representative capacity as the independent professional body for solicitors in England and Wales. Our role is to be the voice of solicitors, to drive excellence in the profession and to safeguard the rule of law.
2. We welcome the Legal Services Board's (LSB) consultation on its proposed rules for applications to alter regulatory arrangements and are pleased to note that the draft rules reflect a direction of travel that has for some time formed the basis for discussions between the LSB and the Law Society, and which reflects the various points we have highlighted in earlier consultation responses and engagement with the LSB.
3. We have previously argued that in order to achieve the regulatory objectives of the Legal Services Act, it is important for the decisions of the LSB and frontline regulators to be robust and well-evidenced, and to take account of the cumulative impact of all the changes on the legal profession and on the consumers of legal services. We argued that by improving the quality of rule change applications, the LSB would be better able to ensure consistent evidence-based regulation of legal services. We have also previously raised concerns about a lack of supportive evidence and impact assessments in rule change applications that the LSB has been asked to consider.
4. The new proposed rules, if implemented, would be a significant step in the right direction. There is both a coherence and a clarity of purpose in the proposed rules which, while very much needed, was previously lacking. We agree with the LSB's view that the new rules will most likely lead to better applications and make the process more efficient.
5. The rules and guidance, as proposed, should improve the quality of rule change applications, as there will be a need for changes to promote the eight regulatory objectives and better regulation principles, and to be supported by sufficient information, material and evidence.
6. Furthermore, requiring frontline regulators to produce a full economic impact assessment alongside proposals for rule changes, will mean greater clarity of the impact of any particular change for consumers, the public interest and on the profession. We are also encouraged by a stronger focus on evaluation and monitoring of rule changes, with the LSB proposing to routinely assess the implementation of regulators' evaluation and monitoring plans as part of the LSB's regulatory performance framework.
7. While we welcome the introduction of a standard application format as well as the requirement for impact assessments for each proposal, it is also important for the LSB to set out any criteria against which applications and impact assessments will be evaluated. This seems to be lacking from the current rules and guidance.
8. We are also conscious that every change to the regulatory arrangements has the potential to increase red tape for either regulators or those who are regulated, and we have a slight residual concern that while these changes are undoubtedly to be welcomed, they could have the effect of increasing the cost of regulation, as has been acknowledged in paragraph 63 of the consultation document. This is because each stage of the process of applying for rule changes will need to be handled with more attention to detail than has been the case in the past, with increased time needed for certain key aspects such as

impact assessments. The increased time overall may well have a negative impact bearing on regulatory costs overall.

9. We are mindful too that the LSB is the oversight regulator for eight regulatory bodies, all regulating very distinct professions. It would therefore be welcome if the LSB were to set out its approach for ensuring that a level of consistency is applied across the board when considering requests to alter regulatory arrangements by the various regulators. At the moment, this aspect does not appear to be covered within the consultation.
10. It is right that the draft Rules and the Guidance should apply to alterations made by the Solicitors Disciplinary Tribunal, and reference to this separate body is made several times in the consultation document including in the definitions section. We take the view that equal weight and emphasis should be accorded to other regulatory tribunals, such as the Disciplinary Tribunal run by CILEx or the Bar Tribunals & Adjudication Service, although we understand that a historical anomaly may mean that different operating rules must apply in the Bar's case. A parity of arrangements with other tribunals should be the norm, and, where this is not possible, the reason for this should be made clear within the rules or guidance.

Consultation questions

Question 1: Do you have any comments on the above draft rules 1 to 4? Do you have any comments on the associated draft Guidance?

11. Overall, rules 1 to 4 appear to be both practicable and necessary. It is sensible to include important definitions at the start of the rules. Given the weight placed in the overall process upon impact assessments, we would suggest that this term is also included in the Definitions and perhaps cross referenced with the information contained at 12 in the draft rules. We make further points about impact assessments in our answer to Question 2.
12. It is useful in the guidance to quote from the Act's definition of regulatory arrangements, as a reminder of how wide this definition is.
13. It is sensible to have guidance to assist approved regulators in determining whether their proposals fall within the meaning of alterations to regulatory arrangements requiring approval under the Act, as making such determinations is not necessarily straightforward.

Question 2: Do you have any comments on the above draft rules 5 and 6? In particular, do you have any comments on the information required to be included in applications or requests for exemption specified in Section E (rules 8 to 13) and rule 17 of the draft Rules? Do you have any comments on the associated draft Guidance?

14. We are fully supportive of rules 5 and 6, and of the need for written applications for rule changes which contain the information specified in section E. It is imperative that the Board is able to adjudge applications not to have been properly made if they do not contain the necessary information.

15. Rules 8 and 9 usefully adumbrate the information which is required for applications.
16. We fully endorse the contents of rule 9 as we believe it is important that rule changes are closely aligned with the regulatory objectives contained within the Act, and where this is not the case this should be fully explained.
17. We would suggest that in Rule 9(1) (a), the words 'is compatible with' should be replaced by 'supports' or 'is consistent with'.
18. We would suggest that in Rule 9(2), the words 'not compatible with' should be replaced by 'damaging to or is inconsistent with'.
19. The attention to detail demanded of regulators by rule 10 is also welcomed. We are pleased to note the mention of preventing regulatory conflict and the need to deal with it when such conflict arises unavoidably. However, it is also true to say that this rule will only work well if regulators are adept at identifying conflicts. It would be helpful if the guidance could include some examples of what might constitute regulatory conflict, and some tips or advice for both preventing and ameliorating such conflict.
20. We fully endorse the contents of paragraphs 66-70 in the draft guidance. To further safeguard against a regulator downplaying opposition to any proposed regulatory change, we would recommend that rule 11 stipulates that the counterarguments to the proposals under consideration should be covered in some detail within the summary document, as well as attributing these counterarguments to the relevant individuals or organisations. The regulator's reasons for not taking on board these counterarguments, or any mitigating actions or strategies that it will adopt, should also be spelled out in the summary document.
21. We take the view that the quality of impact assessments undertaken within the legal sector has in the past been variable. We would therefore recommend that with regard to rule 12, it would be helpful for the LSB to provide an example of an impact assessment that represents good practice, perhaps including this in an annex to the rules.
22. Furthermore, while a standard application format and impact assessment for each proposal is a welcome development, the LSB does not appear to have set out any criteria against which applications and impact assessments will be evaluated. For example, 12 in the draft rules stipulates what information should be included in an impact assessment. We would argue that it might also say that the LSB will be scrutinising the methods used in the impact assessment to evaluate whether that methodology can be said to have reasonably produced the predictions or conclusions reached. The rules could also include information to the effect that the LSB will be using process criteria to examine the ways in which stakeholders, and in particular any groups with protected characteristics, were involved in the impact assessment. Also, when considering impact on the public, due consideration should be given to diversity of those in the market affected including those with protected characteristics. As part of the criteria it uses, the LSB might undertake to contact potentially affected parties to determine the degree to which they felt included in the impact assessment. If the LSB were to provide criteria along these lines, we feel that it would assist the openness and consistency of the process.

Question 3: Do you have any comments on draft rule 7 above? Do you have any comments on the associated draft Guidance?

23. We note that time limits are to a large extent determined by the Act rather than by the rules.
24. That said, within its constraints, Rule 7 seems to sensibly deal with time limits. We would consider it to be imperative that the LSB has the ability to extend its consideration time in the event of receiving particularly complicated rule change applications, which, due to their complexity, cannot be dealt with within the usual time frames. The parameters allowing the LSB to issue an extension notice without the consent of the regulator would therefore seem to be critical in this respect.
25. There is also merit in making provision for larger applications, such as significant changes to a code of conduct, to be phased or for the application to the LSB to be made in stages.

Question 4: Do you have any comments on the process for requests for exemption? Do you have any comments on draft rules 15 to 17? Do you have any comments on the associated Guidance?

26. We accept the need for regulators to be able to request exemptions for rule changes that need to be fast-tracked at short notice in a proportionate, consistent, transparent and efficient way. We are reassured by the fact that exemptions will usually only be permitted for minor or non-controversial changes.
27. The guidance also talks about exemptions being made in situations where time is of the essence, but we would caution against the LSB allowing this to be used as a mechanism for bypassing the normal application process. Where an argument is being made that an exemption should be granted because of a shortage of time, the LSB should consider such arguments with particular care, and where appropriate make a determination on what has caused that shortage of time. If, for example, the shortage of time was caused by an avoidable delay on behalf of the regulator in making the application, the LSB should be able to discount the request for an exemption on this basis. The guidance should alert regulators to the fact that the LSB may decide to take this approach.
28. We wonder also whether there should be increased safeguards for when regulators are permitted to make changes at short notice. We believe that any such use of the short notice mechanism should be accompanied by regular reviews overseen by the LSB, a commitment on behalf of the regulator to making the change(s) temporary, and an indication of when the change(s) will be rescinded. We also believe that, where possible, there should be proper provision made for informing third parties about such rule changes that may be of interest to them in order that they can comment. It would be helpful if this too could be built into the rules.
29. The guidance sets out the need for regulators to provide similar information when making an application for an exemption as they would when applying for a rule change. We agree that the process should not be any less thorough. Although in the main exemptions will only be granted for minor or non-controversial changes to the rules, the fact that this is a streamlined process in which the normal rules do not apply means that the requirement for detail to be provided should remain. It would be undesirable for applications for an

exemption to be viewed by regulators as more suited to a more light-touch approach in comparison to regular applications.

Question 5: Do you have any comments on the proposals and scope for new general exemption directions?

30. If a process for applying for exemption is incorporated into the rules, it therefore makes sense for the LSB to also set standard exemptions, within the rules. We are therefore content with the proposal to include changes that need to be made as a result of the Covid-19 Pandemic or because of the UK's exit from the European Union, within the category of standard exemptions. It seems to us that both are wholly appropriate for inclusion.
31. We are also content for general exemptions to include the documentation listed, such internal documents, forms and standalone guidance, or where minor drafting or grammar changes are needed.
32. Again, as a safeguard, we believe that use of the general exemptions route should be open to challenge, in the event that it is perceived that there has been some abuse of process, or that the route has been used in an otherwise inappropriate or incorrect fashion.