

Proposed rules for applications to alter regulatory arrangements:
Response to the consultation on new draft rules for applications to alter
regulatory arrangements under Paragraph 20(1) of Schedule 4 the Legal
Services Act 2007 and draft statutory guidance

Introduction

1. When responding to this and other Consultations, the Solicitors Disciplinary Tribunal ("the Tribunal") must have in mind that it should not make public statements (even in the context of consultation) which might give rise to a complaint at a future date from those appearing before it of predetermination and/or apparent bias. For that reason, the Tribunal tends not to respond to consultations. However, this consultation is somewhat different as it relates to the arrangements for approving amendments to the Tribunal's rules and directly affects the Tribunal and therefore a response is considered appropriate.
2. The Tribunal welcomes the review of the LSB rules for applications to alter regulatory arrangements. As a general observation the Tribunal considers that the draft rules and guidance are clear.

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 Do you have any comments on the associated draft Guidance?

Draft rules

3. The drafting of rule 2 could possibly be reviewed to make it clearer for example by re-ordering the wording to read:

“2. Under section 178 (the Solicitors Disciplinary Tribunal: approval of rules) and Part 3 of Schedule 4 to the Act (alteration of approved regulator's regulatory arrangements) an approved regulator must comply with these Rules in—

(a) making an application for the Board to approve an alteration or alterations to its regulatory arrangements; or

(b) making a request for the Board to direct an alteration is to be treated as an exempt alteration.”

4. Rule 3 sets out that unless otherwise specified the rules apply as if references to “approved regulator” include the Tribunal. The Tribunal fully accepts that the LSB is responsible for considering applications to amend its rules. However, the Tribunal is concerned that as currently drafted the wording of rule 3 means that rules 9 and 10 apply to the Tribunal.
5. In respect of rule 9 the Tribunal is not subject to a duty under Sections 28(2) or (3) of the Legal Services Act 2007. The Tribunal understands that the LSB acknowledge that that is the position. Whilst the Tribunal would expect to provide information as to how its application was compatible with the regulatory objectives and better regulation principles (and indeed did so when it last applied to amend its rules) the Tribunal considers that either rule 3 or rule 9 needs to be amended to make clear that these sections do not apply to the Tribunal.
6. With regard to rule 10 (f) and (g) Sections 52 and 54 of the Legal Services Act 2007 do not apply to the Tribunal. The Tribunal does not consider that these areas would be applicable to any application by it to change its rules and that it should be made clear in rule 3 that rule 10 (f) and (g) do not apply to applications made by the Tribunal.

Guidance

7. The Introduction to the Guidance (paragraphs 1 to 7), the Principles and purpose (paragraphs 8 to 10) and the Structure of Guidance (paragraph 11) are clear and self-explanatory.
8. In respect of paragraph 20 the Tribunal is mindful that when it makes new rules this can mean that its existing rules are modified (for example when the Solicitors (Disciplinary Proceedings) Rules 2019 were made they contained consequential amendments to the Solicitors Disciplinary Tribunal (Appeals and Amendments) Rules 2011). The Tribunal’s assumption is that such consequential amendments would not require a separate application to modify its other rules but perhaps this could be made clearer.
9. The Tribunal’s rules can be amended by the making of legislation brought forward by the Government over which it has no control. The LSB may wish to make it clear that such changes are outside the scope of the rules and guidance.

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?

Draft rules

10. The Tribunal has no comments on draft rules 5, 6, 8, 11, 12 and 13. Its comments in relation to rules 9 and 10 and the applicability of the specified sections are above. As a general observation the proposed rules clearly set out what is required and timescales and this is helpful.
11. In relation to rule 10(h) and the provision of draft guidance or policy that will support implementation of the alteration(s) the Tribunal's position is that its Policy Committee routinely issues Practice Directions and Guidance Notes as required. The need for Practice Directions and Guidance Notes may not be evident at the time of any application to amend the SDT's rules as in some cases they are developed subsequently as practical application of the rules themselves develop. Accordingly, whilst there will be no difficulty in the Tribunal indicating what Practice Directions and Guidance Notes are envisaged, the Tribunal considers that this needs to be provided for information only.

Guidance

12. The Tribunal has no comments on the draft guidance associated with rules 5, 6, 8, 11 and 13.
13. The Tribunal would invite the LSB to reconsider the wording of paragraphs 53, 54 and 56 of the draft guidance in light of its comments above in relation to the duty under Section 28(1) and (2) of the Legal Services Act 2007 not applying to the Tribunal.
14. The Tribunal would invite the LSB to reconsider the wording of paragraphs 62 and 63 of the draft guidance in light of its comments above in relation to the duty under Sections 52 and 54 of the Legal Services Act 2007 not applying to the Tribunal.
15. In respect of paragraph 64 the Tribunal would reiterate its comments at paragraph 11 above.

16. The Tribunal notes the contents of paragraph 72 in relation to the LSB's expectations that approved regulators will collect and use diversity data to help inform policy development. The Tribunal is not an approved regulator under the Legal Services Act 2007 and whilst it can and does request diversity information it has no basis to compel the provision of this information and therefore the Tribunal would ask that consideration is given to amending this paragraph to reflect the Tribunal's position and the limitations upon it.

Question 3:

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

Draft rules

17. The Tribunal has no specific comments on draft rule 7. As a general observation the proposed rules clearly set out what is required and timescales and this is helpful.

Guidance

18. The Tribunal has no comments in relation to the proposed guidance on draft rule 7. The Tribunal notes the intention to make a decision within 28 days. If an application for an exemption was de minimis it would be of assistance if it could be determined as soon as possible.

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?

Draft rules

19. The Tribunal has no comments on draft rules 15 to 17.

Guidance

20. The Tribunal has no comments on the draft guidance associated with the above rules. The provision of optional pro formas summarising the information required for applications and requests for exemptions is helpful.

21. The Guidance in paragraphs 90 - 93 on pre-application engagement provides useful clarification as does the guidance in paragraphs 94 to 96 in relation to third party correspondence. The latter ensures that there is transparency as to the LSB's approach when it receives such correspondence.

Question 5:

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

22. The Tribunal is in an unusual position in that its rules are approved by the LSB but take the form of statutory instruments which must be made in accordance with the relevant parliamentary procedure. This procedure includes scrutiny of the draft Statutory Instrument by the Joint Committee on Statutory Instruments (JCSI). The JCSI can and does identify issues it considers need to be addressed in terms of the drafting of the Statutory Instrument. These are generally very minor and specific to the fact that the Tribunal's rules are a Statutory Instrument. It would assist the Tribunal for there to be a general exemption direction that if having had proposed draft rules approved by the LSB the JCSI identifies any areas that it wants the Tribunal to address solely to meet their drafting requirements for statutory instruments these changes can be made without seeking a specific exemption from the LSB.

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