

Oral and written representations and evidence and the alteration of reserved legal activities

*Decision paper on consultation paper issued
on 6 August 2009*

10 December 2009

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1. Executive Summary

- 1.1 The Legal Services Board (the “**LSB**”) and the Office for Legal Complaints (“**OLC**”) have been created by the Legal Services Act 2007 (the “**Act**”) to ensure the highest quality of regulation within the legal profession and legal services industry for the benefit of consumers and citizens and ultimately the profession itself.
- 1.2 On 6 August 2009 we issued a consultation paper (the “**First Consultation Paper**”) providing initial drafts of the rules that the LSB proposes to make in relation to the making of oral and written representations, and the giving of oral and written evidence, to the LSB as part of its investigations as to whether the scope of the Reserved Legal Activities should be extended or be reduced. This consultation closed on 28 October 2009.
- 1.3 The purpose of this paper is to:
 - provide a summary of the range of responses we received to the questions we posed in the First Consultation Paper;
 - articulate the final policy that the LSB has followed in formulating these rules; and
 - provide a final draft of the rules that will now apply from when the Board takes up its full powers in early January 2010.
- 1.4 The LSB would be like to thank all respondents for their constructive engagement in this consultation process. The LSB notes that nearly all respondents welcomed the general direction of the draft rules and we have made some drafting amendments as a result of some helpful comments.

2. Responses to our Consultation

Introduction

- 2.1 This section of the paper sets out a summary of the range of responses that we received to each question we posed in the First Consultation Paper and sets out the final position the LSB has reached as a result of these responses.
- 2.2 We received 11 responses to the First Consultation Paper. A list of these respondents is set out at Annex 1. Full copies of the responses can be found on the LSB website¹.

Question 1 – Do you agree with the approach taken to making oral representations and giving oral evidence?

Responses

- 2.3 All but one of the 11 respondents generally agreed with the approach that the LSB has taken.
- 2.4 Responses received include:
- comments from the Legal Services Commission (the “**LSC**”) who state that *“in general, the Commission agree with the approach taken”*;
 - a response from the Crown Prosecution Services (the “**CPS**”) who comment that *“in general we are in favour of the approach taken to making oral representations ...”*;
 - comments from the Council for Licensed Conveyancers (the “**CLC**”) who agree *“the approach taken to making oral representations and giving oral evidence and has no improvements to suggest”*;
 - a response from the Solicitors Regulation Authority (the “**SRA**”) who *“agree with the broad approach set out in the consultation paper”*;
 - comments from the Institute of Legal Executives and ILEX Professional Standards Limited (together “**ILEX**”) who consider that *“the process appears too brief considering the complexities that can arise...”*. ILEX consider that *“the extension of reserved legal activities may prove more complex than anticipated in the rules and the LSB could be faced with dealing with mountains of conflicting evidence”*;

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http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/submissions_legal_activites.htm

- a response from the Law Society who express concern that the implication of Rule 9 “*is that ‘affected practitioners’ have rather greater status in the LSB’s consultation of these matters than ‘representing persons’*”. The Law Society is of the view that “*the approach taken as between ‘representing persons’ and ‘affected practitioners’ should be even handed*”;
- comments from the Master of Faculties who raise a concern that the draft rules do not specifically provide for the making of oral representations by Approved Regulators. The Master of Faculties states that “*we consider that an Approved Regulator should be able to make representations once the LSB has decided to hold an investigation about the alteration in designation of reserved legal activities*”; and
- a response from the Bar Standards Board (the “**BSB**”) who note that “*the impact assessment identifies that the policy will have no direct or indirect effect on ‘race, disability or gender equalities’*. It is not clear to us whether an equality impact assessment has been completed in relation to this policy. In our view this is an important and necessary step given the obvious impact the policy could have on equality areas such as disability”.

LSB position

2.5 We note that nearly all of the respondents agree with our general approach. In relation to some of the specific points raised, we respond as follows:

- the LSB does not agree with ILEX’s view that “*the process appears too brief considering the complexities that can arise...*”. The LSB has purposefully designed a process which it believes is transparent, concise and flexible enough to deal with the different eventualities that oral representations and evidence may lead to;
- we note the concern that the Law Society raises about the enhanced status of “affected practitioners”. As the Law Society goes on to recognise in its response, it is the provisions of paragraph 13 of Schedule 6 to the Act that mandate this approach, rather than any specific policy decision that the LSB has made;
- we note the comments made by the Master of Faculties that the rules do not specifically provide for the making of oral representations by Approved Regulators. The LSB has deliberately made the concept of a “Representing Person” a wide one. This approach is consistent with the Act which does not mandate who can and cannot make representations. The LSB believes that this formulation is wide enough to allow representations by Approved Regulators;
- the LSB does not believe that the concerns raised by the BSB in relation to the impact of the rules on race, disability or gender equalities are significant. The rules provide for all practitioners who are affected by any investigation to be given, so far as reasonably practicable, an oral

hearing². In relation to representations from any other bodies, the rules give the LSB a broad discretion to allow oral representations or oral evidence if “*the particular circumstances of the Representing Person or the complexity of the issue merit an exception to the normal process in individual cases*”³.

Question 2 – Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the process.

Responses

2.6 A number of the respondents suggested improvements of a minor drafting nature.

2.7 Responses received include:

- a response from the LSC who suggested some drafting changes to Rules 5, 6, 7, 11, 12, 14 and 15;
- a response from the SRA who recommend that the final version of the rules “*is explicit about accommodating (as far is reasonable) each individual’s personal circumstances, particularly where hearings are conducted in person*”; and
- comments from ILEX who suggest that the LSB should “*provide some indication of the circumstances in which payments will be made by the LSB under Rule 17*”.

LSB position

2.8 The LSB has noted the drafting changes that respondents have suggested and have, where appropriate, adopted these in the final draft rules.

² See Rule 10

³ See Rule 9

3. Final Rules

The Rules

- 3.1. A final draft of the rules that the LSB will now make in relation to the making of oral and written representations, and the giving of oral and written evidence to the LSB under Schedule 6 of the Act is set out at Annex 2.
- 3.2. These rules have been amended from the initial draft that was contained in the First Consultation Paper to reflect:
 - comments received from respondents to the First Consultation Paper; and
 - comments received from respondents to the LSB's two other consultation papers⁴ which contained rules on written and oral representations which are similar in scope to these.
- 3.3. In the LSB's opinion none of these amendments result in the final draft rules differing materially from the initial draft rules. Consequently, the LSB is not publishing details of the differences in accordance with Section 205(5) of the Act.

Publication

- 3.4. In accordance with Section 205(6) of the Act, the LSB hereby publishes the rules set out in Annex 2 which will take effect from when the LSB takes up its full powers on 1 January 2010.

⁴ The LSB Consultation Paper "Designating new approved regulators and approving rule changes" and "Compliance and Enforcement – Statement of Policy"

4. Final Impact Assessment

Introduction

- 4.1 The rules to which this consultation paper relate are largely administrative in nature. We therefore consider that the impacts are broadly negligible and potentially positive.

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

- 4.2 The Act sets out a legal mechanism to extend, or reduce, the scope of Reserved Legal Activities. This mechanism provides that, in undertaking its functions, the LSB must determine if, and to what extent, it should hear representations and take evidence from certain individuals.

What are the policy objectives and the intended effects?

- 4.3 The LSB must promote the Regulatory Objectives set out in the Act. The Act also includes a duty on the LSB to adhere to “best regulatory practice”.

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

- 4.4 Three policy options have been considered:
- not to make rules on the giving of representations and evidence to the LSB;
 - make rules on the giving of representations and evidence on a case by case basis; and
 - make detailed rules to adhere to in all circumstances.
- 4.5 The preferred option is the third option because on one level it could be argued that the Act mandates this approach and on a second level detailed rules allow the LSB to give complete transparency on how it will deal with the representations or evidence it receives.

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

- 4.6 We expect to review our rules by the end of 2011/12 to take into account any experience we have of operating them.

Annual Costs

- 4.7 One-off (transition): £ negligible.

4.8 Average annual cost (excluding one-off): £ negligible.

Annual Benefits

4.9 One-off: £ negligible.

4.10 Average annual benefit: £ negligible.

What is the geographic coverage of the policy/option?

4.11 England and Wales.

On what date will the policy be implemented?

4.12 It is anticipated that the LSB will take on its full powers on 1 January 2010 and the rules will apply from then.

Which organisation will enforce the policy?

4.13 The LSB.

Does enforcement comply with Hampton principles?

4.14 Yes.

Will implementation go beyond minimum EU requirements?

4.15 Yes. EU requirements do not require the regulatory framework set out in the Act.

What is the value of the proposed offsetting measure per year?

4.16 Nil.

What is the value of changes in greenhouse gas emissions?

4.17 Nil.

Will the proposal have a significant impact on competition?

4.18 No.

Annual cost (£-£) per organisation (excluding on-off)

4.19 Micro: negligible; Small: negligible; Medium: Negligible; Large: Negligible.

Are any of these organisations exempt?

4.20 No.

Impact on Admin Burdens Baseline (2005 Prices)

4.21 Increase of £: approximately nil.

4.22 Decrease of £: approximately nil (although potential for small decrease).

4.23 Net Impact £: approximately nil.

Evidence Base

4.24 We consider that the cost of the rules proposed in this consultation paper is significantly below the generally accepted threshold of £5 million costs, below which an impact assessment is not necessary. However, we believe that setting out how we have considered the various elements of the impact assessment will help us consult on both our proposals and our assessment of their impact.

Competition

4.25 There is no direct or indirect impact expected.

Small Firms Impact Test

4.26 There is no direct or indirect impact expected.

Legal Aid

4.27 There is no direct or indirect impact expected.

Race/Disability/Gender equalities

4.28 There is no direct or indirect impact expected. The rules provide for all practitioners who are affected by any investigation to be given, so far as reasonably practicable, an oral hearing⁵. In relation to representations from any other bodies, the rules give the LSB a broad discretion to allow oral representations or oral evidence if “*the particular circumstances of the Representing Person or the complexity of the issue merit an exception to the normal process in individual cases*”⁶.

Human Rights

4.29 There is a specific requirement on the LSB to make rules governing the giving of oral and written representations and evidence.

⁵ See Rule 10

⁶ See Rule 9

Rural Proofing

4.30 There is no direct or indirect impact expected.

Sustainability, carbon emissions, environment and health

4.31 There is no impact expected on sustainability, carbon emissions, environment and health.

Annex 1 – List of respondents

- The Legal Services Commission
- The Crown Prosecution Service
- The Fellowship of Professional Willwriters and Probate Practitioners
- Council of Licensed Conveyancers
- Solicitors Regulation Authority
- The Law Society
- ILEX and ILEX Professional Standards
- The Chartered Institute of Patent Attorneys
- The Institute of Trade Mark Attorneys
- The Master of Faculties
- Bar Standards Board

Annex 2 – Making Oral and Written Representations and Giving Oral and Written Evidence under Schedule 6

A. PREAMBLE

1. These Rules are made by the Board (as defined below) under paragraphs 12, 13, and 14 of schedule 6 to the Act (as defined below).

B. DEFINITIONS

2. Words defined in these Rules have the following meanings:

Act	the Legal Services Act 2007
Affected Practitioner	has the meaning given in paragraph 13(4) of schedule 6 to the Act
Approved Regulator	has the meaning given in section 20(2) of the Act
Board	the Legal Services Board
Provisional Report	has the meaning given in paragraph 10(3) of schedule 6 to the Act
Representing Person	any person wishing to make representations or provide evidence to the Board for the purposes of schedule 6 to the Act (including for the avoidance of doubt, and for the purposes of paragraph 13(3) of schedule 6 to the Act, an Affected Practitioner and any body which represents an Affected Practitioner)

C. WHO DO THESE RULES APPLY TO?

3. These Rules are the rules that apply to a Representing Person if they wish to make representations or provide evidence to the Board for the purposes of schedule 6 (Alteration of reserved legal activities) to the Act.
4. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with section 205 of the Act.

D. FORM OF REPRESENTATIONS

Written representations

Southampton Row
London WC1B 4AD

Email: contactus@legalservicesboard.org.uk

Telephone: 020 7271 0050