



13 October 2020

APPLICATION TO THE LEGAL SERVICES BOARD TO AMEND CILEx REGULATION ENFORCEMENT RULES

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.

Documents accompanying this application are:

Annex 1 – CILEx Regulation Enforcement Rules (2018)

Annex 2 – Consultation and responses

Any queries about this application may be made to:

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Introduction and background

1. This is an application solely to amend existing regulatory arrangements relating to the maximum term of appointment and the maximum number of terms for panel members on each of the CILEx Regulation disciplinary panels.

The nature and effect of the existing arrangements

2. The Enforcement Rules set out the maximum term of appointment and the maximum number of terms for each of the CILEx Regulation disciplinary panels.
3. The current rule 2(4) states:
 - “The term of appointment of a panellist must be not more than three years and no panellist may serve for more than six years.”

The proposed amendment / details of the new arrangement

4. The proposed amendment is to extend the maximum appointment term from 6 years to 9 years. The amended Enforcement Rules show the amendment as a tracked change on page 2 of **Annex 1**.
5. The amendments proposed to the Enforcement Rules are a revision of the wording in rule 2(4) to state:
 - The term of appointment of a panellist must be not more than three years and no panellist may serve for more than nine years.

The reasons for the proposed change and the desired outcome

6. In 2018 the Enforcement Rules were changed from appointment terms for panellists of 5 years with a maximum of 2 terms (10 years in total) to 3 years with a maximum of 2 terms (6 years in total).

7. This change arose following research conducted by the Professional Associations Research Network (PARN) in 2014. The research was conducted to inform the Regulation Special Interest Group held in January 2015. PARN asked professional bodies about the assessment of their regulatory committees, 22 organisations responded to their survey. 14 out of the 22 respondents said their panel terms were 3 years, 5 said they were 5 years plus and 3 had no specified term. Shorter terms make it easier to manage cases where panellists were competent and complying with their contractual terms but not engaging or contributing as fully as other panellists. This is why we would not favour reverting back to 5-year terms.
8. The proposed rule change in this application was identified as part of the evaluation of the impact of the 2018 Enforcement Rules changes and examining the overall effectiveness of the Enforcement Rules.
9. The evaluation concluded the 2018 Rules changes achieved the intended benefits, with one exception. The sole issue identified with the 2018 Rules change was that moving to a 6 year maximum tenure, whilst achieving the benefits envisaged, had the unintended consequence of reducing experience, knowledge and continuity on the disciplinary panels in a short space of time. Out of 22 panellists, 6 changed in 2020, 5 must change in 2021 and without the proposed rule change another 8 must change, meaning in the space of two years 19 of the 22 panellists will have to change, leaving a lack of experience on the disciplinary panels.
10. In hindsight, 6 years is a short maximum time for panellists with some other legal regulators having maximum terms of 8 years and 10 years.
11. Whilst not the driver for our proposed rule change, we also envisage reduced recruitment costs from moving to 3x3 year terms, which keeps the cost of regulation down.
12. The overriding objective when setting the maximum term is to ensure and maintain independence and this can be achieved by setting the right

maximum term as well as maintaining relevant registers, providing useful and appropriate training throughout the term of appointment and considering the composition of the panels at appointment and reappointment.

13. A maximum of 9 years, with new membership every 3 years instead of every 5 years will allow a balance to be struck between having the same panel members for too long a period that their independence comes into question and the impact of too swift a turnaround so that panel members do not have enough time to have a positive impact through the experience they gain.

14. We believe our proposal to extend the term achieves the right balance and offers better continuity and experience, without compromising the fundamental requirement of panel members to be truly independent.

15. Before proceeding, we sought legal advice on the appropriateness of extending panel terms, including on the independence of panel members. The legal advice supported our proposed change to 3x3 terms and it did not identify any legal concerns with the proposed changes.

The impact on the Regulatory Objectives

	Regulatory Objective	Impact	Explanation
RO1	Protecting and promoting the public interest	Promotes	Public confidence in the legal profession is maintained because the optimal level of experience is utilised within the panels without compromising independence, ensuring a fair hearing and confidence in the outcome of disciplinary proceedings. No adverse impact is envisaged.

RO2	Supporting the constitutional principles of the rule of law	Promotes	Maintains the principles of a fair trial in adjudicative procedures by ensuring optimal balance between experience and independence.
RO3	Improving access to justice	Neutral	
RO4	Protecting and promoting the interests of consumers	Promotes	Interest of consumers are protected by ensuring the optimal disciplinary panels are in place to fairly and impartially adjudicate allegations and discipline any misconduct that has affected consumers.
RO5	Promoting competition in the provision of services	Neutral	
RO6	Encouraging an independent, strong, diverse and effective legal profession	Neutral	
RO7	Increasing public understanding of the citizens' legal rights and duties	Neutral	
RO8	Promoting and maintaining adherence (by authorised person) to the professional principles	Promotes	Confidence of the regulated community in disciplinary proceedings promotes and maintains adherence to the professional principles.

Better Regulation Principles

16. The proposal meets the principles of Better Regulation as follows:

Principle	Explanation
Transparent	We have taken a transparent approach to this change by alerting our members directly about the consultation, seeking their and other stakeholder views. We also highlighted the consultation to regulated members on two separate occasions. The consultation was

	<p>published on the CILEx Regulation website, and we are pleased we received a response from the professional body to our consultation. The consultation responses can be found at Annex 2. We also engaged with the existing panel members who supported the change. The length of panel terms is set out in plain English in the Enforcement Rules which are published on our website.</p>
Accountable	<p>We have ensured accountability regarding the proposed rule change through consultation, plus engagement with key stakeholders such as existing panellists and the membership body. The proposals are uniformly supported. We particularly encouraged CILEx, as the representative body of our regulated community, to consider this rule change. We also held early discussions with the LSB, as our oversight regulator, about the intended rule change.</p> <p>The rules will be published so that consumers and the public are able to understand the terms under which the panellists serve.</p> <p>Following consultation CILEx Regulation’s Board considered and approved the rule change.</p> <p>We remain accountable for our rules, with the ability for a member of the public or profession to judicially review our processes.</p>
Proportionate	<p>The proposed change provides a proportionate approach to our enforcement function. The maximum 9 year total length on the panels will still achieve the principle of panel independence but the change will protect the optimal level of knowledge, experience and continuity on the panel which is otherwise at risk of being lost under the current 6 years maximum period. and costs of recruitment and training of new panellists.</p>
Consistent	<p>The revised terms have been checked against the requirements of other legal services regulators and have been found to be in line with other regulators.</p>

	Equally, our legal advice also reaffirmed that the proposal is in line with other legal regulators.
Targeted	The action taken is targeted because it is the minimum necessary to address the problem identified, with a single change to the rules. Moving to 3 x 3 year terms retains the benefits of a shorter single term with the ability to develop the experience and CILEx Regulation specific knowledge of panellists over a 9 rather than 6 year period.

Effect on areas regulated by other Approved Regulators

17. There is no impact on the wider regulated community in respect of the lengthening of the panellist maximum term and there is no cross over with other regulators. The consultation was sent to all the other legal regulators and no concerns were raised by other regulators.

Consultation and engagement

18. We consulted on this proposal between 9 July and 1 October 2020. The consultation was launched on our website [here](#). A copy of the consultation is attached to this application plus the consultation responses in full (**Annex 2**). For ease we include a summary analysis of the consultation response below.

19. To draw attention to the proposed change and our consultation, we highlighted the consultation to regulated members in the members e-newsletter at the start of the consultation and placed a reminder in the newsletter prior to the end of the consultation. We also emailed all the other legal services regulators to ensure they were aware of the proposed changes.

20. We also sought the views of existing panellists and they fed back their concern that too much knowledge and experience was being lost from the pool of panellists too quickly, which would be exacerbated by multiple

members of the panels needing to finish their term at the same time in January 2021.

21. We asked if respondents foresaw any issues in relation to the extension of the panel terms.

22. We received 2 consultation responses about the extension to panel terms; one from CILEx and one from the Solicitor's Disciplinary Tribunal (the SDT).

23. Comments from CILEx who expressed support for the proposal were:

- In CILEx's view, increasing the term of appointment of disciplinary panellists is sensible. It is in line with good governance practice, ensuring a supply of trained, competent panel members and continuity of experience, as well as giving flexibility to meet changing demands and ensure independence.

24. Comments from the SDT were:

- It would not be appropriate for the Tribunal to comment on this question. It may be of assistance to know that there is no maximum time limit that an individual can be a member of the Tribunal (subject to continuing eligibility and re-appointment by the Master of the Rolls).

Equality, Consumer and Regulatory Impact Assessments

25. No equality, consumer or regulatory impact issues have been raised with CILEx Regulation through the consultation process or otherwise.

26. An initial Equality Impact Assessment was carried out which identified that there is no adverse impact on persons with any of the protected characteristics as defined under the Equality Act 2010 from the proposed change.

27. There is no adverse regulatory impact. There are no additional costs from the proposed changes, and there may even be a small financial saving from

needing to recruit slightly less frequently, even though this was not the driver behind the proposed change. This helps keep the PCF as low as possible whilst delivering good regulation.

28. We envisage a positive consumer and regulatory impact because we believe the proposals will protect the consumer and the public better through maintaining an experienced pool of panellists, whilst still protecting the independence of panellists.

29. Equally, in relation to consumer protection and regulatory impact there is a theoretical risk of reduced independence arising from the proposal to increase to 9 years. However, this is low and the length of combined terms is in line with other legal regulators. We did not experience issues of compromised independence when panellists were able to be panellists for 10 years, nor have we experienced any issues with panellist independence moving to 6 years. Therefore, we do not anticipate there being any issues with a move to 9 years.

30. Experienced independent clerks already support the panels to ensure the integrity of independence and separation from the regulator. Further we concluded that a more experienced pool of panellists is more likely to act confidently and independently than an inexperienced largely new pool of panellists.

31. We also took legal advice and specifically instructed our solicitors that, "Our primary concern with this is making sure that the panels are independent and we would not want to make any changes that may affect their independence or the appearance of independence." Our legal advice assured us that the proposed change is legally compliant. The legal advice also assured us that the proposed change is in line with other regulators.

Significance, Impact and Risk Application

32. We sought guidance via the Relationship Management meeting whether an exempt application was appropriate considering the Rules for Rule Changes and SIR guidance and were advised to submit a full rule change application.
33. The significance and impact of the proposed rule change will be to allow current panellists whose term is due to expire in 2021 to renew and will ensure staggered renewals, maintaining experienced panel members throughout.
34. The biggest risk is if the rule is not amended and a significant number of panel members finish over a short period and the resulting loss of knowledge and experience. 5 panel members finish in 2021 but if the rule is not amended a further 8 will need to step down, meaning 13 out of 22 panel members would need to step down in 2021. This undoubtedly detrimental impact on the collective knowledge and experience within the pool could influence the quality of the panel work with the resulting implications for protection of consumers and the public and fairness for regulated members and entities.

Implementation

35. Subject to the Legal Services Board approval, we would like to introduce the new rules on 1 December 2020 so that the 8 panellists whose final terms are due to expire in January 2021 can be renewed before January 2021. We intend to stagger the final terms of these 8 panel members so that they do not all finish at the same time to enable both continuity and a smooth transition.

Monitoring and assessing the impact of the revised rule

36. CILEx Regulation will continue to review the maximum term of appointment as well as maintaining relevant registers, providing useful and appropriate training throughout the term of appointment and considering the composition of the panels at appointment and reappointment to ensure we

are meeting the overriding objective to achieve and maintain independence of the disciplinary panels.

37. In addition, we will seek the views of the clerks and panellists on the impact of the change and this will be included in the 2021 Enforcement annual report, which will be published on our website.

Accessibility checked

38. The Enforcement Rules are published on our website and the proposed change is in Plain English.