

Meeting: Legal Services Board

Date: 20 April 2021

Item: Paper (21) 21

Title: Review of Process for Alterations to Regulatory Arrangements

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Status: Official

Introduction: Purpose of the paper/ Issue

1. This paper sets out and explains the key proposals to be set out in draft new Rules and draft new Guidance, which we intend to publish for consultation following Board approval in June 2021. A draft of the Rules is in Annex B.

Recommendation(s)

2. The Board is invited to:
 - **Note** the key proposals and proposed next steps.
 - **Approve** in principle, the proposals that will be implemented in draft Rules and draft Guidance, with final sign off of the materials for consultation to be at the June 2021 Board meeting.

Timing

3. We are aiming to return to the Board in June with draft rules, draft guidance, and a draft consultation document for approval. We will then issue the consultation as soon as practicable after the June meeting for a 9-week consultation period. The intention is to return to Board in the autumn after the consultation has been completed. This will allow the board to consider a finalised version of the new draft Rules once we have considered all consultation responses and made any changes to the Rules as appropriate. We intend to publish the new Rules following final Board approval.

Background

4. The [January 2021 Board paper](#) set out the background and rationale for the review and invited the Board to provide views on our direction of travel. The Board approved our approach.
5. The Board will recall that the overarching objectives set for the review are:

- **Promotion of the regulatory objectives** – we consider the review provides an opportunity to ensure the entire process for alterations to regulatory arrangements is explicitly and demonstrably focused on ensuring that all changes are developed to promote the regulatory objectives.
 - **Focused applications and assessments** – best use needs to be made of resources both within the LSB and regulatory bodies. In order to achieve this we will consider how best to ensure that applications and LSB assessments are focused on what is meaningful. We intend to revisit what is required content for applications and expect to consider whether greater use should be made of blanket exemptions to cover certain types of alteration.
 - **Clarity of expectations** – we have an opportunity to provide additional clarity to regulatory bodies on the processes we have in place pre-application, what regulatory arrangements require our approval and the circumstances in which we may refuse to consider an application that does not provide us with sufficient evidence to make an assessment.
6. The January 2021 paper also confirmed that we would return to the Board in Q1 with more concrete policy positions to inform new draft rules and guidance.
 7. From December 2020 to February 2021, we met with the regulatory bodies as well as the Law Society and Legal Services Consumer Panel. Those stakeholder meetings have informed us in our development of key proposals for change. We are also intending to engage with the Solicitors Disciplinary Tribunal prior to consultation.
 8. A summary of the stakeholder feedback received is set out in **Annex A** to this paper.

Assessment of current position

9. The Board will note that our process for considering alterations to regulatory arrangements was considered through an internal audit carried out in 2020. The audit determined that the design and operating effectiveness of our statutory decisions process provided significant assurance. In addition, we have made some internal changes within the last year that meant we re-structured the statutory decisions team to ensure the team remains appropriately resourced and focused on the assessment of proposed alterations.
10. Our early engagement with key stakeholders as part of this review has provided a consensus for our overarching objective to use this review to make sure the entire process is focused on ensuring changes are developed to promote the regulatory objectives.
11. The team has had significant experience of assessing applications under a largely unchanged framework. This has provided us with substantial experience of the common issues encountered. With that in mind and with the benefit of early stakeholder engagement we are proposing amendments to:

- enhance the consistency of the process from pre-application right through to decisions and exemptions being issued
- ensure that applications provide all of the information that is required for us to carry out effective assessments
- enable LSB resources to be focused on key issues associated with meaningful policy changes and facilitate minor changes being made with reduced administrative burden.

Key Proposals

12. The following are the core policy proposals to be implemented in new Rules, Guidance and Exemptions Direction(s).

Information to be included in applications for alterations to regulatory arrangements

13. The current rules have been in place without significant amendment since 2010. Having reviewed issues that arise with applications based upon experience we consider that updating the information to be included in applications will aid us in our assessment of applications. The proposal is to restate most of these expectations with added focus on:
- a. impact on regulatory objectives
 - b. proportionate consultation/engagement with all groups that will be impacted by the proposals. This should include the regulated community, consumers and other groups where relevant. The consideration of such engagement and any amendments made as a result should also be clearly set out.
 - c. mandatory assessment of impact of proposed alterations on the regulated community, consumers, other regulators and any other identified persons.
 - d. a requirement for all proposed changes to be set out in the application and not just the main changes.
 - e. a clear explanation of what the proposed alterations are, why it is proposed, and intent/desired effect including any regulatory/consumer protection gaps that the proposal will address.
 - f. any draft guidance the regulator intends to produce in support of the rules.
 - g. proposals for evaluation and monitoring the real impact of proposals once implemented.

Setting a quality threshold for the acceptance of applications

14. We have encountered several situations in recent years where applications have not demonstrated a sufficient grasp of the statutory framework. The information provided has not been sufficient to enable us to understand or engage meaningfully with the material in order to properly carry out our

assessment, creating a risk that the impact on the regulatory objectives is not fully aired fully aired (and, as a consequence, any decision made might not fully serve the public interest).

15. The consequence of this has been a resource intensive process involving lengthy sets of questions being sent to, and meetings held with applicants in an attempt to get all the information needed for us to properly assess the proposals.
16. Even where all reasonable efforts have been made by parties to engage, deficiencies with some applications have resulted in them being withdrawn partway through the process.
17. To address this issue, we intend to set out in rules and guidance the circumstances in which we would consider that a submission made for approval does not meet the requirements for an application to be assessed as an alteration to regulatory arrangements. That is, the information, evidence and material included in the submission is not sufficient for an application to be properly considered in accordance with Part 3, Schedule 4.
18. In practice, upon receipt of a new application, the first steps for the statutory decisions team will be to assess whether the application as submitted is sufficient to progress with consideration under Part 3, Schedule 4.

Clarity over process for requests for exemption

19. The current rules and guidance do not have a clear process for requests for exemption. This has meant that over the years we have seen different approaches from regulators to requests for exemption. For the past two years we have been asking that they answer each of the 20 questions posed in the Significance, Impact and Risk (SIR) Framework which itself has not been amended since 2010.
20. We propose to clarify that requests for exemption do not need to be applications under the rules and provide for timescale for such requests to be handled within the initial 28 period for an application.
21. We consider alterations to regulatory arrangements to be suitable for exemption where they are of low significance, impact and risk.
22. The SIR Framework currently used contains 20 questions and has not been updated since 2010. The proposal is for a reduced and more targeted set of questions to aid regulators in determining their view on whether alterations are suitable for exemption. The answers provided will then be used to help inform the LSB's assessment as to whether the proposal is suitable for exemption.

Application Format

23. Applications we receive are not consistent, in addition we have had feedback from regulators that they would find it helpful if there was a consistent format to follow. However, our engagement has also identified that some stakeholders would like to be able to diverge from the format in certain

circumstances, such as for significant proposed alterations. The guidance will therefore include optional proformas that will cover the information /content requirements, reflecting the rules for full applications and requests for exemption.

24. It will be made clear the proformas are not mandatory but are provided to aid and assist applicants in structuring their thinking where needed.

Clarity on the level of pre-application engagement

25. The approach to pre-application engagement was a significant focus in stakeholder meetings.
26. The LSB is not obliged to engage with proposals until an application is submitted in accordance with the rules. However, we have been persuaded by some regulators that the opportunity to gain feedback from the LSB in advance of a formal application is of value (and this in fact reflects informal practice in recent times). We therefore intend to clarify that this facility will be available to regulators who wish to make use of it, provided that in doing so it is recognised that such feedback does not substitute for a formal decision, and that any early assessment by the LSB can only be as good as the information provided.
27. It is proposed that the guidance set out expectations for applicants and the LSB in any pre-application engagement, acknowledging that the LSB will not be pre-judging or fettering its discretion where an application follows.

Third party representations

28. In stakeholder meetings with TLS and the SRA the status of unsolicited correspondence from interested third parties was discussed.
29. We propose to explain our approach to such representations in Guidance. This approach has been taken in individual decision notices where such representations have been received but has not been set out in rules and guidance. We expect to set out that:
 - a. there is no formal public consultation requirement under Part 3 of Schedule 4 to the Act¹. Our assessment period does not include public consultation.
 - b. in considering applications, the LSB will consider any material issues raised in correspondence received during the assessment period, to the extent that they are relevant to the decision. In particular, the correspondence will be reviewed to establish whether it raises material issues impacting on the regulatory objectives that have not previously been identified through the applicant's public consultation or engagement process, or which were not addressed in the application.

¹ Note the LSB is entitled to obtain advice from anyone it considers appropriate where the Board has issued a Warning Notice. See Paragraph 22 of Schedule 4 to the Act

- c. Even though the initial decision period is 28 days, and the extended period is 90 days, third parties must be aware that the LSB can make its decision at any time during the period and should be aware that the LSB will not be able to consider correspondence received after a decision has been issued.
30. Formal applications are currently published on our website within two working days of receipt. Currently that is the only step taken to publicise the receipt of an application. We expect to make use of the LSB's social media presence in order to draw additional attention to the receipt of applications.

Regulatory Arrangements

31. A common query in stakeholder meetings was around what constitutes a regulatory arrangement. A list of regulatory arrangements is set out in s.21 of the Act, which defines regulatory arrangements. In addition, Exemption Direction 1 sets out a list of regulatory arrangements that the LSB has exempted from the requirement for approval.
32. We expect to use this opportunity to set out guidance that should help to bring section 21 to life and help regulatory bodies to make their own more considered assessments on what changes are likely to require approval or exemption. This will not be exhaustive but would aim to provide clarity on the factors that we consider within the broad parameters of section 21, including circumstances where guidance documents may require approval. In order to aid regulators we will also flag the opportunity for applicants to approach us in circumstances where they are unsure.

Blanket Exemptions

33. We consider that there is value in having Blanket Exemptions available for use. They will enable regulators to make minor and or low risk changes at short notice and will enable the LSB to ensure resources are appropriately focused on more significant alterations. Recently, both the Brexit ED and Covid-19 ED have proven valuable with feedback from stakeholders being very positive.
34. We are proposing new blanket exemptions that allow regulators:
- to make alterations to a range of internal documents, forms and standalone guidance without reference to the LSB.
 - to make alterations to regulatory arrangements that correct minor drafting errors (a slip rule) and make minor changes (such as changes to grammar, punctuation, pronouns) by way of notification with a 14-day window for LSB consideration of whether the proposals are in scope of the exemption.
 - to make consequential minor changes (linked to alterations previously exempted or approved by the LSB) by way of notification with a 14-day window for LSB consideration of whether the proposals are in scope of the exemption.

35. Having such blanket exemptions in place will enable the LSB and regulators to ensure resources are appropriately focused on alterations that are more significant.

Overview and explanation of the new draft Rules

36. Paragraph 20(1) of Schedule 4 to the Act enables the LSB to make Rules on the form and manner of applications for alterations to regulatory arrangements.
37. The new draft Rules reflect Section 28 of the Act i.e., that approved regulators in discharging their regulatory functions (such as altering regulatory arrangements) act in a way which is compatible with the regulatory objectives and have regard to the principles under which regulatory activities should be proportionate, accountable, consistent and targeted only at cases in which action is needed as well as any other principle that represents best regulatory practice.
38. In preparing the new draft Rules, we have sought to balance the need for clarity on what is required in applications against being too prescriptive. It is intended that Guidance be produced that will provide more information on the application of the Rules to help applicants prepare their applications and requests for exemption.
39. The draft rules, which implement the key proposals can be found attached at **Annex B**. The rules are in draft at this stage and will require further revision and refinement.

Impact on Regulators

40. The LSB has considered the likely impact of the new draft Rules on the approved regulators, regulatory bodies and their regulated communities. We recognise that in some instances, changes in our approach to the process, reflected in the new draft Rules may result in an increased regulatory burden. However, we consider that any costs associated with compliance with the new draft Rules are outweighed by the anticipated benefits, as they will lead to greater focus on the regulatory objectives and will reduce regulatory burden in relation to minor, low risk alterations. In addition, we expect to gain greater insight through the process that will inform the LSB's oversight responsibilities.
41. We have had regard to the better regulation principles in our development of the key proposals and we consider that the new draft Rules and Guidance will be a proportionate, transparent, targeted and effective means of achieving the overarching objectives set for the review.
42. In the consultation document, we will invite respondents to provide comments on the impact of the new draft Rules and quantify the likely costs and anticipated benefits, to further inform the LSB's assessment of the regulatory impact of the new draft Rules.

Next Steps

43. Subject to the Board's views and approval, we will finalise the draft new Rules along with draft Guidance for consultation, with an accompanying consultation document that will be shared with the Board for final approval in June 2021.
44. Finally, we expect in due course to propose some modest changes to the scheme of delegations to make clearer that decisions of significance - like the SQE for example - require appropriate engagement with the Board.

Risks and mitigations	
Financial:	The ongoing actions set out in this paper are all within the budget for 2021/22.
Legal:	To mitigate risks we have considered stakeholder views and worked closely with our legal advisers in preparing the key proposals and new draft Rules to reflect the LSB's policy.
Comms and engagement:	By maintaining effective engagement with stakeholders throughout the project we have managed expectations and risk.
Resource:	The ongoing and proposed actions set out in this paper are within planned LSB resourcing.

Annexes

Annex A: summary of stakeholder feedback

Annex B: draft new Rules

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
Annex B	Exemption s22 future publication	

Annex A - Summary of Stakeholder feedback

1. The feedback from stakeholders can be grouped into some key themes:
2. Overarching objectives
 - All stakeholders agree with the principle of greater focus on the regulatory objectives. They also all agree with the importance of focusing applications/assessments and there being clarity of what is necessary for an application.
 - Some stakeholders expressed a view that the LSB must consider its internal processes to ensure that the objective of a focused assessment can be achieved.
3. Pre-Application
 - The approach to pre-application engagement was a significant theme in stakeholder discussions.
 - In a letter from Chris Nichols to regulatory bodies in January 2020 we set out a view that we would like to see draft applications only for significant applications. This approach has not been followed.
 - There was also concern expressed that the pre-application process can sometimes feel undefined in terms of timescale and that it could provide false comfort in circumstances where issues of substance are not addressed.
 - A commonly held view among stakeholders was that clear guidance and timescales for pre-application feedback would be welcome.
 - There was also comment that early engagement would also be welcome, along with clarity on whether that engagement was through the relationship management process or direct with the Statutory Decisions team.
 - Some stakeholders commented positively on the availability and willingness to engage shown by the LSB and the value they had found in that engagement.
4. Internal LSB Processes
 - Several stakeholders were not clear on how the LSB assesses risk on applications and were also unclear on what the process was for assessing applications.
 - One stakeholder also raised the view that too many people at the LSB get involved in low-risk applications, they consider the LSB should consider streamlining the internal process for applications that are not high risk.

- It was suggested that including a process map of some sort in updated guidance would be useful.

5. Guidance content

- One stakeholder felt guidance should include detail such as the LSB's expectations of the governance processes used by regulators.
- Another made a plea for examples to be included in the guidance that would assist regulators in determining whether an alteration might be exempt.
- Several stakeholders made the point that some additional assistance on what constitutes a regulatory arrangement would be helpful.

6. Pro-Forma for Applications

- When speaking about focused assessments there was a repeated sentiment that the SIR questions felt like box-ticking.
- There was also a view that some sections of the application were often an attempt to generate an answer that didn't feel necessary.
- The suggestion of proformas for both applications and requests for exemption was generally welcomed with the caveat that making them optional would be helpful where applications dealt with substantive or complex alterations.

7. Reliance on regulators processes

- Some of the regulators were of the view that there was scope for the LSB to rely more on the fact that proposed alterations had been approved by internal Boards and also that drafting of regulations involved external legal counsel.

8. A need for more evidence and assessment of impact

- Non-regulator stakeholders consider that applications should be backed by more evidence and more detailed assessment of impact.
- One would like to see a more balanced application of the regulatory objectives from the LSB.
- Another expressed the view that the LSB should obtain clearer commitments from regulators on exactly how and when they will monitor/evaluate the real impact of rules changes.
- One stakeholder raised a concern that having clear follow up requirements could be considered to be provisional approval.

9. Representations received during the process

- Two stakeholders touched upon unsolicited representations.
- One was of the view that there should be a mechanism for stakeholders to be informed of applications and for greater clarity around the process for submitting representations.
- The other felt there was scope for the LSB to set out more clearly what its approach is to these representations and to be clear that where something has been dealt with through consultation it should not need to be repeated during the LSB assessment.

10. Rejection of Applications that don't meet criteria

- Several stakeholders stated that they would not expect such a measure to be needed if everyone is clear on expectations for applications.
- One stakeholder noted that often the greatest concern around withdrawal/refusal was the fact it could be picked up and be reputationally damaging. If such a rejection was not public it would be preferable.

11. Use of blanket exemptions

- Stakeholders were positive about the LSB's recent use of blanket exemptions for both Brexit related alterations and Covid-19 related alterations.
- Stakeholders tended to favour the idea of further blanket exemptions that would allow them to make minor or corrective alterations without the need to make an individual request for exemption.
- Several regulators indicated they had been put off making minor alterations as a result of the LSB process.
- One regulator was of the view there was an opportunity for the LSB to be expansive in what it exempted to give more freedom to regulators to be able to make alterations.

12. Post-Application Feedback

- Two stakeholders suggested that they would find it helpful for feedback post-application. This was on the basis that sometimes decisions don't reference minor niggles or deficiencies, and these could be addressed if feedback was provided on a regular basis.