

Decision Document: Schedule 12 rules

Decision document and responses to the consultation on how the LSB will review decisions about whether a body can make a licence application to it

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Introduction

1. The Legal Services Board (the “**LSB**”) was created by the Legal Services Act 2007 (the “**LSA**”) and is responsible for overseeing legal regulators, (referred to as the approved regulators (“**ARs**”) in the LSA) in England and Wales. The LSB’s mandate is to ensure that regulation in the legal services sector is carried out in the public interest and that the interests of consumers are placed at the heart of the system. The LSA gives the LSB and the ARs the same regulatory objectives and a requirement to have regard to the better regulation principles and best regulatory practice.
2. The LSA sets out a new regulatory framework for the operation of regulators and the ownership of legal service providers. It gives the LSB a new power to recommend to the Lord Chancellor the designation of licensing authorities (“**LAs**”). These are ARs with the power to license a particular type of legal service provider, commonly known as alternative business structures (“**ABS**”). The LAs will regulate ABS according to their licensing rules, the requirements for which are set out in the LSA.
3. We have now received applications from the Council for Licensed Conveyancers (“**CLC**”) and from the Law Society for designation as LAs. The Board has considered these applications and has decided to recommend designation. We anticipate that the CLC will be able to license ABS from 6 October 2011.
4. When Part 5 of the LSA is commenced, the concept of “licensable body”¹ will become law. In general, a body will be licensable if a non-authorized person is a manager of, or has an interest in it (for example, because they have shares or voting rights). A licensable body that carries out reserved legal activities must apply to a LA for a licence.
5. This document sets out the responses to the consultation on the rules for reviewing decisions about whether a licensable body can apply for a licence to the Board (acting as a LA) (“**LSB(LA)**”). This document also sets out the LSB’s decision in relation to how it will review decisions about requests to make licence applications to it. The final rules are published in Annex A. A version with blackline changes can be found in Annex B.
6. The consultation period ran from 3 May 2011 to 19 July 2011 and we received responses from:
 - The Solicitors Regulation Authority;
 - The Law Society;
 - Institute of Legal Executives; and
 - ILEX Professional Standards.

¹ Section 72

Proposals in the consultation document regarding the entitlement to make an application to the Board

7. There are three grounds on which a licensable body may apply to the Board for a decision about whether the body is entitled to make an application for a licence to the Board. These are²:
- If there is no competent LA and no potentially competent LA to whom a licensable body can apply for a licence;
 - If each competent or potentially competent LA has determined that it does not have suitable regulatory arrangements (after taking into account any rules changes that are being considered by the LSB); and
 - In the case of not for profit bodies, community interest companies and independent trade unions, an application has been made to each LA with suitable regulatory arrangements but no such LA is prepared to grant a licence that is appropriate for that body.
8. A competent LA is an AR that has been designated as a LA for the reserved legal activities that the licensable body wants to carry out.³ A potentially competent LA is an AR that has made an application to the Board for a recommendation to the Lord Chancellor for designation as a LA (for the relevant reserved legal activities) or for which a recommendation has been made but no decision has been reached by the Lord Chancellor.
9. The LSA sets out the grounds on which an application can be made⁴ and the timescale within which the Board must decide whether a licensable body can make an application to it for a licence.⁵ In summary these are:
- If the application has been made because there is no competent LA and no potentially competent LA: 14 days;
 - If the application has been made because competent or potentially competent LAs do not have suitable regulatory arrangements: 28 days; and
 - For licensable bodies that are a not for profit body, a community interest company or an independent trade union: 60 days.

² Schedule 12 paragraph 1(3), (4) and (5)

³ Schedule 12 paragraph 5

⁴ Schedule 12 paragraphs 1(3), (4) and (5)

⁵ Schedule 12 paragraph 2(2)

10. The Board does not have to make rules about how it will reach its decision. However, the Board expects the licensable body to submit their application either by email, post or courier to the LSB and to provide sufficient information to allow the Board to make a proper consideration of the application. This must include all:
- Determinations made by a competent licensing authority under Schedule 12 paragraph 3(1)(a) to the LSA;
 - Statements and determinations made by a competent licensing authority under Schedule 12 paragraph 3(1)(b) to the LSA; and
 - Determinations made by a potentially competent licensing authority under Schedule 12 paragraph 3(2) to the LSA.⁶
11. Licensable bodies may make an application to the Board and the Board will acknowledge by email all applications received. The Board may request additional information in order to consider the application and may refuse to consider, or to continue its consideration of, an application if it believes that it has not received all the information it requires. Applicants are free to withdraw their application at any time.
12. Once the Board has made its decision, it must give a notice to the licensable body stating its decision and the reasons for it.⁷ In reaching its decision the Board will take into account any determination or statement made by a competent or potentially competent LA following a request by a licensable body to the LA to decide whether it has suitable regulatory arrangements to license it.
13. The Board must make rules about how it will review any decision it makes.⁸ The rules can state that a decision can be reviewed if there is a competent LA or potentially competent LA before the LSB(LA) makes a decision whether to grant a licence to the body.⁹ In addition to the requirements of Schedule 12 to the LSA, the rules at Annex A also take into account the requirement to act, so far as reasonably practicable, in a way that is compatible with the regulatory objectives and having regard to the principles of better regulation. The rules therefore do no more than the LSA requires and have been drafted in a way that is as straightforward as possible.
14. If the Board decides that the body may make an application to it then the application must then be made in accordance with the LSB(LA)'s licensing rules. For the avoidance of doubt, a decision by the Board that a body may make an

⁶ Schedule 12 paragraph (3)

⁷ Schedule 12 paragraph 2(3)

⁸ Schedule 12 paragraph 4

⁹ Schedule 12 paragraph 2(5)

application to it for a licence is not a decision that the Board will grant that body a licence. A decision whether to grant a licence will be made by LSB(LA) after it has considered all the information provided in an application.

Summary of the proposed rules

15. The LSA only allows licence applications to be made to the Board if there is no competent or potentially competent LA. The LSB considers that in the first instance it should be ARs, acting as LAs that license ABS. Therefore we consider that it would be reasonable to review a decision that a body can apply to LSB(LA) for a licence if, for example, an approved regulator becomes a competent or potentially competent LA after that decision has been made.¹⁰ Such a review would have to take place before a decision had been made whether to license the body because once a licence is granted the LSB(LA) would be the body's LA. Depending on the outcome of the review, that could mean that the licensable body then had to make an application to the newly competent or potentially competent LA. This is considered reasonable as it will ensure that it will generally be approved regulators (designated as LAs) regulating ABS rather than LSB(LA).
16. There may be cases when the Board decides that a body is not entitled to make an application to it for a licence when in fact an applicant does have grounds to apply. If that happens then we would expect the applicant to set out the reasons why it considers the Board has made an incorrect decision. The Board will then, if it considers it appropriate to do so, review its decision.¹¹
17. The rules also allow the Board to review its decision about an application in other circumstances if it considers it appropriate to do so. This would include circumstances where the Board decides on its own initiative to review its decision and does not need additional information from the applicant. This applies to a decision to grant an application as well as a decision to refuse an application.¹²

¹⁰ Rules paragraph 5

¹¹ Rules paragraph 6

¹² Rules paragraph 7

Responses to the consultation

18. The LSB consulted on how it will review decisions about whether a body can apply for a licence to the Board. We did not consult on the rules or process of a licensable body making an application to the LSB(LA). If we need to make licensing rules in future, they will be subject to a separate consultation.
19. The consultation closed on 19 July 2011. LSB received four responses to the consultation. All of these responses were broadly supportive of the LSB's approach.
20. Two of the responses did not have substantive comments about the proposed rules, although one of them sought clarification on two issues. The two other responses received raised several issues in the consultation relating to the rules, including further details of the role and remit of the Licensing Authority Committee and more detailed rules on LSB's review of decisions.

Solicitors Regulation Authority

21. The response by the Solicitors Regulation Authority (SRA) was supportive of the draft rules. The SRA agreed that the draft rules seemed 'appropriate to support the LSB in managing applications from licensable bodies where no suitable licensing authority exists'.

Law Society

22. The Law Society was broadly supportive of the approach that the LSB took in relation to drafting proposed rules.
23. The Law Society said that it would welcome clarification on the issue of whether the LSB intends that applications from licensable bodies should be public. The Law Society also queried the specific reference in the consultation paper concerning the regulatory objective of promoting competition. The Law Society considered that singling out one regulatory objective may give a misleading impression of the importance of the other regulatory objectives.

LSB response

24. The LSB has considered whether it should make public the fact that a body has asked the Board whether it can apply to it for a licence. The LSA directs us to give a notice¹³ of our decision regarding the entitlement to make an application for a licence to the Board. It is usual practice for the LSB to publish all notices and so the decision of the Board about whether a body can apply for a licence to the Board will be made public. We will not, however, publish the initial request. This is because if a competent or potentially competent LA emerges before the decision is made, the applicant's intention to enter the market would remain confidential. Once a decision has been made, publishing the Notice makes that

¹³ Schedule 12 paragraph 2(3)

intention public and the body then loses the advantage of commercial confidentiality. The LSB's approach to publicity about actual licence applications will be included in any future consultation about its licensing rules.

25. The reference to competition as one of the regulatory objectives in the consultation document was not intended to emphasise this objective above the other regulatory objectives in the LSA. Rather it was in support of the wider point that competition should not be fettered by there being a lack of a suitable regulator. The LSB does not give greater weight to this regulatory objective over and above the other regulatory objectives set out in the LSA.

Institute of Legal Executives

26. The Institute of Legal Executives (ILEX) made the general point that Schedule 12 should be seen as a 'last resort' for the Board. ILEX also stated that it is important for the 'Board to exercise a degree of self-restraint' and 'generally leave it to the licensing authorities to approve licensable bodies'.

27. ILEX also noted that it would welcome further detail on the role and remit of the Licensing Authority Committee. ILEX commented that the intention of the paragraph in the consultation which states that 'we would expect the applicant to set out the reasons why it considers the Board has made an incorrect decision' appears not to be fulfilled in the Draft Rules. ILEX's view is that the relevant paragraph in the rules should refer to the applicant setting out reasons why it considers the Board has made an incorrect decision.

28. ILEX proposed a minor change in wording for the proposed rules which concerned the timing of the Board's review of its decision. ILEX's proposed wording is: 'if the Board decides to review its decision, it will do so as soon as is reasonably practical'.

LSB response

29. The LSA only permits the Board to make a decision about a licence application if it has decided that the applicant can apply to it because there is no competent or potentially competent licensing authority.¹⁴ As noted in the consultation document, the LSB has established a Licensing Authority Committee. The purpose of the committee is to fulfil the functions of the Board in preparing to act as, and in its capacity (if any), as a Licensing Authority and to deal with any matters that arise in relation to those functions.

30. Further details about the Licensing Authority Committee are now available on the LSB website, including the Committee's terms of reference and members. The LSB is not required to have licensing rules in order to review decisions about whether an application can be made to it for a licence.

¹⁴ Section 84(2)

31. The drafting suggestions were helpful in clarifying the intent of the rules and we have amended them accordingly.

ILEX Professional Standards

32. The response by ILEX Professional Services (IPS) points out that the LSB has not produced or consulted on its licensing rules before issuing the consultation. IPS states that it is therefore difficult to comment on the LSB's ability to consider applications from licensable bodies.

33. IPS noted that the LSB established a Licensing Authority Committee but that its role, remit and capacity have not been detailed. IPS also commented that the LSB should consider producing policy or guidance on how it will reach its decisions, with such guidance offering a degree of transparency in the process for applications.

34. Like ILEX, IPS noted that the intention of the consultation appears not to be fully reflected in the Draft Rules. IPS suggested that the rules relating to the grounds of review should be more detailed and include a reference to the necessity of an applicant setting out reasons why they consider the Board has made an incorrect decision.

35. IPS takes the view that the basis upon which the Board will decide to review its decision is too wide and does not contain measurable criteria as it does not provide the applicant with clear factors that will be considered by the Board when it decides whether to review the decision. Therefore the application process is seen to be too uncertain for applicants in making an application to the Board.

36. In the view of IPS, the LSB should have in place measureable timescales for the review process. IPS views the proposed rules which state 'as soon as possible' as not being a 'measureable timescale and could be used inappropriately to cause delay'.

LSB response

37. The LSB is not required to have licensing rules in place for the purposes of reviewing decisions about whether an application can be made to it for a licence. The decision of whether a licensable body can apply to the LSB for a licence is different to the decision made about the merits of an application for a licence. The LSA¹⁵ gives the LSB 12 months to make suitable licensing rules from the day on which a licensable body first becomes entitled to make an application to it for a licence. It would be during this period that the LSB(LA) would consult on its licensing rules. It would be a disproportionate use of resources to develop licensing rules now as the LSA provides sufficient time to develop the appropriate licensing rules if required.

¹⁵ Section 83(1)(a)

38. IPS makes the point that the basis upon which the Board will decide to review its decision is too wide. The Board considers that it is appropriate to have this degree of discretion since the nature of the applications may vary widely. However, the Board is bound by the regulatory objectives and the principles of better regulation in making any decision. It must also reach a decision in a reasonable period of time.

Annex A – Final version of rules

Rules for LSB review of decisions about licence applications made to it

PREAMBLE

1. These Rules are made by the Board (as defined below) under Schedule 12 paragraph 2(4) to the Act (as defined below).

A. DEFINITIONS

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

Act	the Legal Services Act 2007
Applicant	a licensable body that submits an Application
Application	an application submitted under Schedule 12 paragraph 1 to the Act to the Board for a decision that the Applicant is entitled to apply for a licence to LSB(LA)
Board	the Legal Services Board (acting otherwise than in its capacity as a Licensing Authority)
Competent Licensing Authority	has the meaning given in Schedule 12 paragraph 5 to the Act
LSB(LA)	the Legal Services Board (acting in its capacity as a Licensing Authority)
Licensing Authority	has the meaning given in section 73 of the Act
Potentially Competent Licensing Authority	has the meaning given in Schedule 12 paragraph 6 to the Act

C. WHO DO THESE RULES APPLY TO?

3. These Rules set out the grounds on which the Board may review any decision made by it about an Application.
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 representations in accordance with section 205 of the Act.

D. GROUNDS FOR THE BOARD TO REVIEW ITS DECISION

5. If the Board granted the Application, it may review its decision if the ground on which the application was granted ceases to be made out before the LSB(LA) determines any application for a licence made by the Applicant.
6. If the Board refused to grant the Application, it may at its discretion review its decision following receipt of a written request from the Applicant which sets out the reasons why it considers the Board has made an incorrect decision.
7. The Board may review its decision about an Application if it considers it appropriate to do so.

The outcome of a review

8. After reviewing its decision the Board will give a notice to the Applicant stating the outcome of the review and giving reasons for its decision.
9. The Board will publish on its website a copy of any notice that it gives to the Applicant.

Timing

10. If the Board decides to review its decision, it will do so as soon as reasonably practical.

Annex B – Final rules (blackline version)

Rules for LSB review of decisions about licence applications made to it

PREAMBLE

1. These Rules are made by the Board (as defined below) under Schedule 12 paragraph 2(4) to the Act (as defined below).

A. DEFINITIONS

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

Act	the Legal Services Act 2007
Applicant	a licensable body that submits an Application
Application	an application submitted under Schedule 12 paragraph 1 to the Act to the Board for a decision that the Applicant is entitled to apply for a licence to LSB(LA)
Board	the Legal Services Board (acting otherwise than in its capacity as a Licensing Authority)
Competent Licensing Authority	has the meaning given in Schedule 12 paragraph 5 to the Act
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5. If the Board granted the Application, it may review its decision if the ground on which the application was granted ceases to be made out before the LSB(LA) determines any application for a licence made by the Applicant.
6. If the Board refused to grant the Application, it may at its discretion review its decision following receipt of a written request from the Applicant ~~providing the request specifies the grounds on which it has been made.~~ which sets out the reasons why it considers the Board has made an incorrect decision.
7. The Board may review its decision about an Application if it considers it appropriate to do so.

The outcome of a review

8. After reviewing its decision the Board will give a notice to the Applicant stating the outcome of the review and giving reasons for its decision.
9. The Board will publish on its website a copy of any notice that it gives to the Applicant.

Timing

10. If the Board decides to review its decision, it will do so as soon as ~~in its reasonable view, possible~~ reasonably practical.