

DESIGNATING NEW APPROVED REGULATORS AND APPROVING RULE CHANGES

RESPONSE BY THE FACULTY OFFICE ON BEHALF OF THE MASTER OF THE FACULTIES, AN APPROVED REGULATOR

In accordance with the request in paragraph 7.2 of the Consultation Paper to link comments to specific questions, or parts of the Paper, our general comments are given in response to questions even if they are not strictly within the scope of the question concerned.

RULES FOR NEW BODY DESIGNATION APPLICATIONS

Question 1- Bearing in mind the Regulatory Objectives and the Better Regulation Principles do you agree with the Board's approach to its requirements for the content of Applications?

Response

This question is very widely drawn. The objective of the Rules in relation to the content of an application should be

- (1) To make it clear in what form the application must be made to the Board;
- (2) To list the items which it is mandatory for an applicant to provide;
- (3) To set a timetable for the provision of the items in (2) so that the applicant is made aware at what point the Board will formally consider the merits of an application.

One of the principles set out in paragraph 2.5 of the Consultation Paper is the need for the LSB

“to be efficient, rapid , transparent and cost effective in the consideration of applications”.

It will be difficult to achieve this objective if the LSB does not identify what information is essential to consideration of an application. Paragraph 1.17 rightly places the burden on the applicant but also sets out what the LSB is looking for, namely,

“any potential new Approved Regulator (whether a new entrant or an existing Approved Regulator extending its scope) needs to demonstrate to the LSB that it has prepared properly and thoroughly for its role, that it has the governance and institutional stability to discharge its functions on a proper basis and that it has solid regulatory arrangements to ensure that it can discharge the Regulatory Objectives contained in the Act.”

The draft rules in section C do not reflect the clarity and rigour anticipated in the rule-making powers conferred on the LSB by Part 2 of Schedule 4 of the Legal Services Act 2007. Whilst we recognise that the LSB seeks to be helpful in providing guidance for applicants, the inclusion of guidance within the body of the rules obscures the distinction between what the Act makes mandatory in terms of information to be provided, i.e. the use of the word ‘must’ in paragraphs 3 (3) and (5) of Part 2, and guidance which is advisory only.

The LSB should exercise the rule-making power in accordance with paragraph 3 of Part 2, and must not exceed that power. It is surprising to find rule 4 stating “In the event of any inconsistency between these Rules and the provisions of the Act, the provisions of the Act prevail”, because this simply states a well-known principle of law. It is elementary that the Board is obliged to make rules which it reasonably believes to be consistent with the Act; otherwise the Board could be said to be failing to exercise its rule-making power properly and lawfully. We draw attention to the following points:

- Although paragraph 3 (3) empowers the Board to specify in what form the application is to be made, draft rule 5 does not state what this is to be;
- In Part 1 of the draft schedule there is a column headed ‘What is required’ and another headed ‘Possible evidence’. Yet the background information sought under ‘Possible evidence’ should surely be required as a starting point in an application and this should be spelt out in a rule?
- In draft rule 5 the reference to the schedule as ‘guidance’ is misleading because items 2 to 8 refer to matters which it is mandatory for the applicant to deal with and they should be set out in rules;

- From item 9 onwards the schedule deals with the procedure for processing an application, which is a separate and distinct topic from requirements about the contents of the application and should not be included here, as it does not fit under the headings to the columns;
- We consider that parts of rule 6 as presently drafted are likely to be outside the scope of the Board’s rule-making power in giving the Board the right “*to reject the Application outright and require a fresh application to be made if the Application is judged so incomplete as to prevent proper assessment*” (underlining added). Parliament has not given the Board power to reject an application ‘outright’ nor to require a fresh application to be made. Paragraph 3 (6) of Part 2 enables an applicant ‘at any time’ to withdraw an application, as is stated in draft rule 21. Paragraph 4 of Part 2 confers a discretion on the Board to ‘refuse to consider, or to continue its consideration’ of an application but only after applying ‘criteria’ laid down in the Rules (paragraph 4 (2)). There are no criteria set out as such in these draft rules. An appropriate place for them would be between rules 19 and 20. Whether an applicant decides to submit a fresh application is a matter for the applicant and not a right of the Board to require it. We believe that rule 6 needs to be redrafted.

For the reasons given above we are unable to agree with the Board’s present approach to the content of applications as contained in the draft rules.

Question 2 – If you do not agree with the Board’s approach to its requirements for the content of Applications what alternative approaches would you suggest and why?

Response

Guidance should be presented separately in a schedule, if it is to be contained in the Rules at all, because it does not fit within the body of Rules. Guidance is advisory whereas rules are legally binding. If the guidance is to be retained in the rules, then draft paragraphs 7 to 11 at present in the Rules could be inserted at the beginning of the schedule. The reference in rule 5 to “the kind of evidence which the Board may

consider.....” is within the category of guidance and this passage would be more appropriate as the introduction to Part 2 of the schedule than in the body of the Rules. A rule could however, require the applicant to take account of the principles set out in Part 2 of the draft schedule in formulating any application.

For the reason given in response to Question 1 above, rule 5 should set out as mandatory requirements

- (i) a description of the detailed background information to be included in the application. Consideration could usefully be given to the inclusion in the schedule of a standard form of application, or questionnaire, to assist in securing the right kind of information;
- (ii) the list of matters specified in paragraph 3 (3) (a) to (c) and (3) (5) (a) to (c) of Part 2 of Schedule 4 to the Act, which it is mandatory for the applicant to provide with the application. The points under the heading ‘Possible Evidence’ against these matters (paragraph 2 to 8 in the draft schedule) could appropriately be included as sub-paragraphs of a rule;

Rule 12 refers to the Board’s ‘judgment’ but the appropriate word is ‘decision’ in accordance with paragraph 14 (1) of Part 2 of Schedule 4 to the Act, and it is correctly used in draft rule 32.

Question 3 – What additions or alterations to the Application process would you suggest?

Response

Re-structuring of the rules and schedule, as suggested in response to question 2, including the setting out of criteria, as suggested in response to question 1, for determining whether or not to consider an application.

Question 4 – What do you think the appropriate level of, and method of calculation of the Prescribed Fee should be?

Response

Paragraph 3 (4) of Part 2 of Schedule 4 deals with the setting of a prescribed fee. This is the fee specified in or determined in accordance with rules made by the Board with the consent of the Lord Chancellor. In other words the rationale

for arriving at a fee has to be set out in rules made by the Board. Thus if there is to be a differentiation between the fee to be paid by a body applying to become a new approved regulator, as compared with an application from an existing approved regulator, this has to be specified in the 'Fee Rules'. We therefore consider that the definition of a Prescribed Fee in rule 1 of the draft rules would need to define the fee as 'that specified in the Fee Rules, which must accompany an application and be paid in the manner specified in section D of these Rules'.

As to the options contained in paragraph 3.5 of the Consultation Paper we do not consider that the fourth option is viable in that the Act makes a prescribed fee mandatory. Paragraph 3 (3) of Part 2 says "must be accompanied by –

(d) the prescribed fee".

But even if it were a feasible option we agree with the LSB that it should not be pursued, because it would impose a disproportionate burden on the existing Approved Regulators if it were to be included in the overall levy.

As to the other options the first one – a set fee - would be clear because it would be limited to those bodies making an application under the Rules and would be fair and proportionate for that reason.

The second option would lack clarity at the outset and would be likely to be more costly overall due to the additional work in assessment which would have to be done by the LSB.

The third option would be entirely unpredictable, so an applicant body would not be able to assess the cost implications before making an application, which would mean that the system lacked the transparency advocated by the Board.

Question 5 – Do you think we should reduce the Prescribed Fee for applications from existing Approved Regulators to take on additional Reserved Legal Activities?

Response

Yes. This would be consistent with the recognition in paragraph 8 of the draft Rules under the heading of 'Guidance' that a more limited assessment would be required for applications from existing regulators because they will have

established regulatory records. It has to be remembered that all costs imposed on Regulators will be passed on to authorised persons and from them are likely to be passed to the consumer. For this reason the cost of regulation by the LSB should always be kept to the minimum possible.

Question 6 – Do you agree that the Board should use external advisers when necessary with the cost of these being met by way of an adjustment to the Prescribed Fee?

Response

As the Board is given discretion by paragraph 5 (2) (d) and paragraph 8 of part 2 of Schedule 4 of the Act to obtain advice, it would be reasonable for provision to be made in the Fees Rules for the Board to charge a sum in addition to the set Prescribed Fee (option 1, which we support – see our response to question 5). Both the set fee and such additional fee would need to be authorised by the Fees Rules as coming within the general definition of a ‘Prescribed Fee’.

Question 7 – Do you agree with the approach taken to oral representations?

Response

The right to make representations conferred by paragraph 11 (2) of Part 2 of Schedule 4 is limited to representations about the advice received by the Board. Rules 42 and 45 need to be clarified by the insertion of the words ‘about the advice received by the Board’ after ‘Board’ in the first line of rule 42 and after ‘representation ‘ in the first line of rule 45.

The date for a hearing should obviously be notified a reasonable time before hand. Draft rule 46 says the Board ‘will usually give the Applicant not less than ten business days notice’ (underlining added). This leaves it open to the Board to give a shorter period of notice which is not reasonable when the Applicant has to make arrangements for attending the hearing. The word ‘usually’ should be omitted.

If the Board agrees to hold a hearing in private then it should not admit persons other than representatives of the Board and the Applicant without notifying and securing the Agreement of the Applicant. It would be unfair to

agree to privacy and then introduce third persons. In draft rule 47 the last line should be altered along the following lines;

'Where the hearing is held in private the Board will only admit persons other than representatives of the Applicant and the Board after obtaining the agreement of the Applicant.'

Question 8 – 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 suggested process.

Response

The order as well as the content of the process as set out in the draft Rules needs to be consistent with the Act as well as internally consistent. We draw attention to the following points:-

- (i) rule 17 should provide for acknowledgment by post as well as by e-mail to be consistent with rule 15;
- (ii) in accordance with paragraph 4 (2) of Part 2 of Schedule 4 there should be a rule immediately after (or part of) rule 19 setting out the criteria that the Board will apply to its consideration of an application. (see our response to question 1 above);
- (iii) the second bullet point in rule 23 is inconsistent with the mandatory requirement placed on the OFT (paragraph 6 (1) of Part 2) and the Consumer Panel (paragraph 7 (1)) to give advice to the Board. If they fail to do so they will be in breach of their statutory duty. The Optional Consultee is not subject to the same duty but "may give the Board advice". It would be prudent to delete this bullet point, or else limit it to Optional Consultees;
- (iv) rules 24 and 27 are not requirements of the Board as the duty arises under paragraphs 6 (1), 7 (1) and 9 (2) of Part 2 of Schedule 4. The Board cannot guarantee that they 'will' provide advice, so these rules are superfluous and should be deleted;
- (v) The logical progression in Part 2 of Schedule 4 of the Act has not been followed in the sections headed 'The Board's decision, the Lord Chancellor's Decision and section G 'Criteria for determining

applications'. To be consistent with Part 2 of Schedule 4 section G should precede the decisions of the Board and the Lord Chancellor (cf. Paragraphs 13 to 17 of Part 2 of Schedule 4).

Question 9 – Do you consider that these are the appropriate criteria?

Response

Yes. They correctly apply the criteria set out in paragraph 13 of part 2 of Schedule 4 of the Act.

RULES FOR RULE CHANGE APPLICATIONS

Question 10 – Do you agree with the Board's view that the process suggested is the most effective way to address the Regulatory Objectives and the Better Regulation Principles in relation to approaching potentially low impact rule changes? If not, then please can you suggest how the Objectives and Principles could be better addressed?

Response

There can be no doubt that in approving changes in the rules of approved regulators the LSB is discharging a function under the Act. Consequently, pursuant to section 3 of the Act which applies to the whole range of its functions, the Board

“must, so far as is reasonably practicable act in a way –

- (a) which is compatible with the regulatory objectives, and
- (b) which the Board considers most appropriate for the purpose of meeting those objectives”.

So the Act recognises that there may be limitations in certain instances in relation to the degree of compatibility with the regulatory objectives, which can be achieved in the exercise of some functions.

The first consideration has to be what requirements are laid down in the Act in respect of the particular function the Board is exercising. Here it is the approval of changes made by an Approved Regulator. So far as

notaries are concerned, the Master of the Faculties makes rules to regulate the activities of notaries, and the clear regulatory objective of those rules is to promote and maintain adherence to the “professional principles” (see section 1 (1) (h) and section 1 (3) of the Act). We believe that the same will apply to other Approved Regulators.

It follows that the Board’s function of approving rule changes is a statutory function which must be exercised in accordance with specific requirements of the Act, notwithstanding the general requirement laid down in section 3. Much in the draft rules correctly follows the requirements in Part 3 of Schedule 4 of the Act. However, we do not consider that section C on Exempt Alterations is consistent with paragraph 19 of Part 3.

An exempt alteration is one which is “approved for the purposes of the Act” if the Board has made a direction, specific or general, in relation to that type of alteration. In other words, the legislation is making it clear that a formal application is not required, with the beneficial consequence that time and cost are saved for the Board and the Approved Regulator wishing to introduce a change in its rules. We read this as implementing the principle that regulatory requirements should be “targeted only at cases in which action is needed” (see section 3 (3) (a)).

Accordingly, we do not consider it correct for section C of the draft rules to make provision for a formal application to be made and dealt with in the manner suggested in section C. The Board has no power to “allow the application to be deemed to be granted in accordance with paragraph 21 (3) of Schedule 4 of the Act.” That is a default provision applicable only when the Board has not taken the step of giving out a “warning notice”. Approval of an alteration in rules is automatic by virtue of paragraph 19 (2) of Schedule 4 when the Board has made a direction that certain alterations are exempt. The task before the Board is to prepare such a direction so that, as pointed out above, time and money can be saved once the general system of approval by the Board is brought into operation.

We recommend that

- (i) section C and other references to exempt alterations are deleted from the rules, and

- (ii) a direction is made by the Board stating that proposed alterations to rules which are of a minor, non-material or technical nature are exempt for the purposes of paragraph 19 of Part 3 of Schedule 4 of the Legal Services Act 2007.

In order to assist Approved Regulators, and to reassure the Board, it would be useful for the Board to issue guidance as to what is to be regarded as 'minor' or 'non-material'. Until such time as the Board has gained experience in this area, and is able to include a list of examples in its guidance, the Board could appoint a member of its staff to deal with informal inquiries as to whether a proposed alteration can be regarded as minor or non-material. Contact details for this purpose could be included in the guidance. It is accepted that ultimately the responsibility for obtaining any necessary approval rests with the Approved Regulator concerned.

Question 11 – Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the requirements specified above? If not, why not? What alternative or additional requirements would you recommend?

Response

Draft rule 13 correctly includes the mandatory matters contained in paragraph 20 of Part 3 of Schedule 4. Some of the additional bullet points duplicate the same theme and could be deleted, thus making the rule clearer and more concise. For ease of use it is preferable to have numbered sub-paragraphs in a rule than a series of bullet points. In our response to Question 10 we have already recommended that references to an Exempt Alteration should be deleted from all the Rules, and this includes rule 13.

Our specific points are as follows:-

- (i) the 3rd bullet point requires 'an explanation of why the Applicant wishes to make the Alteration in question'. Bullet point 6 covers the same ground 'a statement explaining the desired outcome of the Alteration' and is thus superfluous and should be deleted. As to the

second part of this bullet point, it is obvious that time will be needed to see if there is any need for further alteration or whether the particular alteration has been effective. It seems a waste of time for the Board to receive such banal comments, so this part of bullet point 6 should also be deleted;

- (ii) Bullet points 4 and 5 cover the same ground. It is section 28 which imposes a duty on Approved Regulators to act in a way, so far as reasonably practicable, which is compatible with the regulatory objectives, and bullet point 5 spells this out adequately. Bullet point 4 should be deleted or placed in guidance to go with these Rules;
- (iii) Bullet point 7 on page 45 is comprehensive and obviates the need for the second bullet point on page 46 as well. 'Evidence of consultation', as sought by bullet point 7, is the same as 'details of all consultation' contained in the later bullet point.

Question 12- Do you agree with the approach taken to oral representations?

Response

We make the same comments about the rules relating to oral representations as we made in response to Question 7 of the questions answered above in relation to the Rules for New Body Designation Applications. For the reasons given there

- (i) The words 'about the advice received by the Board' should be inserted in the second line of rule 39 after the word 'representations';
- (ii) In rule 40 the word 'usually' should be deleted from the second line;
- (iii) The last sentence in rule 41 should be replaced by the sentence

'Where the hearing is held in private the Board will only admit persons other than representatives of the Applicant and the Board after obtaining the agreement of the Applicant'.

Question 13 – Bearing in mind the Regulatory Objectives , the Better Regulation Principles and need to operate efficiently in relation to the

Freedom of Information Act, please could you suggest improvements to the suggested process.

Response

As a general comment we point out that the logical progression in Part 3 of Schedule 4 of the Act has not been followed in the 'Processes and Procedure' contained in sections E and F of these Rules. In Part 3 'Representations by Applicant' (paragraph 23) follow 'Advice' (paragraph 22). 'Publication of Advice' (paragraph 24) and 'Decision by the Board (paragraph 25) come afterwards. In the draft Rules the 'Form of Representations' does not follow rule 25 headed 'Representations', where it should be, but is placed after 'the Board's decision,' which seems illogical. We recommend that rules 36 to 45 are repositioned (and renumbered) to follow rule 25. Rules 28 to 32 should then appear next to section G, their logical position.

Our comments about specific rules in sections E and F are as follows:

- (i) Rule 19: Paragraph 25 (3) (f) of Schedule 4 does not confer the power stated. That paragraph relates to a failure on the part of the applicant to comply with the particular procedures governing its changes to its rules. This draft rule appears to be trying to give the Board a similar discretion to that conferred by paragraph 4 of Part 2 of Schedule 4 but this discretion is not repeated in Part 3. The procedure to be followed by the Board is set out in paragraph 21 of Part 3 whereby the Board must either grant the application or issue a "warning notice", as is correctly stated in draft rule 20. Rule 19 should be deleted.
- (ii) Rule 20: Bullet point 3 is incorrectly expressed. Paragraph 21 (3) provides that there is an automatic grant of approval. The Board has no part in this, so the word 'allow' is inappropriate. The wording of paragraph 21 (3) should be copied in any rule on this matter.
- (iii) Rule 27: This draft rule does not correctly reflect paragraph 24 (3) which must be read as requiring the question of exclusion of any matter from publication to be dealt with on a case by case basis. For the Board to say that its "normal assumption is that none of the representations will remain private" is pre-judging the matter. The rule should follow the

wording of paragraph 24 (3). The last sentence of draft rule 27 should be replaced by the words 'The Board will so far as practicable exclude any matter which relates to the private affairs of a particular individual the publication of which in the opinion of the Board, would or might seriously and prejudicially affect the interests of that individual';

- (iv) Rule 38: Paragraph 23 (4) (b) of Part 3 empowers the Board to give "such longer period as the Board may specify in a particular case". This means that the Board must approach the question of extension of time for representations on a case by case basis. Draft rule 38 can be read as pre-judging such applications. The rule should copy paragraph 23 (4) (b).

Question 14 – Do you consider that these are the appropriate criteria?

Response

Yes. They are the only criteria which the Board may apply, as laid down in paragraph 25 (3) of Part 3 of Schedule 4.

8 October 2009