

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

Consultation paper on developing rules to govern the making of oral and written representations and the giving of oral and written evidence to the Board in relation to investigations to alter the scope of reserved legal activities

This consultation will close on **28 October 2009**

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1. Executive Summary

- 1.1 The Legal Services Board (the “**LSB**”) is the organisation created by the Legal Services Act 2007 (the “**Act**”) and is responsible for overseeing legal regulators in England and Wales. The LSB’s mandate is to ensure that regulation in the legal services sector is carried out in accordance with the Regulatory Objectives¹.
- 1.2 Under the new regime, the scope of the Act is currently limited to the regulation of certain Reserved Legal Activities². Despite this, the Act does anticipate that in future this scope could be extended, or reduced, and Sections 24 and 36 and Schedule 6 of the Act provide mechanisms for this to happen.
- 1.3 These mechanisms to extend, or reduce, the scope of Reserved Legal Activities are almost fully set out in the Act. However, to ensure that these mechanisms can be fully utilised when the LSB takes up its full powers (anticipated to be on 1 January 2010), the Act does prescribe that the LSB may make certain rules 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.
- 1.4 This consultation paper relates to these rules which the LSB believes it should make to govern the making of representations and the giving of evidence. Section 2 of this paper puts the requirement for these rules in context and Annex 1 contains a draft of the rules that the LSB proposes to make.
- 1.5 We are in the process of consulting on rules which contain provisions similar in scope to these rules³. However, given that the rules required by Schedule 6 of the Act do have some specific requirements, we are issuing this separate consultation paper.

¹ The Regulatory Objectives are

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of services such as are provided by authorised persons;
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen’s legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

² Section 12 and Schedule 2 of the Act define “reserved legal activity” as (a) the exercise of a right of audience; (b) the conduct of litigation; (c) reserved instrument activities; (d) probate activities; (e) notarial activities; and (f) the administration of oaths

³ The LSB Consultation Papers “Designating new approved regulators and approving rule changes” and “Compliance and Enforcement – Statement of Policy” both contain drafts of rules dealing with oral and written representations

- 1.6 The deadline for written responses to this consultation is 5pm on **28 October 2009**. Information about how to make submissions is provided at Section 4 of this paper.

2. Rules Required Under Schedule 6 of the Act

Background

- 2.1 The list of current Reserved Legal Activities can be altered either:
- under Section 24 of the Act which provides that the LSB may recommend to the Lord Chancellor that a legal activity be added to the activities which are Reserved Legal Activities; or
 - under Section 26 of the Act which provides that the LSB may recommend to the Lord Chancellor that an activity should cease to be a Reserved Legal Activity.
- 2.2 Before the LSB can make a recommendation to the Lord Chancellor, either under Section 24 or Section 26, the LSB must comply with the provisions relating to recommendations contained in Schedule 6 of the Act.
- 2.3 Schedule 6 provides that a person may:
- request the LSB to hold an investigation to determine whether or not the LSB should make a recommendation in accordance with Section 24 (a “**Section 24 Investigation**”); or
 - request the LSB to hold an investigation to determine whether or not the LSB should make a recommendation in accordance with Section 26 (a “**Section 26 Investigation**”).
- 2.4 Before deciding whether it is appropriate to hold a Section 24 Investigation or a Section 26 Investigation, as relevant, the LSB may seek the advice of the Office of Fair Trading, the Consumer Panel and the Lord Chief Justice⁴. If after considering any advice, the LSB decides to hold an investigation, the LSB has a 12 month⁵ period to:
- carry out such investigations as it considers appropriate for the purposes of enabling it to produce a “provisional report” in respect of the activity which must state, with reasons, whether or not the LSB proposes to make a recommendation to the Lord Chancellor; and
 - produce and publish the “provisional report”⁶.

⁴ See paragraphs 5 and 6 of Schedule 6 of the Act

⁵ See paragraph 11(1) of Schedule 6 of the Act. This period can be extended up to a maximum of 16 months

⁶ See paragraph 10(2) of Schedule 6 of the Act

2.5 Within 3 months⁷ from the date of publication of the LSB’s “provisional report”, the LSB must prepare its “final report” which sets out, amongst other things, its final decision and reasons for it⁸. The LSB must give a copy of the “final report” to the Lord Chancellor and must publish the report⁹.

The need for rules governing representations and evidence

2.6 Schedule 6 of the Act provides that the LSB may make rules in relation to the above process in three specific areas. These are:

- rules under paragraph 12(2) of Schedule 6 to govern the making of oral and written representations, and the giving of oral and written evidence to the LSB during the 12 month investigation period leading up to the LSB producing its “provisional report”;
- rules under paragraph 13(1) of Schedule 6 to govern the making of oral and written representations to the LSB in respect of the “provisional report” it publishes. The Act provides that rules made under paragraph 13(1) must make provision: (a) enabling written representations, and so far as is reasonably practicable, oral representations to be made by “affected practitioners”¹⁰; and (b) enabling written or oral representations to be made by bodies which represent “affected practitioners”¹¹; and
- rules under paragraph 14(2) to govern the giving of such further evidence as the LSB may determine after publication of the “provisional report”.

2.7 A draft of the rules that the LSB proposes to make to govern the making of oral and written representations and the giving of oral and written evidence in these circumstances is set out at Annex 1.

Your comments

2.8 Specific questions have been inserted into the draft rules contained in Annex 1. However, you are invited to comment generally on the LSB’s approach and on the content of the proposed rules.

⁷ See paragraph 17(1) of Schedule 6 of the Act. This period can be extended up to a maximum of 5 months

⁸ See paragraph 16(2) of Schedule 6 of the Act

⁹ See paragraph 16(3) of Schedule 6 of the Act

¹⁰ Paragraph 13(4) of Schedule 6 of the Act defines an “affected practitioner” as “a person carrying on the activity in respect of which the investigation is being held”.

¹¹ See paragraph 13(3) of Schedule 6 of the Act

3. Initial Impact Assessment

Introduction

3.1 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. We are however keen to listen to other views about the impact of these proposed rules to the way in which the LSB conducts Section 24 Investigations and Section 26 Investigations.

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

3.2 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. This consultation paper sets out the framework for the LSB to do that.

What are the policy objectives and the intended effects?

3.3 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

3.4 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.

3.5 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?

3.6 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

3.7 One-off (transition): £ negligible.

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

Annual Benefits

3.9 One-off: £ negligible.

3.10 Average annual benefit: £ negligible.

What is the geographic coverage of the policy/option?

3.11 England and Wales.

On what date will the policy be implemented?

3.12 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?

3.13 The LSB.

Does enforcement comply with Hampton principles?

3.14 Yes.

Will implementation go beyond minimum EU requirements?

3.15 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?

3.16 Nil.

What is the value of changes in greenhouse gas emissions?

3.17 Nil.

Will the proposal have a significant impact on competition?

3.18 No.

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

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

Are any of these organisations exempt?

3.20 No.

Impact on Admin Burdens Baseline (2005 Prices)

3.21 Increase of £: approximately nil.

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

3.23 Net Impact £: approximately nil.

Evidence Base

3.24 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

3.25 There is no direct or indirect impact expected.

Small Firms Impact Test

3.26 There is no direct or indirect impact expected.

Legal Aid

3.27 There is no direct or indirect impact expected.

Race/Disability/Gender equalities

3.28 There is no direct or indirect impact expected.

Human Rights

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

Rural Proofing

3.30 There is no direct or indirect impact expected.

Sustainability, carbon emissions, environment and health

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

4. How to Respond

- 4.1 Our consultation period ends at 5pm on **28 October 2009**. In accordance with Section 205(3) of the Act, you are therefore given notice that any representation about the proposals contained in the consultation paper must be received prior to the end of this period.
- 4.2 In framing this consultation paper, we have posed specific questions to help develop our proposed rules. These questions can be found in the body of the rules and also as a consolidated list in Annex 2. We would be grateful if you would reply to these questions, as well as commenting more generally on the issues raised where relevant. Where possible please can you link your comments to specific questions or parts of the paper rather than making general statements.
- 4.3 We would prefer to receive responses electronically (in Microsoft Word format), but hard copy responses by post or fax are also welcome. Responses should be sent to:
- Email: consultations@legalservicesboard.org.uk
- Post: Mahtab Grant,
Legal Services Board,
7th Floor, Victoria House,
Southampton Row,
London WC1B 4AD
- Fax: 020 7271 0051
- 4.4 We intend to publish all responses to this consultation on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We will record the identity of the respondent and the fact that they have submitted a confidential response in our decision document.
- 4.5 We are also keen to engage in other ways and we would welcome contact with stakeholders during the consultation period.
- 4.6 If you have any questions about this consultation, please contact the LSB by telephone (020 7271 0050) or by one of the methods described in paragraph 4.3.

Annex 1 – Making Oral and Written Representations and Giving Oral and Written Evidence under Schedule 6

A. DEFINITIONS

1. 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 of 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 of the Act
Representing Person	any person who can make representations or provide evidence to the Board for the purposes of Schedule 6 of the Act (including for the avoidance of doubt, and for the purposes of paragraph 13(3) of Schedule 6 of the Act, an Affected Practitioner and any body which represents an Affected Practitioner)

B. WHO DO THESE RULES APPLY TO?

2. 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) of the Act. The Board has made these rules in accordance with paragraphs 12, 13, and 14 of Schedule 6.
3. In the event of any inconsistency between these Rules and the provisions of the Act, the provisions of the Act prevail.
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.

C. FORM OF REPRESENTATIONS

Written representations

5. Subject to Rules 6 and 9, all representations and evidence given to the Board must be in writing and must be submitted to the Board either by email, post or courier to the relevant address shown below:

- if by email to : [insert email address]
- if by post or courier to:

Address: Legal Services Board
7th Floor Victoria House
Southampton Row
London WC1B 4AD

For the attention of: [insert name]

6. Once developed, the Representing Person must, unless otherwise agreed with the Board, submit all written representations and evidence to the Board using the online tool at www.legalservicesboard.org.uk.

7. All representations and evidence given under:

- paragraph 12 of Schedule 6 must be received by the Board within 3 months of the Board giving a notice under paragraph 9(2) of the Act, or within such other time as the Board may specify;
- paragraphs 13 and 14 of Schedule 6 must be received by the Board within 2 months of the Board publishing its Provisional Report, or within such other time as the Board may specify.

8. Representations and evidence submitted out of these times will not be considered unless, exceptionally and at the sole discretion of the Board, they appear to raise matters of substance relevant to the issue in question which are not already under consideration.

Oral representations

9. The Board may, at its sole discretion, authorise a Representing Person to make oral representations or provide oral evidence. Subject to Rule 10, on grounds of cost, efficiency, transparency and consistency of treatment between Representing Persons, the Board will not normally accept oral representations or oral evidence unless the particular circumstances of the Representing Person or the complexity of the issue merit an exception to the normal process in individual cases. If the Board grants such an exception, it will publish its reasons for doing so.

10. Notwithstanding Rule 9, so far as reasonably practicable, the Board will allow oral representations to be made by Affected Practitioners.
11. Should the Board authorise a Representing Person to make oral representations or give oral evidence, the representations or the giving of evidence will take place at a hearing to be held either by telephone, video conference or in person. The Board will usually give the Representing Person not less than ten business days notice that there will be a hearing. If the hearing is to be held in person, the notice will specify the place and time at which the hearing will be held. If the hearing is to be held by telephone or video conference, the notice will specify the time of the telephone call or video conference and also the arrangements for facilitating the telephone call or video conference.
12. Hearings conducted in person (rather than by telephone or video conference) will normally be held in public. However, the Representing Person may request, with reasons, that aspects of the hearing be held in private. The Board will consider the reasons given and will then publish the reasons for any decision that it reaches. Where the hearing is held in private, the Board may admit such persons as it considers appropriate.
13. The Representing Person must appear at the hearing, either in person, by telephone or by video conference (as the case may be) and may be represented by any persons whom they may appoint for the purpose. The proceeding of the hearing will be recorded on behalf of the Board and will be transcribed onto paper.
14. Where oral representations are made or oral evidence given, the Board will prepare a report of those representations or evidence which will be based on the transcription of the hearing made in accordance with Rule 13. Before preparing the report, the Board:
 - must give the Representing Person a reasonable opportunity to comment on a draft of the report; and
 - must have regard to any comments duly made by the Representing Person.
15. Subject to complying with the requirements of the Act, the Board reserves the right to extend processes to take account of the need to transcribe and verify oral submissions and to require the Representing Person to pay for the cost of the transcription service.
16. The Board may from time to time adjourn the hearing.
17. The Board may at its sole discretion pay such costs of a Representing Person as the Board considers reasonable for the purpose of facilitating the giving of oral evidence or the making of oral representations, by or on behalf of a Representing Person.

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

D. FURTHER INFORMATION

18. If you have any questions about the process for making oral or written representations you should contact the Board at:

Address: Legal Services Board
 7th Floor Victoria House
 Southampton Row
 London WC1B 4AD

Email: *[insert details]*

Telephone: *[insert details]*

Annex 2 – List of Questions

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

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.