Solicitors Regulation Authority

SRA response

"Designating new approved regulators and approving rule changes", Legal Services Board consultation

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Introduction

The Solicitors Regulation Authority (SRA) is the independent regulatory arm of the Law Society for England and Wales. We regulate individual solicitors, certain other lawyers and non lawyers with whom they practise, solicitors' firms and their staff.

We welcome this consultation by the Legal Services Board (LSB), and have set out some detailed comments below.

General comments on transition arrangements (section five of the consultation paper)

We note at paragraph 5.3 of the consultation paper that the LSB and the Ministry of Justice (MoJ) [http://www.justice.gov.uk/] have agreed the need for transitional arrangements to be put in place. We were unable to ascertain from the approach set out as to whether the arrangements are intended to focus solely on provisions for applications made under schedule 4 of the Legal Services Act 2007 (LSA) [http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=legal+services+act&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=3423426&PageNumbe, or whether the arrangements will also consider other rule applications which require concurrences or approvals. We have responded separately to the letter from the MOJ/LSB on the basis that it relates to all applications.

SRA comments on consultation questions

Q1. 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?

Q2. 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?

Q3. What additions to or alterations to the Application process would you suggest?

We support the broad approach set out in the paper, particularly paragraphs 1.16 to 1.22, and consider also that the proposed rules support that approach. It makes considerable sense for the LSB to receive well thought out documentation. However, given that applicants will have to expend considerable resource in preparing the documentation and engaging in pre-application consultation with other approved regulators, etc, we think it would be helpful for the LSB to offer some initial guidance, particularly to new bodies that may be unsure as to whether a full application would be successful. There is clearly a resource commitment in making that offer, but broadly we feel it may be more cost effective for some sort of short initial process to help in weeding out applications that are unlikely to be successful. The supporting guidance could usefully refer to such internal communications. We note the LSB's assertion that it will take a proportionate 'case by case' view when deciding how much information will be required from different applicants, and we endorse this approach.

As a general point, the recent procedure adopted by the MoJ in relation to applications under schedule 4, has been of concern in that it has not included early consultation with other approved regulators. We believe that in some cases better early consultation could have led to alternative arrangements. We do agree, therefore, that all new applicants should consult with other approved regulators and include the responses to that consultation exercise in their application. However, applications are likely to change during the course of discussion and, although the proposed rules permit the LSB to refer an application to optional consultees, we do think it would be an important safeguard for the LSB to ask existing approved regulators for any additional views as part of its own consultation activity, rather than relying on the prior consultation work of the applicant.

It is our experience, through the schedule 4 procedure, that the LSB's decision may not always be as clear as a decision to grant the application or to refuse the application. In practice there is often a mid-way decision, which is that the LSB may want to indicate that it would be minded to grant an application if further additional conditions were fulfilled by the applicant. While such a process would appear possible on the basis of the current proposed rules, it may be helpful to state that such an indication could be made by the LSB giving the applicant the option of amending its application in part without having to go through a whole new application process. Thought would then have to be given as to whether such amended applications would need to be resubmitted to mandatory or optional consultees who may have been involved at an earlier stage in the application process.

Q4. What do you think the appropriate level of, and method of calculation of the Prescribed Fee should be?

The prescribed application fee must reflect cost recovery, and we support the LSB's proposed approach set out at paragraph 3.6 of the consultation paper.

The fairest way is clearly the second option, i.e. a set fee with the ability for a refund to be provided to the applicant if the LSB's costs turned out to be significantly less than set rate, or indeed for the fee to be increased. If the additional work for the LSB is only required in the case of costs being significantly more or less the additional burden will be reduced.

Q5. Do you think we should reduce the Prescribed Fee for Applications from existing Approved Regulators to take on additional Reserved Legal Activities?

It is reasonable that Reserved Legal Activity applications from existing approved regulators should attract fees that reflect the assessment and consideration required of them by the LSB. The prescribed fee for this type of application must be capable of adjusting to account for the knowledge and evidence that may already be held by the LSB in relation to the capacity of the applicant to successfully take on additional Reserved Legal Activities.

Q6. Do you agree that the Board should use external advisors when necessary with the cost of these being met by way of an adjustment to the Prescribed Fee?

As per our comments above, we believe the prescribed fee must be capable of accurately reflecting the resources and overheads incurred by the LSB in assessing applications case by case. These resources reasonably will include the expertise and knowledge requirements of the LSB. However the point made at paragraph 11 (page 28) of the consultation paper is important – that emphasis should be placed on encouraging applicants to provide sufficient detail and present it to the LSB in such a way that the need for external expertise will be minimised. This feeds back in to our previous assertion that early pre-application dialogue between the applicant and the LSB is important in order to discuss the LSB's expectations for each application.

Q7. Do you agree with the approach taken to oral representations?

We agree. It has been our experience with the existing panel procedures that having the option of an informal discussion at an early stage of considering an application can be helpful in clarifying issues and enabling the applicant to adjust detail in the application in the light of any initial concerns expressed by the LSB. There may be merit in requiring face to face meetings with all new applicants who have not previously been involved in the regulation of legal services.

Q8. 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?

See our comments under questions 1–7.

Q9. Do you consider that these are the appropriate criteria?

The criteria as described seem appropriate. The additional proposal set out at paragraph 53 of the consultation paper (page 34) is important in order to ensure high quality and consumer-focused regulatory arrangements are upheld within all corners of the legal services market.

Looking at the table showing *"evidence required"*, much of the evidence relates to satisfaction of the criteria *"that the Applicant's proposed regulatory arrangements make appropriate provision for the regulation of its members"*. It is clear that *"appropriate"* must be read in the light of the indicators set out in the evidential requirements but, without having given thought to the drafting, we do feel that the importance of this criterion could be enhanced. As a minor point, we are not sure whether reference to *"members"* is right in this set of criteria. While it is likely that many professional bodies will authorise their members it may be that other and new forms of approved regulator would have contractual arrangements which may not be the same as membership. A more general description along the lines of …*those it wishes to authorise"* may be suitable for all cases.

We also believe that greater emphasis should be placed on the requirement to produce a *"statement of the Reserved Legal Activities or Activities to which the Application relates"* (page 36 of the consultation paper). We expect there will be a number of applications from those only requiring powers to authorise people to provide Reserved Legal Activities in a limited context, such as the Patent and Trade Mark bodies who may seek to authorise their members to provide litigation and advocacy but only within the context of patent and trade mark work. Their training and regulatory arrangements are appropriate for that type of work, but they do not authorise their members to provide litigation or advocacy services. Any such limitations or conditions on activities should be detailed and made clear in the application statement.

General comments under question 9 on rule change applications

We support the LSB's approach in seeking to ensure that rule change applications will be considered and dealt with swiftly. All approved regulators will of course be subject to the regulatory objectives and better regulation principles, and their ability to ensure that rule changes are made in the public interest will be enhanced by the application of governance rules and assured independence from any representative interest. We believe that the LSB's role should therefore be to ensure that the approved regulator has acted appropriately in reaching

decisions on rules, has undertaken appropriate consultation, and has then reached a reasonable conclusion as to the way forward. We do not however believe this process requires the LSB to consider what its own approach might have been when considering rule changes, except in cases where a rule change is covered by guidance provided by the LSB on a particular regulatory area, such as for example requiring more harmonisation among all approved regulators.

Our experiences with different statutory approval processes have been markedly different, and we hope that the relationship between the LSB and approved regulators will support sensible engagement at the earlier stages of the application process, despite what is already set down within the formal application process. Early dialogue between the LSB and approved regulators will help ensure there are as few surprises as possible when the formal application process begins, particularly for applications concerning significant rule changes.

We have found this approach of early engagement to be of significant benefit in our interactions with the Financial Services Authority (FSA) Board, which is required to approve certain rules made by the SRA as a designated professional body. In such cases we have engaged with the FSA at the preliminary stages of the rule change process to discuss concerns they might have relating to policy or content, so that their views can be explored and factored in to the early thinking.

Conversely, applications under schedule 4 have been made on the basis that the considering Panel has deemed it inappropriate to comment at the early consultation stages, in order to avoid any impact upon their statutory role in the approval process. We believe that approach to be over-cautious; there are ways for those with a statutory role in approval processes to engage with applicants at early stages, and we urge the LSB to take such an approach. Changes to rules and regulations often have a substantial operational impact within an organisation, making it important to plan with some certainty as to when and how new rules will come into force. We therefore recommend that the LSB supports an approach of early engagement with approved regulators that enables applicants to 'front load' as much of their application work as possible, avoiding surprises for the LSB or those applying.

General comments under question 9 on changes to regulatory arrangements

We have written separately to the LSB highlighting that, while current approval processes broadly only apply to changes to rules and regulations, the approval process set out in the LSA applies to all changes to all "regulatory arrangements". This broad description captures many changes which have not, until now, been subject to formal approval processes, even during the days of regulation by professional bodies without independent regulatory arms.

For the SRA, changes to "regulatory arrangements" can be substantial, and range from minor annual changes to application forms and notes (often made at staff level), through to substantial changes to the details of delegations. We strongly advocate that the LSB should not take on the role of approving all such matters, and believe that all changes other than those relating clearly to rules and regulations should be held as exempt alterations. Such changes should not require a prior approval process. The LSB could retain the ability to add to a list of specific arrangements requiring approval, or could seek to be notified of certain changes based on the understanding that, if inappropriate changes are made, the LSB has sufficient other powers available to it to ensure matters are corrected.

Q10. 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?

Statute (Under schedule 4, part 3(19) of the Legal Services Act 2007 [http://www.statutelaw.gov.uk/content.aspx?LegType=All+Legislation&title=Legal+Services+Act&Year=2007&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&TYPE=QS&PageNumber=1&NavFror) provides that alterations to the regulatory arrangements of approved regulators do not have effect unless they are specifically approved or do not require approval. We believe this provision makes it essential for there to be no doubt as to which regulatory arrangements require approval and which do not, underlining that regulatory certainty must be a driving principal once the LSA comes fully into force. There should be no doubt as to whether or not a regulatory arrangement is valid.

We believe that the process of identifying *"exempt alterations"* (as described on page 44 of the consultation paper) can be sensibly applied to minor rule changes which require approval. However, we do not think it is appropriate for the term *"exempt alterations"* to be used to cover any processes still requiring an application. We believe the LSA's intention at paragraph 19 of schedule 4 is to enable the LSB to specify changes which do not require an application at all; consequently we do not find the application process set out in the consultation paper appropriate for the many other changes to regulatory arrangements which are not formal changes to rules and regulations. We believe that even the process described on page 44 of the consultation paper would be disproportionate.

We are concerned enough about the potential volume of non-material rule or regulation changes having to be made available on the LSB's website to contemplate the addition of all other changes to regulatory arrangements.

As a minor technical point, and for the avoidance of doubt, we believe that the rules set out in the consultation paper should not apply to alterations of regulatory arrangements that are already subject to the practising fees

approval process set out in Section 51 of the LSA [http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&title=legal+services+act&searchEnacted=0&extentMatchOnly=0&confersPower=0&blanketAmendment=0&TYPE=QS&NavFrom=0&activeTextDocId=3423426&PageNumbe
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Q11. 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?

The suggested approach on page 46 of the consultation paper seems reasonable. The ability to group together inter-related alterations under one application, or indeed to require unrelated alterations to be the subject of individual applications, should ensure sufficient flexibility within the application process to accommodate all eventualities.

Q12. Do you agree with the approach taken to oral representations?

The proposed approach seems adequate. Formal oral representation should be rare if appropriate informal discussions have taken place at an earlier stage.

Q13. 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?

We have no further specific comments.

Q14. Do you consider that these are the appropriate criteria?

The criteria set out in paragraph 46 (pages 50—51) of the consultation paper seem appropriate.