

To:	Board		
Date of Meeting:	28 January 2020	Item:	Paper (10) 03

Title:	Rule approval update		
Workstream(s):	5D – Developing excellence in legal services regulation		
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Status:	Restricted		

Summary:

On 1 January 2010, the LSB assumed responsibility for approving applications by Approved Regulators (**ARs**) wishing to make any alteration to their regulatory arrangements. This paper provides an **update** about key developments and issues in this area, including:

- a. outline of the forward plan and exemption process for facilitating changes to Regulatory Arrangements, including proposed Board involvement;
- b. details of the key applications that we anticipate receiving from the main ARs up to the start of the new financial year (when the forward plans and exemptions will be in place), including proposed Board involvement;
- c. resourcing the Workstream;
- d. plans for setting future KPIs / performance targets; and
- e. Section 69 order to make legislative changes to enable an AR to carry out its role more effectively or efficiently.

Risks and mitigations

Financial:	Potential financial claims relating to legal risks (see below).
FoIA:	Non-disclosable (formal applications will be published when submitted).
Legal:	Possible legal challenge from rejected applicants or competitor if application accepted. A report of justification for decisions openly published by LSB. Application requires wide consultation in advance with objections being addressed or explained.
Reputational:	Rule changes will be key interface between/with ARs and provide first measure of LSB's business as usual capability. Approach adopted promotes partnership.
Resource:	Processing applications will be resource intensive but approach adopted allows certainty for planning. Resource currently considered sufficient.

Consultation	Yes	No	Who / why?
Board Members:		✓	Update only
Consumer Panel:		✓	Update only

Recommendation(s):

The Board is invited to consider and to note the update.

LEGAL SERVICES BOARD

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Rule approval update

Introduction

1. Since the final rules were published on 10 December, the LSB has made good progress in developing our internal processes for dealing with applications to alter regulatory arrangements and engaging with the leading Approved Regulators (**ARs**). An overview of the new process has been provided at **Annex 1**.

Forward plan and exemption process

2. On 10 December we wrote to each AR setting out further detail about developing the forward plan and exemption process that the Board agreed in November.
3. Forward plans are to be developed prior to April 2010 (LSB will arrange individual AR meetings in January and February) to cover changes to be made in the financial year 2010/11. For each proposed change, we will expect the AR to undertake an analysis of significance, impact and risk – as well as an assessment of compatibility with the regulatory objectives and better regulation principles. We are developing a framework to share with ARs to aid a common understanding of significance, impact and risk. A first draft of this is attached at **Annex 2**.
4. Based on the AR evaluation and following LSB modification, we will determine which of the changes will require full scrutiny and LSB approval. Directions will be issued to exempt all other changes.
5. At the November Board, authority was delegated to the Chief Executive to determine which changes will require full scrutiny. However, it was recommended that the forward plans of the Solicitors Regulation Authority (**SRA**) and Bar Standards Board (**BSB**) as the largest regulators should be reviewed by the Board or a Board Committee before any exemptions are granted. It is further recommended that at a working level a solicitor Board Member is involved in reviewing the SRA forward plan, that David Wolfe as a Barrister Board Member is involved in reviewing the BSB forward plan and that Barbara Saunders as a consumer expert and previous Legal Services Consultative Panel observer is involved in both.

Rules in the pipeline and Board input

6. As forward plans will be finalised by and will run from April, we have asked each AR to submit details of all changes that will be required before then to the LSB. These must be approved or exempted on a case-by-case basis.
7. Attached at **Annex 3** is a table containing details of the key applications from the SRA, BSB and Institute of Legal Executives (**ILEX**) that we are aware of being in the pipeline through to April. The table includes a brief overview of the change, when we expect the application to be submitted, an initial RAG (Red / Amber / Green) evaluation of significance / impact / risk and the recommended Board advice required during decision-making as well as recommended sign-off.

8. The key applications expected prior to April include:
 - a. SRA New Qualified Lawyers Transfer Scheme
 - b. BSB Public Access Rules
 - c. BSB Acceptance and Return of Instructions
 - d. BC Contractual Terms for Acceptance of Instructions
 - e. BSB changes to facilitate decision to allow LDPs
 - f. Application for ILEX to regulate CPS prosecutors
 - g. ILEX change to Rights of Audience Certification Rules.
9. We have received comprehensive information about the changes that are expected from the SRA, BSB, ILEX and Council for Licensed Conveyancers (**CLC**) in the near term. These are the ARs that will generate the majority of the rule change applications. The Project Team has developed solid working relationships with these organisations that should make the process as effective as can be hoped going forward.
10. The smaller ARs have proved harder to engage but the Project Team has continued to challenge them over recent days and has received agreement to meet with most. In the meantime, we know little about the changes that they have planned. However, this knowledge gap presents little risk in terms of resource as volumes will be small and can likely be absorbed on an ad hoc basis.
11. The initial RAG ratings for each pipeline application for changes to the regulatory arrangements has taken into account the views of the applicant ARs. Applications a. – e. above have initially been rated Amber and applications f. – g. have been rated Green.
12. It is recommended that our general approach to Board advice and sign-off will be centred around the RAG evaluation of significance, impact and risk as follows:
 - a. Overall assessment Green: Decision made by CEO following recommendation of Project Team and Board informed of decision via CEO update. Board advice requested on an exception basis.
 - b. Overall assessment Amber: Decision made by CEO following recommendation of Project Team and Board informed of decision via CEO update. CEO will request specific Board Members to be allocated to advise throughout decision-making process based on the specific expertise required and will assist CEO in making final decision.
 - c. Overall assessment Red: Decision made by full Board or a Board Committee (to be considered further as part of the review of delegated authorities being undertaken by the Board Secretary) following recommendation of the Project Team. CEO will request specific Board Members to be allocated to advise throughout Project Team evaluation stages prior to a recommendation being put to the Board or Board Committee. Allocation to be based on the specific expertise required.
13. Therefore, applications a. – e. will require allocated Board Member advisors at a working level. Furthermore, although the initial assessment is Amber, it is recommended that applications b. – d. are put to the Board or a Board Committee for determination. As these are the first applications under the new process, we would like to test whether the Board has interest in reviewing these applications – which might not have ordinarily been put to the Board. The applications represent changing policy rather than implementing known policy decisions.

14. We are further aware of a proposed application by ILEX to be designated as an AR in relation to probate services. We are having ongoing discussions with ILEX about this application and it is currently anticipated that this will be received in March. As agreed in November, the Board will consider all designation applications. It is also likely that further Board Member involvement will be required at working group level, but this decision will be made at or shortly before the point of application.
15. It is likely that in the near term the demands for Board-level expertise will lean heavily on solicitor and barrister Board Members and Barbara Saunders. The Project Team will consider ways to reduce this reliance going forward, for example by investigating the possibility of engaging other expertise in these areas as voluntary consultees.

Business as usual and Executive resource

16. Early discussions with the SRA, BSB and ILEX have dampened the feared rush by ARs to make applications immediately after 'go-live'. We have encouraged greater focus on taking the time to get the applications right, planning (with the LSB) optimal time for submission and how planned applications may fit with the extended use of our power to exempt in April following submission of the forward plans. This will allow for more structured resource expenditure over the course of each year.
17. Initial resource modelling for the year based on an estimate of steady state traffic has been undertaken. The modelling indicates that the equivalent of three people at Project Manager / Associate level will be required to work on applications at all times. However, we do not anticipate that this will take the shape of a distinct 'Approvals Team', but rather that resource from the Project Teams for which the rule changes apply will be heavily involved. For example, the LDP application will be submitted imminently and we expect the ABS Team will be heavily involved in scrutinising this application.
18. We are currently confident that there is sufficient allocated resource for this workstream. We will refine our modelling further as forward plans are developed and we have a fuller picture of changes over the year. The primary risk in resource terms is that the high volume of organisations threatening to apply to become ARs follow through at the same time. This will be mitigated by open dialogue and realistic messaging to these organisations.

Setting KPIs and performance targets

19. The LSB, ARs and other applicants will be presented with a steep learning curve working within the new rule approval framework. It will be important to establish (following an initial period of flexibility) certainty of expectation and benchmarks of acceptable performance. The Project Team will work closely with early applicants to benchmark our service and identify if and where improvements can be made. We will maintain feedback channels and a log of applications received and time taken to progress the different stages of the process, as well as total turnaround time. This information will be reviewed in Quarter 4 (10/11) to set appropriate KPIs for the following year. It is recommended that ARs are involved in this process.
20. A key driver for the new framework is to ensure faster decision-making and to provide certainty for applicants about the timescales for decision-making. Therefore, challenging but deliverable KPIs in this area will be of paramount importance to maintain confidence and credibility in the new system. However, LSB performance is only one side of the coin. It is also important that AR performance is measured both in terms of following the process correctly and competence in maintaining and developing their regulatory arrangements. Therefore, the Project Team will also consider how it will measure the performance of ARs. For example, the number of change requests submitted within a

year that were not included within the forward plan, the number of applications that are adjudged by the LSB (or external consultees) to be incomplete or lacking, etc.

Section 69 Orders

21. An Order under s69 of Legal Services Act 2007 (**'the Act'**) allows (amongst other things) changes to be made to any Act (including the Act) to enable an AR to carry out its role more effectively or efficiently. This power raises important issues of principle about the legal regulatory framework, in particular in what circumstances it is appropriate to amend primary or secondary legislation rather than change regulatory arrangements in order to secure the necessary outcomes. Our initial thinking is that the burden of proof for use of s69 should be high, for a number of policy reasons:

- First, for 'tidy mindedness' and transparency, to keep a single definitive source of information on all regulatory arrangements;
- Second, for both speed of response and independence of regulation, to ensure a rapid response by ARs to regulatory problems, rather than a lengthier parliamentary process;
- Third, to aid, over time, a move towards more outcome-focussed regulation to encourage strategic thinking driven by the objectives to be achieved rather than the detail of the current framework.

22. We intend to publish an open letter at the beginning of February setting out our view on the way s69 Orders should operate to test this policy thinking and the related legal analysis and inviting comments before coming to a final view. We are likely to propose that ARs measure any proposals for a s69 Order to change regulatory arrangements against some robust criteria.

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