

To:	Legal Services Board	
Date of Meeting:	10 October 2012	Item: Paper (12) 68

Title:	Review of process for applications for approval of alterations to regulatory arrangements	
Workstream(s):	Statutory Decision Making	
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Status:	Protect	

Summary:
<p>The last four Rule Change applications from the Bar Standards Board were some of the most difficult and time consuming that we have had to consider. We undertook to complete a review of the processing of those applications to assess whether there were any changes that could be made to the Rules and processes to improve the submission and handling of future applications.</p> <p>This report summarises the main findings from that review and the proposed next steps.</p>

Recommendation(s):
<p>The Board is invited:</p> <p>(1) to note the main conclusions from the review of the rules change application process, and</p> <p>(2) to note the proposed future actions.</p>

Risks and mitigations
Financial: N/A
Legal:
Reputational:
Resource:

Consultation	Yes	No	Who / why?
Board Members:	√		Barbara Saunders and David Wolfe were invited to provide feedback on their experiences of the process as the non-executive directors most usually involved in applications

Consumer Panel:		√	
Others:	A number of LSB colleagues were invited to provide feedback. A meeting was also held with Ewen Macleod, Head of Professional Practice at the Bar Standards Board		

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
N/A	N/A	N/A

LEGAL SERVICES BOARD

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Review of process for applications for approval of alterations to regulatory arrangements

Background / context

1. The current Legal Services Board (LSB) rules and processes for approval of applications to change regulatory arrangements (rules change applications) have been in place since the beginning of 2010. The rules were written before the LSB had assumed its full powers and are largely based on the procedural requirements set out in the Legal Services Act 2007 (“the Act”). Since the beginning of 2010, 45 rules change applications have been submitted to the LSB.
2. As our own policies and priorities have become more defined, our approach to considering and assessing rule change applications has changed. The last three rules change applications from the Bar Standards Board proved to be some of the most difficult and time consuming.
3. Following the completion of those BSB applications (the Cab Rank Rule: New Standard Terms and Conditions; Equality and Diversity Provisions; the Bar Course Aptitude Test) it was decided that we should review how each had been handled and whether it is necessary and appropriate to make changes to either the rules or our own processes. The review did not include any assessment of those individual decisions.
4. A number of LSB colleagues and non-executive directors were invited to provide input based on their own experience of involvement in these applications. We also invited the Bar Standards Board to provide feedback. I am grateful to all for the open and constructive way in which they approached this.

Summary of findings and proposed actions

5. The review has identified a number of areas for improvement in the process, many of which are minor. Here we summarise the main issues and proposed actions.

Warning Notices (Schedule 4, para 21(1)(b))

6. A Warning Notice allows the LSB to seek advice on whether to grant an application and extends the time in which a decision has to be made.

7. The LSB power to issue a Warning Notice was used for the first time in the Cab Rank Rule application. Consequently we have now developed a process to cover all steps for dealing with a Warning Notice.
8. Schedule 4, para 21(1)(b) states that the LSB may give an approved regulator a Warning Notice “*stating that the Board is considering whether to refuse the application*”. In the past, our approach has been that a Warning Notice will only be used where, on balance, we consider that we are more likely to refuse than grant the application. During the review it has been questioned whether this is too narrow an interpretation.
9. Inevitably there will be applications that raise complex policy issues (and therefore need more time to be considered) or are in areas in which the LSB does not have sufficient technical expertise or knowledge (an issue that was raised in the BSB feedback). Using Warning Notices in such cases would enable a more informed decision to be taken, although this may mean that some cases take longer to conclude. We would differentiate these from extension notices, which are more appropriate for cases where technical complexity, incomplete information or resource priorities mean that more time is needed for rules changes which are otherwise less problematic.
10. It is proposed that we develop an approach in which we use the Warning Notice process more widely to allow for better decision making. Alongside this we should consider using the general power of the Board to seek advice (paragraph 19 of schedule 1 LSA2007). Given the potential for Warning Notices to be seen as “negative” we will need to explain our approach both in our general communications on matters and in particular cases. The Warning Notice is not an enforcement tool but a key part of managing applications appropriately and transparently.
11. Although the formal delegation to the Chief Executive extends to all aspects of the rule approval process, in practice he would refer any potential decision to refuse a rule change to the Board, so that decisions are informed by non-executive judgements on policy substance and legal risk.

Board engagement

12. The Executive must be clear in the purpose of seeking Board advice or direction from the Board on any specific application.
13. The current Scheme of Delegations states the Board resolved “to delegate authority to determine how to handle applications for rules changes on a case-by-case basis and following an assessment of significance, impact and risk to the Chief Executive, subject to new AR [approved regulator] applications always being submitted for approval to the Board” (November 2009). It follows therefore that the Chief Executive should be clear as to why something is of such of significance, risk or impact that it needs Board attention.

14. The Schedule of Matters reserved to the Board includes “approving the process for considering requests to alter the regulatory arrangements of Approved Regulators”. The Cab Rank Rule application required us to develop the process for Warning Notices and therefore the Board’s agreement to the approach was necessary. Now that that process has been developed, future applications where a Warning Notice is being considered would fall within the delegation to the Chief Executive.
15. Individual Board Members are sometimes invited to provide input on specific applications. The reasons for seeking those views should be made clear, for example, is it a governance check on the process or because we need technical input? Most usually, as in project work, it will be to secure some independent ‘fresh pair of eyes’ advice to the Executive in making the decision, rather than the non-executives taking a formal part in the delegated authority.
16. We also need to consider which Board Member may be best placed (in terms of time and expertise) to provide that input. We should consider what information and support Board Members need to enable them to participate in the process effectively; this could be included in the induction programme for new Board Members.

Maintaining integrity of the process

17. The LSB aims, as far as operationally practicable, to separate its “policy” and “statutory decision” making activities by having a team charged with the responsibility for processing applications. This separation is difficult to manage within an organisation of just 30 people and, perhaps inevitably, it was not always observed during the processing of these applications with various discussions taking place which elicited additional information. The BSB commented that they would prefer to have a single nominated contact point for each application.
18. “Team Rules” (who manage applications) is required to consider the information contained in the applications it receives. It does not have (and probably cannot have) complete knowledge of all potentially relevant matters that it may have to consider; therefore colleagues’ input and experience can be helpful to both fill the knowledge gaps and ensure decisions are consistent with LSB policy. That means that, while the desire for a single point of contact is reasonable especially once an application has been submitted, it cannot be offered as a certainty.
19. As with Board Member input, there is a risk that policy preferences are given a disproportionate amount of attention relative to the precise legal tests for acceptance or refusal; we need to ensure that our decisions have a sound evidential base. It is for that reason that the process has always contained balancing elements:

- getting early non-executive involvement;
 - maintaining separation of team rules from policy when making formal recommendation;
 - using mix of colleagues to develop and test policy thinking; and,
 - having senior leadership overview and review of all areas.
20. Going forward, we will need to ensure that the integrity of the rules process is maintained. Team Rules should be clearly responsible for managing the process of individual applications, usually including organising and participating in all meetings and discussions relating to the application once it is made. In some cases Team Rules' involvement may need to be substantial before the application is formally submitted; we will need to ensure that there is a clear "handover" from policy to statutory decisions so that the ARs have certainty as to whom they are dealing with.
21. We plan to introduce more peer review within Team Rules to ensure that the process is followed and that recommendations on decisions are made on a sound basis. With the existing legal review of decisions, this will reduce the risks of inconsistent approaches and decisions being made that are outside the scope of our powers and/or not supported by a robust evidential base.

Engagement with ARs and the proposed changes

22. As noted above, where applications are complex and/or technical it may be necessary to seek external advice on the proposals. We should also consider what improvements can be made to the process to allow us to identify and acquire the relevant knowledge at the earliest stage.
23. The process would be improved if there were more engagement with ARs before applications are made - as they are developing proposals and drafting the applications. We have already started to review ARs consultation papers and raise potential issues with them in advance without formally responding to consultation; ARs appear to welcome this approach. We will need to be mindful of avoiding overlap between any Team Rules early engagement and ongoing policy work with regulators, but as with the reverse discussed above, careful management, good LSB communications and a joint working approach will make this manageable.
24. Once an application is received there should be less reliance on written exchanges to resolve issues and more discussions – but at the same time ensuring we have a complete audit trail to show how the issues were raised and the conclusions ultimately reached.
25. We will consider to what extent this needs to be formalised as we develop revised Rules for applications to approve alterations to regulatory arrangements.

26. Although not specifically part of this review, the recent practising certificate fee applications raised the issue of whether we consider the right level of detail when looking at applications (which is also relevant to rules change applications). While we need to ensure that we have covered all of the issues, it can delay the process if we end up in extended discussions about fine details.

The Rules for approval of alterations to regulatory arrangements

27. The current rules for making applications were drafted before the LSB assumed its full powers under the Act. They are largely based around the process and timelines defined in the Act and are more about the form than the substantive content of the application.

28. As we have gained more experience of rules applications and as we have developed our approach to regulatory effectiveness, our approach has moved to focus more on risks, supervision and enforcement. The current Rules do not require applications to be presented in this way.

29. It is proposed that we review the Rules for approval of alterations to regulatory arrangements to determine whether, and if so how, they need to change to reflect the regulatory effectiveness approach. The objective will be to move to a set of arrangements (which may be rules and /or guidance) that:

- are outcomes focused and based more around four parts of regulation in the regulatory standards work
- are robust in terms of the criteria in Schedule 4, paragraph 25
- encourage ARs to properly consider the proposals against the Better Regulation Principles and demonstrate that they have done so; this should specifically cover public interest
- encourage ARs to undertake a proper analysis of the risks associated with implementing (or not) the alteration. This could include risks to the regulatory objectives and mitigation actions
- provide an explanation of the supervision and enforcement tools that the AR will use to satisfy itself that the changes to the arrangements have delivered the desired outcome and that the regulated community has achieved compliance

30. While this review has been prompted by recent BSB applications, we will need to ensure that we engage with all of the ARs as the proposals are developed.

Next steps

31. We therefore propose to review the current Rules for approval of alterations to regulatory arrangements to determine what changes should be made. This will include consideration of what guidance is needed to support the proposed revised rules. Once the proposed changes have been agreed, determine the appropriate approach to consultation.

32. Develop and communicate a clear position on how Warning Notices might be used in future applications.

33. Review Team Rules processes and procedures to ensure that they are consistent with the conclusions from this review and any changes to the Rules.

Recommendations

34. The Board is invited:

- (1) to note and comment on the main conclusions from the review of the rules change application process, and
- (2) to note the proposed future actions.

02 October 2012