

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

Decision paper on consultation paper issued on 6 August 2009

10 December 2009

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#### 1. Executive Summary

- 1.1 The Legal Services Board (the "LSB") and the Office for Legal Complaints ("OLC") have been created by the Legal Services Act 2007 (the "Act") to ensure the highest quality of regulation within the legal profession and legal services industry for the benefit of consumers and citizens and ultimately the profession itself.
- 1.2 On 6 August 2009 we issued a consultation paper (the "**First Consultation Paper**") providing initial drafts of the rules that the LSB proposes to make 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. This consultation closed on 28 October 2009.
- 1.3 The purpose of this paper is to:
  - provide a summary of the range of responses we received to the questions we posed in the First Consultation Paper;
  - articulate the final policy that the LSB has followed in formulating these rules; and
  - provide a final draft of the rules that will now apply from when the Board takes up its full powers in early January 2010.
- 1.4 The LSB would be like to thank all respondents for their constructive engagement is this consultation process. The LSB notes that nearly all respondents welcomed the general direction of the draft rules and we have made some drafting amendments as a result of some helpful comments.

#### 2. Responses to our Consultation

#### Introduction

- 2.1 This section of the paper sets out a summary of the range of responses that we received to each question we posed in the First Consultation Paper and sets out the final position the LSB has reached as a result of these responses.
- 2.2 We received 11 responses to the First Consultation Paper. A list of these respondents is set out at Annex 1. Full copies of the responses can be found on the LSB website<sup>1</sup>.

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

#### Responses

2.3 All but one of the 11 respondents generally agreed with the approach that the LSB has taken.

#### 2.4 Responses received include:

- comments from the Legal Services Commission (the "**LSC**") who state that "in general, the Commission agree with the approach taken";
- a response from the Crown Prosecution Services (the "CPS") who comment that "in general we are in favour of the approach taken to making oral representations ...";
- comments from the Council for Licensed Conveyancers (the "CLC") who agree "the approach taken to making oral representations and giving oral evidence and has no improvements to suggest";
- a response from the Solicitors Regulation Authority (the "SRA") who "agree with the broad approach set out in the consultation paper";
- comments from the Institute of Legal Executives and ILEX Professional Standards Limited (together "ILEX") who consider that "the process appears too brief considering the complexities that can arise...". ILEX consider that "the extension of reserved legal activities may prove more complex than anticipated in the rules and the LSB could be faced with dealing with mountains of conflicting evidence";

 $<sup>\</sup>underline{\text{http://www.legalservicesboard.org.uk/what\_we\_do/consultations/closed/submissions\_legal\_activites.h}\\ \underline{\text{tm}}$ 

- a response from the Law Society who express concern that the implication of Rule 9 "is that 'affected practitioners' have rather greater status in the LSB's consultation of these matters than 'representing persons'". The Law Society is of the view that "the approach taken as between 'representing persons' and 'affected practitioners' should be even handed";
- comments from the Master of Faculties who raise a concern that the draft rules do not specifically provide for the making of oral representations by Approved Regulators. The Master of Faculties states that "we consider that an Approved Regulator should be able to make representations once the LSB has decided to hold an investigation about the alteration in designation of reserved legal activities"; and
- a response from the Bar Standards Board (the "BSB") who note that "the impact assessment identifies that the policy will have no direct or indirect effect on 'race, disability or gender equalities'. It is not clear to us whether an equality impact assessment has been completed in relation to this policy. In our view this is an important and necessary step given the obvious impact the policy could have on equality areas such as disability".

#### LSB position

- 2.5 We note that nearly all of the respondents agree with our general approach. In relation to some of the specific points raised, we respond as follows:
  - the LSB does not agree with ILEX's view that "the process appears too brief considering the complexities that can arise...". The LSB has purposefully designed a process which it believes is transparent, concise and flexible enough to deal with the different eventualities that oral representations and evidence may lead to;
  - we note the concern that the Law Society raises about the enhanced status of "affected practitioners". As the Law Society goes on to recognise in its response, it is the provisions of paragraph 13 of Schedule 6 to the Act that mandate this approach, rather than any specific policy decision that the LSB has made;
  - we note the comments made by the Master of Faculties that the rules do
    not specifically provide for the making of oral representations by Approved
    Regulators. The LSB has deliberately made the concept of a
    "Representing Person" a wide one. This approach is consistent with the
    Act which does not mandate who can and cannot make representations.
    The LSB believes that this formulation is wide enough to allow
    representations by Approved Regulators;
  - the LSB does not believe that the concerns raised by the BSB in relation to the impact of the rules on race, disability or gender equalities are significant. The rules provide for all practicitioners who are affected by any investigation to be given, so far as reasonably practicable, an oral

hearing<sup>2</sup>. In relation to representations from any other bodies, the rules give the LSB a broad discretion to allow oral representations or oral evidence if "the particular circumstances of the Representing Person or the complexity of the issue merit an exception to the normal process in individual cases"<sup>3</sup>.

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.

#### Responses

- 2.6 A number of the respondents suggested improvements of a minor drafting nature.
- 2.7 Responses received include:
  - a response from the LSC who suggested some drafting changes to Rules 5, 6, 7, 11, 12, 14 and 15;
  - a response from the SRA who recommend that the final version of the rules "is explicit about accommodating (as far is reasonable) each individual's personal circumstances, particularly where hearings are conducted in person"; and
  - comments from ILEX who suggest that the LSB should "provide some indication of the circumstances in which payments will be made by the LSB under Rule 17".

#### LSB position

2.8 The LSB has noted the drafting changes that respondents have suggested and have, where appropriate, adopted these in the final draft rules.

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<sup>&</sup>lt;sup>2</sup> See Rule 10

<sup>&</sup>lt;sup>3</sup> See Rule 9

#### 3. Final Rules

#### The Rules

- 3.1. A final draft of the rules that the LSB will now make in relation to the making of oral and written representations, and the giving of oral and written evidence to the LSB under Schedule 6 of the Act is set out at Annex 2.
- 3.2. These rules have been amended from the initial draft that was contained in the First Consultation Paper to reflect:
  - comments received from respondents to the First Consultation Paper; and
  - comments received from respondents to the LSB's two other consultation papers<sup>4</sup> which contained rules on written and oral representations which are similar in scope to these.
- 3.3. In the LSB's opinion none of these amendments result in the final draft rules differing materially from the initial draft rules. Consequently, the LSB is not publishing details of the differences in accordance with Section 205(5) of the Act.

#### **Publication**

3.4. In accordance with Section 205(6) of the Act, the LSB hereby publishes the rules set out in Annex 2 which will take effect from when the LSB takes up its full powers on 1 January 2010.

<sup>&</sup>lt;sup>4</sup> The LSB Consultation Paper "Designating new approved regulators and approving rule changes" and "Compliance and Enforcement – Statement of Policy"

#### 4. Final Impact Assessment

#### Introduction

4.1 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.

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

4.2 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.

#### What are the policy objectives and the intended effects?

4.3 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

- 4.4 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.
- 4.5 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?

4.6 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

4.7 One-off (transition): £ negligible.

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

#### **Annual Benefits**

- 4.9 One-off: £ negligible.
- 4.10 Average annual benefit: £ negligible.

#### What is the geographic coverage of the policy/option?

4.11 England and Wales.

#### On what date will the policy be implemented?

4.12 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?

4.13 The LSB.

#### Does enforcement comply with Hampton principles?

4.14 Yes.

#### Will implementation go beyond minimum EU requirements?

4.15 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?

4.16 Nil.

#### What is the value of changes in greenhouse gas emissions?

4.17 Nil.

#### Will the proposal have a significant impact on competition?

4.18 No.

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

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

#### Are any of these organisations exempt?

4.20 No.

#### Impact on Admin Burdens Baseline (2005 Prices)

- 4.21 Increase of £: approximately nil.
- 4.22 Decrease of £: approximately nil (although potential for small decrease).
- 4.23 Net Impact £: approximately nil.

#### **Evidence Base**

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

There is no direct or indirect impact expected.

#### Small Firms Impact Test

4.26 There is no direct or indirect impact expected.

#### Legal Aid

4.27 There is no direct or indirect impact expected.

#### Race/Disability/Gender equalities

There is no direct or indirect impact expected. The rules provide for all practicitioners who are affected by any investigation to be given, so far as reasonably practicable, an oral hearing<sup>5</sup>. In relation to representations from any other bodies, the rules give the LSB a broad discretion to allow oral representations or oral evidence if "the particular circumstances of the Representing Person or the complexity of the issue merit an exception to the normal process in individual cases"6.

#### **Human Rights**

There is a specific requirement on the LSB to make rules governing the giving 4.29 of oral and written representations and evidence.

<sup>&</sup>lt;sup>5</sup> See Rule 10 <sup>6</sup> See Rule 9

#### Rural Proofing

4.30 There is no direct or indirect impact expected.

#### Sustainability, carbon emissions, environment and health

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

### **Annex 1 – List of respondents**

- The Legal Services Commission
- The Crown Prosecution Service
- The Fellowship of Professional Willwriters and Probate Practitioners
- Council of Licensed Conveyancers
- Solicitors Regulation Authority
- The Law Society
- ILEX and ILEX Professional Standards
- The Chartered Institute of Patent Attorneys
- The Institute of Trade Mark Attorneys
- The Master of Faculties
- Bar Standards Board

# Annex 2 – Making Oral and Written Representations and Giving Oral and Written Evidence under Schedule 6

#### A. PREAMBLE

1. These Rules are made by the Board (as defined below) under paragraphs 12, 13, and 14 of schedule 6 to the Act (as defined below).

#### **B. DEFINITIONS**

2. 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 to 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 to the Act

**Representing Person** any person wishing to make representations or provide

evidence to the Board for the purposes of schedule 6 to the Act (including for the avoidance of doubt, and for the purposes of paragraph 13(3) of schedule 6 to the Act, an Affected Practitioner and any body which

represents an Affected Practitioner)

#### C. WHO DO THESE RULES APPLY TO?

- 3. 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) to the Act.
- 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.

#### D. FORM OF REPRESENTATIONS

Written representations

5. Subject to Rules 6, 7 and 8, 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:

a) if by email to: contactus@legalservicesboard.org.uk

b) if by post or courier to:

Address: Legal Services Board

7<sup>th</sup> Floor Victoria House Southampton Row London WC1B 4AD

For the attention of: Schedule 6 Representations Administrator

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, once this has been developed.

7. All representations and evidence given under:

- a) paragraph 12 of schedule 6 to the Act must be received by the Board within 3 months of the Board giving a notice under paragraph 9(2) of schedule 6 to the Act, or within such other time as the Board may specify;
- b) paragraphs 13 and 14 of schedule 6 to the Act 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 Rules 5, 6 and 7, the Board will allow written representations and, so far as reasonably practicable, 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 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 open to the public. However, within the period ending four business days prior to the scheduled date of the hearing, the Representing Person may submit to the Board a written 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 will only admit persons, other than representatives of the Representing Person and the Board, after obtaining the agreement of the Representing Person.
- 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:
  - a) must give the Representing Person a reasonable opportunity to comment on a draft of the report; and
  - b) 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 directly pay the transcription provider for the reasonable 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 or oral representations, by or on behalf of a Representing Person.

#### **E. 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

7<sup>th</sup> Floor Victoria House

Southampton Row London WC1B 4AD

Email: contactus@legalservicesboard.org.uk

Telephone: 020 7271 0050