Consultation response

Legal Services Board consultation on proposed rules for applications to alter regulatory arrangements

19 July 2021

Introduction

The Costs Lawyer Standards Board (**CLSB**) welcomes the LSB's review of its approach to considering applications to alter regulatory arrangements under Schedule 4 to the Legal Services Act 2007 (the Act).

Overall we agree with the proposals and are supportive of efforts to improve certainty and efficiency in the process for making changes to regulatory arrangements. We find the provision of optional proformas particularly useful in understanding the LSB's expectations and were pleased to see proformas included in the draft guidance.

We have two main observations on the proposals and we would encourage the LSB to consider these when finalising its rules. They relate to:

- the lack of specified criteria for directing that an alteration should be treated as exempt;
- some discrete areas in which further clarity would be welcome around the definition of "regulatory arrangements".

In responding to this consultation, we have focused on the above observations and thus we have answered question 4 and, jointly, questions 1 and 5.

Question 4: Do you have any comments on the process for requests for exemption? Do you have any comments on draft rules 15 to 17? Do you have any comments on the associated Guidance?

Paragraph 30 of the consultation document explains that a key driver behind the new rules is to establish "a clear distinction between" applications for approval of alterations to regulatory arrangements (**approval applications**) and requests for the LSB to direct that an alteration is an exempt alteration (**exemption requests**). We agree that such clarification would be helpful for both the regulators and the LSB.

The criteria against which the LSB must assess approval applications are clearly set out in the Act, via the refusal conditions in paragraph 25(3) of Schedule 4. However, those refusal conditions do not apply to exemption requests; exempt alterations are by definition outwith the scope of any assessment against the refusal conditions. Instead, paragraph 19(3) of Schedule 4 to the Act simply provides that "an exempt alteration is an alteration which the Board has directed is to be treated as exempt for the purposes of this paragraph". The LSB's proposed rules adopt this definition by reference. In order to know whether an alteration is exempt, regulators (and members of the public) therefore need to understand the circumstances in which the LSB will direct that an alteration is exempt.

Proposed rule 17 sets out the information that must be provided in an exemption request. The list includes (at subparagraph (d)): "details of why the approved regulator considers the alteration is … appropriate for an exemption direction". Rule 6 provides that, where a regulator does not include these details in the exemption request, the request is not properly made. The onus is therefore on the regulator to explain to the LSB why the alteration should be exempt.

Given the above, our question is this: against what criteria will the LSB determine whether an alteration is appropriate for an exemption direction? And, similarly, what details is the regulator required to provide to demonstrate why they consider the alteration is appropriate for an exemption direction? We feel this is fundamental to the regime, but it is not covered in the rules.

The consultation document (at paragraph 30) says that the draft guidance "details matters that approved regulators may consider in assessing whether a proposed alteration is suitable for a request for exemption". But we are not sure which aspect of the guidance is being referred to here.

Paragraph 83 of the guidance provides: "Rule 17 sets out the information the approved regulator needs to include in a request for an exempt alteration. This is required by the LSB to assess whether the proposed alteration(s) is suitable for exemption. A request for exemption is to be used in circumstances where an approved regulator considers its alterations are suitable for exemption from the full approval process." However, there is no indication of the criteria against which either the LSB's assessment or the regulator's consideration should be based.

There are nods to factors that the LSB might take into account, as follows:

- Paragraph 84 of the draft guidance: "The information requirements in rule 17 are similar to the Section E application requirements but are not as detailed given that exemptions are **usually only applicable for minor and non-controversial changes** or where **time is of the essence**."
- Paragraph 85: "The information set out in rule 17 is intended to focus on the **significance, impact and risk** of the proposed alteration."
- Paragraph 88: "An alteration may not be appropriate for exemption if for example it **involves more than a very minor change** to regulatory arrangements or **raises issues that are potentially prejudicial to the regulatory objectives**. In that case, the approved regulator may need to prepare and submit an application to seek approval of the alterations."
- In relation to general exemption directions, paragraph 57 of the consultation document: "General exemption directions allow approved regulators to make **minor and/or low risk changes** at **short notice** in a proportionate, consistent, transparent and efficient way, subject to requirements being satisfied".

On this basis, factors that the LSB might decide to take into account could include:

- whether the alteration is "more than very minor", "minor" or something else
- how significant the alteration is
- how controversial the alteration is
- the regulator's timeframes
- the size and/or nature of the alteration's impact, at least on the regulatory objectives, and possibly on other matters
- the degree of risk associated with the alteration

If these are intended to be the criteria for assessment, then it is important for this to be made explicit. It seems to us that these (or other) criteria should be set out in the rules, with the guidance providing examples of types of alterations that might or might not be exempt. We would also welcome clarification as to how the criteria will be applied, when they will be applied (usually or always?), how they interact with one another (are they cumulative, mandatory?), and an indication of the thresholds below/above which an alteration would become exempt.

Without this clarification, the rules cannot sensibly impose an obligation on regulators to predict – and justify with reasons – whether an exemption is appropriate in any given case. It also hinders the LSB's ability to meet its stated objective of establishing a clear distinction between alterations that are exempt and alterations that are not.

We note that the proposed guidance states (at paragraph 28) that, if an approved regulator is in doubt as to whether its alteration is appropriate for exemption, it should consult with the LSB. We of course appreciate the need to consult with the LSB in cases that are novel or unclear and we welcome the opportunity to do so. However, in the generality, we would be concerned if the LSB's intention was to substitute individualised consultation for the publication of objective criteria.

Finally, we note that paragraph 89 of the guidance sets out the LSB's expectation that regulators will provide all information required under rule 17 with their exemption request, and this is reflected in the optional proforma. However, the proforma does not seem to require the regulator to provide any information about why an exemption is appropriate, despite this being a requirement under rule 17(d). Assuming that the LSB does adopt clear criteria in the final version of the rules against which a regulator can provide such information, the LSB might wish to consider adding a box into the proforma to cover this.

Question 1: Do you have any comments on draft rules 1 to 4? Do you have any comments on the associated draft Guidance?

Question 5: Do you have any comments on the proposals and scope for new general exemption directions?

The rules adopt the definition of "regulatory arrangements" that is set out in section 21 of the Act. The scope of the term "regulatory arrangements" has caused some confusion in the past and we welcome the LSB's attempt in the guidance (at paragraphs 19 to 24) to flesh out the statutory definition. We also appreciate that it is a difficult concept to define in strict terms.

That said, there are three discrete areas in which we feel further clarification would be helpful.

1. *The status of internal documents and forms*

Paragraph 23 of the guidance provides as follows:

> "Ordinarily, **changes to guidance or policy documents that do not impose mandatory requirements will not be considered to be regulatory arrangements** and therefore will not require LSB approval. However, there may be circumstances where guidance or policy documents fall within the meaning of an alteration or alterations to regulatory arrangements requiring LSB approval. The focus ought to be on content and intent, rather than what a particular document might be labelled as. **This is most often relevant in circumstances where an approved regulator proposes to issue guidance that impose obligations on or in relation to regulated persons that are not underpinned by existing regulatory arrangements** – and therefore likely to require approval under the Act before they can have lawful effect."

This suggests that the main factor indicating that an intervention constitutes a "regulatory arrangement" (alongside the statutory definition) is that it imposes a mandatory obligation in relation to the regulated community.

The consultation document (at paragraph 58) explains the LSB's proposals for issuing general exemption directions. It sets out the intention to issue a direction that will enable approved regulators to "make alterations to a range of internal documents, forms and standalone guidance". We wondered what kinds of internal documents and forms the LSB had in mind here, given that they would need to impose mandatory obligations to fall within the scope of regulatory arrangements.

In relation to internal documents, perhaps the intention is for this to cover documents that are considered "internal" but are nevertheless published, given that regulators could not impose mandatory obligations without informing those affected. And perhaps a form could impose a mandatory obligation by, for example, prescribing the submission of certain information in order to access a service. But these are our guesses, and we would welcome clarification around the types of regulatory arrangements the LSB is seeking to cover through this general exemption direction, in line with its definition of regulatory arrangements.

2. The provision of draft documents with approval applications

Proposed rule 10(h) provides that an approval application must include "any draft guide or policy that will support implementation of the alteration or alterations". This is supplemented by paragraph 64 of the guidance, which explains:

> "It also may be the case that these documents [the draft guide or policy] may fall within the meaning of regulatory arrangements and having them enclosed with an application will assist in determining this. These documents do not necessarily have to be in final form – but they must be sufficiently advanced to enable meaningful consideration."

Presumably such documents could not be considered (and ultimately approved) if it turned out they *were* regulatory arrangements but they were only in draft, which raises the question of whether a fresh application would be required. We would welcome clarification in paragraph 64 of the guidance as to how the LSB would treat draft supporting materials that turned out to be regulatory arrangements.

3. Existing regulatory arrangements

Our understanding is that the LSB's interpretation of the term "regulatory arrangements", as described in paragraph 23 of the guidance, is broader in scope than it used to be (particularly if it does extend to internal documents and forms). This will mean that the regulators have materials – possibly a significant volume of materials – that were not previously considered to fall within the scope of regulatory arrangements and, consequently, were not previously approved by the LSB.

Since the definition of regulatory arrangements in the rules has not itself changed, this is not an issue that can be resolved by reference to the temporal scope of the new rules. It would therefore seem prudent to include a grandfathering provision of some kind in the guidance to account for the change in approach.