

## **POLICY ON WAIVERS OF PRACTICE RULES – PRINCIPLES**

### **Background and Overarching Requirements**

The Society's Practice Rules<sup>1</sup> ("the rules") generally permit the Society<sup>2</sup> to waive any provision of the rules in any particular circumstances or case. Waivers can be granted subject to such conditions as the Society determines, at its discretion<sup>3</sup>. This is subject to exceptions<sup>4</sup>, with the result that the following rules may not be waived:

- Section B Rule 1 (the Standards of Conduct)
- Section B Rule 8.4.2 (relates to intimating difficulties procuring representation by a solicitor advocate)
- Section C Rule 2 (the IFB Rules) – but only to the extent that any waiver would be incompatible with the requirements of the relevant Directive (as defined in that rule)
- Section C Rule 4.1 (re procuring rights of audience in the civil courts)
- Section C Rule 4.2 (re procuring rights of audience in the criminal courts).

Any power to waive rules must also be exercised in a manner which is compliant with the Society's statutory obligations and legal requirements generally. In particular, no waiver can be granted where to do so would be incompatible with the requirements of the 1980 Act<sup>5</sup> or the 2010 Act<sup>6</sup>. The 1980 Act, for example, sets restrictions on the ownership of a multi-national practice or incorporated practice and some of the rules reflect those restrictions – it would not be competent for the Society to purport to waive a restriction which legislation requires.

The 2010 Act<sup>7</sup> requires the Society, when exercising its regulatory functions, to act in a way which (a) is compatible with the regulatory objectives (see Annex 1); and (b) which it considers most appropriate with a view to meeting those objectives. The Society has published a Statement<sup>8</sup> on how it complies with this obligation which should also direct and

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<sup>1</sup> The Law Society of Scotland Practice Rules 2011 (as amended) – note that these do not include the Admissions Regulations or CPD Regulations as same are not practice rules in terms of the relevant legislation – this paper does not, therefore, deal with waivers of such regulations

<sup>2</sup> "Society" has been used throughout for ease of reference – all regulatory functions (which include the grant of waivers of practice rules) must be exercised on behalf of Council by the Regulatory Committee or by a sub-committee or person to which or whom the Regulatory Committee has delegated performance of that function in terms of the current Scheme of Delegation

<sup>3</sup> See Rule A5.1

<sup>4</sup> See Rule A5.2 and Schedule 2

<sup>5</sup> Solicitors (Scotland) Act 1980

<sup>6</sup> Legal Services (Scotland) Act 2010

<sup>7</sup> See section 119

<sup>8</sup> Statement of Regulatory Objectives and Professional Principles of the Law Society of Scotland approved by the Council of the Society on 27 May 2011

inform the Society's policy on waiver of practice rules. This paper takes that Statement into account.

The 2010 Act also refers to "best regulatory practice" under which (in particular) regulatory functions should be

- (a) carried out –
  - (i) effectively (but without giving rise to unnecessary burdens),
  - (ii) in a way which is transparent, accountable, proportionate and consistent,
- (b) targeted only at such cases as require action.

Although the 2010 Act does not require the Society to adopt best regulatory practice in relation to its regulation of solicitors, it would be desirable to do so<sup>9</sup>. The waiver policy set out in this paper aims to take best regulatory practice into account.

### **Why is a waiver power necessary?**

The rules attempt to set requirements which are necessary, appropriate and proportionate (and seek to promote achievement of the regulatory objectives and adoption of best regulatory practice) in the usual case or circumstances which commonly occur. It is, however, clearly not possible to predict and pre-judge in advance whether such requirements will always, in every possible set of circumstances, be completely appropriate, proportionate or necessary. In exceptional circumstances the imposition of such requirements may lead to inadvertent or disproportionate consequences which may tend to inhibit promotion of the regulatory objectives and adherence to best regulatory practice. In such circumstances the most workable and appropriate remedy is to permit waiver (which may be partial and subject to conditions) to the extent necessary to prevent the undesirable consequences that would otherwise flow from strict application of the standard requirements.

### **When should the power be exercised? General Criteria to be taken into account when considering waiver requests**

#### *Exceptional Circumstances Justifying Waiver*

The Society's general policy on waiver requires the applicant for waiver to set out the exceptional circumstances and explain why, in the applicant's view, those circumstances justify waiver. Circumstances which may justify waiver may include the fact that application of the standard rule in the precise circumstances would:

- cause an unintended or capricious effect not consistent with the principle intended to be achieved by the rule;
- cause undue hardship to the applicant or client not consistent with principle;
- prevent a benefit to clients or consumers.

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<sup>9</sup> If the Society becomes an approved regulator of licensed providers (ABS) in terms of the 2010 Act this requirement will apply to its regulation of licensed providers

### *Absence of Risk of Detriment*

The applicant would also be required to establish to the Society's satisfaction that grant of the waiver requested would not carry any appreciable risks to the interests of clients or consumers or achievement of the regulatory objectives or adoption of best regulatory practice.

### *Examples*

Circumstances which may be deemed to satisfy these criteria may include where a practice is required to comply with a multiplicity of regulatory requirements imposed by different regulators, perhaps because it operates in more than one legal jurisdiction. The Society has experience of practices which provide services in Scotland and England and Wales seeking waivers to avoid what would otherwise be a duplication or conflict between regulatory requirements. Waiver is often an effective tool to alleviate such difficulties as the waiver is specific to the particular entity or practice and can be tailored to the precise circumstances – so that it only operates to remove regulation which is unnecessary or inappropriate in the precise circumstances – and does not prejudice the integrity of the principle which the standard rule seeks to achieve.

There are obviously many different combinations of facts and circumstances which may justify waiver of a provision in the rules and it is not realistically possible to set out detailed examples or pre-judge their treatment in a general policy document.

### **Detailed Waiver Policies**

Applications for waiver of practice rules are considered and determined by the regulatory sub-committee which is responsible for exercising the regulatory functions under the relevant rules – or, in some instances, by members of the Society's staff acting under authority delegated by the relevant sub-committee, and subject to its supervision.

Some sub-committees have published more advice and information about the policy they adopt in relation to waiver of the rules within their remit. Such policies should be:

- consistent with the principles set out in this paper;
- applied consistently, having regard to the regulatory objectives, best regulatory practice and general legal requirements.

### **Monitoring Waiver Applications and Responses**

Records of applications for waiver and all responses to such applications are maintained by the Society.

Records are reviewed regularly to ensure consistency of decision-making and to inform the development of rules and guidance. If a particular rule generates a large number of waiver requests which are granted that may suggest that the terms of the rule are out of step with legitimate practice and cause difficulties which are not justified by consumer protection concerns. This information issued when reviewing the Society's performance in relation to promotion of the regulatory objectives and adherence to best regulatory practice – and improvements promoted where merited.

## **Annex 1 – the Regulatory Objectives**

As set out in Section 1 of the 2010 Act, the regulatory objectives are the objectives of—

- (a) supporting the constitutional principle of the rule of law,
- (b) protecting and promoting—
  - (i) the interests of consumers,
  - (ii) the public interest generally,
- (c) promoting—
  - (i) access to justice,
  - (ii) competition in the provision of legal services,
- (d) promoting an independent, strong, varied and effective legal profession,
- (e) encouraging equal opportunities (as defined in Section L2 of Part II of Schedule 5 to the Scotland Act 1998) within the legal profession,
- (f) promoting and maintaining adherence to the professional principles.

As set out in Section 2 of the 2010 Act, the professional principles are the principles that persons providing legal services should—

- (a) support the proper administration of justice,
- (b) act with independence and integrity,
- (c) act in the best interests of their clients,
- (d) maintain good standards of work,
- (e) where—
  - (i) exercising before any court a right of audience, or
  - (ii) conducting litigation in relation to proceedings in any court,comply with such duties as are normally owed to the court by such persons,
- (f) meet their obligations under any relevant professional rules.