



**THE LEVY:
FUNDING LEGAL SERVICES REGULATION**

**RESPONSE TO CONSULTATION ON
THE PROPOSED RULES TO BE MADE
UNDER SECTIONS 173 AND 174
OF
THE LEGAL SERVICES ACT 2007**

Introduction

1. On the 9th April 2009 the Legal Services Board [LSB] issued its consultation paper on the funding proposals for the LSB itself and the Office for Legal Complaints [OLC].
2. This is the response of the General Council of the Bar [GCB]; the Approved Regulator [AR] for the Bar in England and Wales which consists of just over 15,000 Approved Persons [AP] who are in both employed and self-employed practice.
3. The LSB is obliged under sections 173 and 174 of the Legal Services Act 2007 [LSA] to recover from the ARs the costs of implementation of both the LSB and OLC. In addition the LSB wish to cover the running costs of the LSB from January to March 2010. The running costs of the LSB from March 2010 will be subject to a separate consultation document to be issued in early 2010. At the same time the LSB propose to issue a consultation document on the running costs of the OLC, although that will take account of the decision that by then will have been reached on how it derives and apportions its revenue between the levy and case fees; that will itself have been the subject of separate consultation under section 136 LSA.
4. It is noted that the LSB expressly states that this consultation does not seek views on overall spend as this was covered in the LSB's draft business plan. In

any event the figures relied on for purposes of this consultation on funding were covered in the draft business plan and approved by Ministers. The GCB in noting the starting point of this consultation wishes to emphasise that the LSB has also committed to the 5 tenets of good regulation and in particular in this context being accountable and proportionate. The GCB wishes to make clear that it will examine and if appropriate question expenditure of both the LSB and OLC always seeking to ensure both that the LSB is accountable for what it spends and that what it spends is proportionate to the AR and the AP that are regulated by the ARs.

Overview

5. The GCB supports and recognises the strength of the arguments that provides for a different approach to the recovery of LSB-related costs from those incurred by the OLC.
 - a. A system of recovery that requires all APs to contribute to the new regime of regulation as implemented by the LSB is unexceptional and supported by the GCB.
 - b. A system of recovery that, in the first instance, recovers the running costs of the LSB for the first three months, based on the total number of APs across the regulated sector is a proportionate way of recovering the LSB running costs.
 - c. A system of recovery that requires in the first instance, and subject to further consultation on the “polluter pays” arguments which are to come, the implementation costs of the OLC should be recovered on the basis of the number of service complaints as a proportion of the whole regulated sector is proportionate and fair.
 - d. The GCB would wish to have the opportunity to comment further should the LSB decide to progress matters differently to the proposals which are in effect being adopted by this paper.

The Questions

6. The consultation seeks answers to 14 Questions, which we address hereafter.

Question 1

Can respondents see any areas where the definition of “fair principles” could be improved?

7. The GCB considers that the declaration of fair principles is perfectly acceptable as far as they go. It is however to be noted that the LSB appears not to be recognising the right of the ARs and the Approved Persons that are regulated to have complete transparency over the way that the Levy is spent and have the right in the spirit of the legislation to make representations on the way that the fair principles are translated into expenditure decisions.

Question 2

Are respondents content that the detailed mechanisms for the collection of the levy are detailed in individual Memoranda of Understanding [MOU] between the Approved Regulators and the LSB? What might such memoranda most usefully contain?

8. The GCB has always been concerned in the context of being able to fix the practising certificate fee [PCF] in time to enable the prompt collection from APs in January (for the self-employed Bar) and April (for the employed Bar) that the budget (which would now include the Levy requirements) is fixed no later than early November.
9. This would entail a consultation period concerning the levy to begin at the same time as the budget round begins at the GCB. This is in and around April. The importance of this occurring at the same time is to permit the AR to take into account the LSB/OLC requirements when applying the reasonably practical test to the BSB's budget for the following year and catering for its representative functions.

Question 3

We would welcome comments from Approved Regulators on the timetable for the first year

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Question 4

Are there other options in terms of timetabling we should consider?

10. The GCB does not accept that the costs for 2009/2010 need or should be recovered in their entirety by 28th February 2010. The GCB suggests that the recovery of implementation costs in year 1 (together with 3 months running costs of the LSB) should be no different to the recovery of the levy in subsequent years. In this context the GCB is opposed to an annual one lump payment and would wish to have the levy payable by instalments. Neither the LSB nor the OLC appear to have budgeted to reduce their requirements by reference to interest earned from monies on deposit. This is something that will become more important as interest rates start to move up (as they will). The GCB is used to budgeting based on income interest and as the AR it should be the beneficiary of that income.
11. It is important that the MOU contains the timetabling commitment on the part of the LSB and OLC for fixing the annual levy. It should also contain provisions for the payment of the Levy. It would be inappropriate for this to be payable in one "lump sum" and the GCB would suggest that the Levy is paid in quarterly instalments.

12. It is to be noted that the collection of the PCF from the APs is in two tranches with the self-employed bar obligated to pay during January and the employed bar obligated to pay in April. It follows that to require the GCB to pay the Levy by the 28th February would have a disproportionate impact on the cash flow of the GCB. Further, it is not necessary in the context of capital repayments being structured so that the Treasury is to be re-paid the implementation costs in an advantageous way compared to their expectations and some earlier suggestions that they might be prepared for those costs to be paid over 3 years or if there was a good case over a longer period.
13. The GCB notes the reference to the possibility that the MOJ may charge what is called a capital recharge of 3.5% and that therefore this might be an incentive for early payment. However this depends on the cost of money to the GCB and whether the MOJ does decide to raise such a charge. It would be quite wrong to agree a repayment schedule without having a clear understanding of all the relevant ingredients, including knowing if the MOJ will impose a capital recharge.
14. To summarise, the GCB does not consider that the levy should be paid in one lump sum in January/February as the consultation paper proposes. It is necessary for there to be discussion about the advantages and disadvantages of payment in one payment or by instalments, which is the preferred approach to payment of the AR. The importance of this decision will become more acute as interest rates rise.

Question 5

We would welcome views in what timetable the implementation costs should be recovered. We propose that the costs should be split 70% in the first year, 20% in the second year and 10% in the third year. Do respondents agree with this approach to cost recovery of the LSB and OLC implementation costs?

15. The GCB supports this proposal and recognises that the intention of the LSB in front-loading the implementation costs is to pick up on the low running costs in year 1 and the higher running costs as the LSB and OLC further their work in year 2 and 3.

Question 6

Do respondents agree that there are no suitable metrics for the assessment of regulatory risk to enable it to be used as an apportionment for the LSB costs in the short-term?

16. The GCB agrees that there are no suitable metrics for the assessment of regulatory risk in the short term for the costs of the LSB.
17. The LSB has been set up to deal with the regulation of the legal sector. That entails more than “merely risk” it engages such issues as education, approving

practice rules and looking at systems and implementation of the delivery of legal practice in its widest sense. Those tasks impact upon the whole of the legal sector. Each AR has at its heart the desire to achieve delivery of legal services in the public interest by a strong and independent legal services sector.

18. The only fair way for the LSB to raise its implementation costs as well as its day to day running costs thereafter, after proper consultation, is by reference to the totality of APs, then divided by reference to the number of APs regulated by a particular AR. In short, APs are a proxy for regulatory risk, which is a relative proxy for costs.

Question 7

Do respondents agree that there are no suitable metrics for the assessment of volume activity to enable it to be used as an apportionment tool for LSB costs to March 2010.

19. The GCB relies on its answer to question 6 in answer to this question.

Question 8

We would welcome views on the apportionment of costs based on the number of authorised persons and whether 1 April is a suitable date at which numbers of authorised persons are defined.

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Question 9

Are there options other than those canvassed in this paper for the recovery of implementation costs which should be explored further?

20. The GCB have made clear that it supports the apportionment of LSB costs now and in the future based on the number of authorised persons. It is assumed that the LSB would need to know the numbers of APs throughout the regulated sector and that therefore different dates may not be wholly suitable. However the following matters need to be considered:
 - a. The LSB does not need to know the totality of APs in the regulated sector until the very end of the levy assessment cycle, since that number will be used to divide up the budget provision in any particular year.
 - b. Each of the ARs will have intakes at different times of the year. In some it maybe that there is no ceremony to mark the addition of another AP or potential APs in others (such as the Bar) there will be such an occasion, Call to the Bar. The main month for Call to the Bar is July.

- c. The numbers of APs are published within the GCB each month.
 - d. In the light of the LSB proposal 1st April is as good a time as any although a final and later calculation, taking into account the July calls might be preferable.
21. The GCB submits that the approach of the LSB to raising the LSB levy is proportionate and therefore appropriate way to raising the costs of the LSB. The GCB does not consider that there is any other way to achieve proportionality as all ARs have a stake in ensuring that the LSB achieves its statutory purpose. It would be unfair therefore if the costs of the LSB were fall disproportionately on some APs.

Question 10

Do respondents agree that apportionment based on numbers of authorised persons in relation to OLC costs does not fit the fairness principles set out in Chapter 3?

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Question 11

We would welcome views on the suggested approach for collection of implementation costs for the OLC based on the number of complaints?

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Question 12

Are there options other than those canvassed in this paper which should be explored further for the apportioning of the implementation costs of the OLC?

22. The GCB, whilst firm in its view that LSB costs are a matter for equal recovery from all APs, does not consider that applying the same approach to the OLC would be fair and proportionate.
23. The GCB has long been of the view that the proven polluter should pay the costs of the OLC; however until that debate is had and concluded we accept that the fairest way in which the OLC costs be raised, at this stage, is by reference to the number of service complaints.
24. It might be better if this calculation was based on the number of proved service complaints as it could become as unfair to levy an AR according to unproved service complaints as it would be to levy an AR where complaints against its APs are levelled at another AR, such as in the case of ILEX and their APs conduct being the subject of complaints to the SRA, because of the role that ILEX APs have, for instance, in the practice of solicitors.

Question 13

We would welcome views on possible different approaches that might be adopted in the medium term.

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Question 14

Are respondents content with the proposed longer-term timetable for collection, set out in chapter 3(sic) - We assume this should be a reference to chapter 4

25. The GCB wishes as a stakeholder in the ethical and independent delivery of legal services in the public interest to pay its fair and proportionate share of the costs of regulation.
26. Fair and proportionate means that everyone who has a stake in the delivery of legal services must pay an equal share in the implementation and running costs of the LSB. The LSB will be overseeing all the ARs. The LSB costs charged to any AR will be reflected by the number of APs that are being regulated by a particular AR and therefore will necessarily be proportionate to the total cost.
27. The GCB is content with a timetable that permits its settled way of collecting the PCF (to which the Levy will be added in a transparent and clear way) to continue. The annual levy of the LSB and OLC must be set each year to enable it:
 - a. To be taken into account during the final phase of budget making by the GCB so that it can be considered in the final analysis as part of the overall budget of the BSB and Bar Council to ensure that the final sum is proportionate to the profession reflects what is fair and reasonable as a total sum and is not a disproportionate cost to either ARs or individual APs.
 - b. To be reflected in the PCF demands that are sent to the self-employed bar in time for collection in January.
28. The proposals set out at chapter 4.4 impose a regime of collection that is out of kilter with the current PCF and members services fee-raising regime of the GCB. It would be unnecessarily costly to have a collection round that is just for the LSB and OLC costs.
29. The LSB is therefore urged to permit a degree of flexibility in the Levy payment process such that takes account of the settled GCB income raising processes. This will entail (whether the payments are to be paid by instalments or not) a first payment in early February and at least a second payment from the employed PCF raising round in March/April in say, early May.

The draft levy rules

30. In closing the GCB would comment on the draft rules as follows:
- a. Rule 1(3) would be improved with the date set out rather than leaving the Board to specify the date.
 - b. Rule 2(1) the date by which the levy should be notified for the following year should be no later than the 1st September and not as proposed in this draft rule 1st October, this in order to ensure as long a timetable for the GCB to consult with the BSB and ensure that the whole budgetary process for all is fair, reasonable and proportionate.
 - c. In Rule 2(2) the proposed fixed date for payment of no later than 28th February is unacceptable. The employed Bar which represented an increasing number of APs is not sent their PCF invoices until March/April and therefore payment of the sums received by them would not be possible until May. It is unfair to expect the AR to carry the burden of paying the LSB whilst awaiting recovery from the employed Bar. The better approach, it is suggested, is for payment to be made to the LSB in four equal tranches during the course of the relevant financial year.
 - d. In Rule 3(1) the GCB does not agree with the date of the 28th February for the reasons set out above, otherwise the proposed rule is acceptable.
 - e. In Rule 3(2) again the 28th February is not acceptable and should be rewritten, as should the earlier rules where the dates appears, to permit staged payments.
 - f. In Rule 3(3) the GCB raises the same concerns as to the date in this rule but otherwise is content with the recovery proposals.
 - g. Subject to the better date for assessing the number of APs being July the GCB has no comment on the proposals contained in Rule 4.
 - h. The GCB has no comment on Rule 5 but would not wish by this acceptance to be understood to agree with the proposal for fixing OLC costs in the future. The fairer and more proportionate way of determining the costs of the OLC is by reference to the polluter pays principle. The innocent should not have to pay.