

The Levy: funding legal services regulation
Consultation on proposed rules to be made under sections 173 and 174
of the Legal Services Act 2007

Response by the Faculty Office on behalf of the Master of the Faculties, an Approved
Regulator

This paper responds to the questions raised in the Consultation Paper with additional comments as appropriate.

General

Question 1: Can respondents see any areas where our definition of "fair principles" could be improved?

Response

The Consultation Paper correctly refers to the mandatory obligation imposed by section 173 (3) of the Act under which "the Board must satisfy itself that the apportionment of the levy as between different leviable bodies will be in accordance with fair principles". This is an overriding duty in respect of the particular function of making rules for the imposition of a levy. There is nothing in the section saying that "fair principles should match the principles of better regulation" as is suggested in the second sentence of paragraph 3.1.

It is true that section 3 (3) of the Act provides that in discharging its general functions "the Board must have regard to (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed." However, "having regard to" these principles in the context of the specific function of making rules for a proposed levy is subject to the overriding requirement in section 173 (3) to act in respect of the apportionment in accordance with "fair principles". These principles of fairness thus apply when considering the meaning of "proportionate" and "consistent" in respect of any proposed levy.

The Consultation Paper has correctly recognised that in the interest of fairness there may need to be differentiation between Approved Regulators and their authorised persons in applying a levy in respect of implementation costs e.g. for the Office of Legal Complaints (see Chapter 6 option one paras. 6.7 to 6.11), but this power of the Board to apply fair principles in this respect is not spelt out in chapter 3 under "proportionate" or "consistent". In fact the definition of "consistent" assumes a requirement on the Board to use "common and relevant units of

measurement for all Approved Regulators." This can be interpreted as meaning that the Board will not differentiate between Approved Regulators even if the principles of fairness and proportionality justify them in doing so. But circumstances are not, and will not be, the same either in respect of a levy for implementation costs or for running costs for the LSB or the OLC, as the Board has recognised in this Consultation Paper.

It is recommended that bullet point 3 in paragraph 3.1 be altered to make it clear that

" the apportionment of the levy in question should be proportionate taking account of any different circumstances applicable to some Approved Regulators as compared with others."

Bullet point 4 should be altered to say

"we are consistent in how we apportion any levy amongst different categories of approved Regulators where the principles of fairness as well as proportionality justify the treatment of some Approved Regulators differently from others."

Question 2: Are respondents content that the detailed mechanisms for the collection of the levy are detailed in individual Memoranda of Understanding between the Approved Regulators and the LSB? What might such memoranda most usefully contain?

Response

Yes, it will be helpful to have an individual Memorandum of Understanding. If a per capita basis is used for raising a levy either this year or in future years the Memorandum should make provision for fluctuation in the number of notaries from whom the levy can be recovered through practising fees. It will also have to contain a reasonable time scale for payment by the Faculty Office to the LSB to cover instances where some practising fees are paid after the due date for renewal, which is currently 1 November each year. It should also deal with the circumstances in which an amount of the levy may be waived (section 174(7) (b)) e.g. on death or bankruptcy of an authorised person.

Timetabling

Question 3: We would welcome comments from Approved Regulators on whether this timetable we propose is achievable for the first year?

Response

As to the timetable for the year to 31 March 2010 (para. 4.3) the practising fee for notaries for the year commencing 1 November 2009 has already been fixed by an order issued by the Faculty Office. The introduction of a levy will necessitate the issue of a new Order or a

Supplementary Order to cover the cost whatever it may ultimately be.

Question 4: are there other options in terms of timetabling we should be considering?

Response

As to future years, the timetable proposed would be acceptable to the Faculty Office, assuming that notaries will have to contribute towards the cost of running the LSB, provided that the decision on the split of the levy is determined by the end of July each year. It is the usual practice for the Faculty Office to notify notaries no later than early September each year as to the fee for the practising certificate renewable on 1 November of that year.

Question 5: We would welcome views on 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 LSB and OLC implementation costs?

Response

The Faculty Office is only concerned with recovery of the implementation costs of the LSB as the Board, acting fairly, is not proposing to make a levy in respect of OLC implementation costs for Approved Regulators representing less than 0.1% of complaints (para. 6.12).

The principle of spreading recovery of the levy for implementation costs over 3 years has its attraction. However, there is apparently uncertainty (para.4.5) as to whether there will be an additional charge upon Approved Regulators to "bear the cost of capital recharge, which is currently set by the Treasury at 3.5% charged on the average balance in the year." It is unsatisfactory that the Consultation Paper is unable to say whether any such charge will be applied to implementation costs outstanding, because it will affect the total amount to be paid by the Regulators, authorised persons and ultimately the consumer. It is not possible to say whether the present proposal is the fairest solution when this information is lacking.

LSB Levy for implementation and running costs until the end of March 2010

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 tool for LSB costs in the short-term?

Response This is agreed.

Question 7: Do respondents agree that there are no suitable metrics for the assessment of volume activity to enable it be used as an apportionment tool for the LSB costs in the short-term?

Response

The answer to this question is inevitably in the affirmative because the LSB will not have been in operation for a sufficient period of time to collect material for the assessment of volume activity. However, in the longer term it would be fair and reasonable for the LSB to keep open the possibility of using volume of activity for the purpose of apportionment of LSB running costs. As is pointed out in paragraph 5.13 this would have to be done on a retrospective basis so that the previous year's work drives next year's apportionment.

Question 8: We would welcome views on the apportionment of cost based on the number of authorised persons and whether 1 April is a suitable date at which numbers of authorised persons are defined?

Response

The total figure of £4,458,700 in the table at paragraph 5.21 consists of 70% implementation costs (£3,318,700: para. 5.4) and £1,140,000 estimated running costs for the LSB for the period January to March 2010 (para. 5.4).

(i) Implementation costs:

Putting the two elements together and apportioning the total costs on a per capita basis produces a simple arithmetical solution but in doing so fails to give any consideration to the fairness of including the smaller Approved Regulators, with less than 1000 authorised persons each, within the levy for implementation costs.

As is well documented, the need for regulatory reform was primarily generated by problems over regulation in the larger branches of the legal profession, not least because they were exercising both representative and regulatory functions. The Faculty Office is and was distinctive in that as Regulator it has always been separate from the representative bodies of the notarial profession. At no stage prior to the passing of the Act was any criticism made of the regulatory system operated through the Faculty Office. The inclusion of the small branches of the legal profession, including notaries, within the new supervisory regulatory system set up by the Act was simply for uniformity across the various branches of the legal profession as a whole. For this reason, in view of the specific duty under section 173 (3) to apply "fair principles" the Board should be apportioning the implementation costs of the LSB in a

manner that reflects cost causation in relation to the need for setting up the Board. On this basis the Faculty Office should be excluded, together no doubt with other smaller Regulators.

We do not accept the suggestion in the Impact Assessment (para. 10.18) that a levy as proposed on a per capita basis "should not put a burden on the profession which would result in extra costs being passed to the consumer." We have repeatedly stated that the specialist service offered by notaries in different parts of the country does not in many instances generate much income but it is a facility which benefits the consumer by being available and accessible in their locality.

The Board expresses the view (para. 10.18) "We do not believe that the costs here would mean that the profession would need to increase costs." Whatever may be the situation with other branches of the legal profession, we have to say that an ever-increasing fee for a practising certificate (and this is only the commencement of the levy system) will inevitably increase costs for the consumer. If the costs cannot be passed on, it will have an effect upon the number of notaries finding it worthwhile to practise in some parts of the country and this will be to the detriment of the consumer.

(ii) Running costs

It is recognised that having been brought within the scope of the Act some element of the running costs of the LSB will inevitably fall upon the Faculty Office and thence the notaries. The figure of £1.140,000 is an estimate and a short term measure as emphasised in the Consultation Paper and on that basis the proportion of .63% is acceptable. The Faculty Office reserves its position in relation to making further representations about apportionment of the running costs of the LSB in the future.

1 April is an acceptable date for defining the number of notaries in practice, although it is nearly halfway through their practising year.

Question 9: Are there options other than those canvassed in this paper for the recovery of implementation costs which should be explored further?

Response

Apportionment of the implementation costs should be considered separately from apportionment of the running costs for the first quarter of 2010 for the reasons given in response to question 8. The Faculty Office and other small Approved Regulators should be treated on a 'cost causation' basis in respect of implementation costs of the LSB.

OLC levy for implementation costs

Question 10: Do respondents agree that apportionment based on authorised persons in relation to OLC costs does not fit the fairness principles set out in Chapter 3?

Response

This is agreed. It would be very unreasonable to base an apportionment on the number of authorised persons rather than on the number of complaints. Complaints against notaries are minimal, as is recognised in this Consultation Paper.

Question 11: We would welcome views on the suggested approach for collection of implementation costs for the OLC based on the number of complaints?

Response

This seems a fair and proportionate approach.

Question 12: Are there options other than those canvassed in this paper which should be explored further for the apportioning of implementation costs for the OLC?

Response

None that would be as fair.

Longer-Term Options

Question 13: We would welcome views on possible different approaches that might be adopted for the medium term?

Response

Implementation costs should be apportioned on a 'cost causation'¹ principle for the LSB as well as the OLC. This would reflect the fact that the notarial profession was brought within the remit of the LSB simply for uniformity of supervisory regulation across the legal profession and not because of any fault in the regulatory system operated by the Faculty Office. Notaries are not part of the mainstream of legal service providers dealing with English law. They offer specialist knowledge and assistance in respect of notarial acts required by civil law jurisdictions in the rest of Europe and further afield. It is not fair to consumers that they should have to pay more for the services of a notary because of the decision to include notaries as authorised persons within the Act.

Question 14: Are respondents content with the proposed longer-term timetable for collection, set out in Chapter 3?

Response

This appears to be a reference to Chapter 4 not 3. The Faculty Office would accept this timetable subject to the proviso stated in response to Question 4 above that the decision on the split of the levy is determined and publicised by the end of July each year. The Board should be required to give notice to the Approved Regulators no later than 1 September of the relevant financial year rather than 1 October as proposed for rule 2 (Chapter 8). This is to enable the Faculty Office to carry out the necessary administration for the inclusion of the levy as part of the cost of a notary's practising certificate to be renewed on 1 November.