

The Levy: Funding Legal Services Regulation

The Law Society response to the Legal Services Board consultation

Introduction

1. The Law Society welcomes the opportunity to respond to the Legal Services Board consultation on apportionment of Levy expenditure for the establishment of the Legal Services Board and the Office for Legal Complaints, and the running costs of the Legal Services Board until the end of March 2010.

Background

2. The Law Society accepts that the costs of regulating legal services should in general be borne by the regulated sector itself (and thus ultimately by users of legal services) rather than being borne primarily from public funds. That is already the case with the costs of front line regulation carried out by the regulatory arms of the Law Society, the Bar Council, and the other regulators.
3. However, the Law Society considers there is a strong case for the cost of the supervisory regulation provided by the Legal Services Board to be shared between the regulated sector (and thus its clients) and public funds, as applies in other sectors. The Law Society believes a similar approach should be taken to the cost of introducing the new arrangements.
4. Sharing the cost of the supervisory tier in this way would have a number of advantages. First, it would be a concrete demonstration of the fact that regulation is intended to serve the public interest, rather than merely being a matter of concern to the regulated sector itself. Secondly, it would give the Government – which is a far better position to influence the costs of the Legal Services Board and the Office for Legal Complaints – a stake in ensuring that the costs were no greater than necessary. Thirdly, it would reflect the current position, under which the costs of the Legal Services Ombudsman, and the costs incurred by other supervisory regulators, are met from public funds rather than being recharged to the regulated community.
5. This argument was accepted by Sir David Clementi who commented on the issue as follows:-

“The issue arises as to how the LSB should be paid for. At present a substantial part of the oversight function is paid for by the State: judicial oversight falls to the taxpayer, as does the cost of the oversight function carried out by the Government departments. The arguments in favour of the Government contributing to the cost of oversight functions, beyond the fact that it does already, are:-

- That the LSB, in pursuit of its objectives set out in Chapter A such as ‘access to justice’, has a wider role in the public interest than the oversight of practitioners in the legal sector; and

- That an element of payment by other than the bodies being regulated confirms that the regulator is independent of the regulatee.

There is an interesting precedent in the proposed funding of the Financial Reporting Council. Its funding is to be split, two thirds falling to the private sector and one third to Government. How the split should be made between the private sector and Government for the LSB would need to be covered in statute and would, therefore, be the subject of Parliamentary scrutiny.”

6. The Joint Committee examining the draft Legal Services Bill made similar comments in respect of the start up costs of the new arrangements.
7. However, the Government remained determined that, with the exception of some internal costs to the Ministry of Justice in working up the new arrangements, all the costs both of implementation and for running the new bodies should be met by the regulated sector, and thus by users of legal services.
8. That was a regrettable decision, sharply different from the approach which had been taken when new regulatory arrangements were introduced in other professional sectors. The fact that all the costs incurred by LSB and OLC in implementing the new arrangements will be recharged to the professional bodies places even greater importance on the need to ensure that costs are properly controlled, and that a fair basis is found for apportioning them between the different approved regulators concerned.
9. The Law Society comments on the key issues raised in the consultation paper in the following paragraphs. The Society’s response to the LSB’s detailed questions are set out in the Annex to this response.

Overall approach to Apportionment

10. In the Law Society’s view, there are broadly two approaches which can sensibly be taken to the apportionment of costs.
 - Apportionment according to the number of authorised persons regulated by each approved regulator/
 - Apportionment according to the proportion of work undertaken by LSB or OLC which is attributable to each approved regulator, or its members.
11. In principle, the Society prefers a system under which the costs are apportioned according to the level of activity attributable to each approved regulator or its members. However, the Law Society recognises that that approach can more practicably be adopted so far as running costs are concerned. It cannot readily be adopted for implementation costs for the Legal Services Board. Accordingly, the Law Society broadly supports the approach suggested by the Legal Services Board to apportionment of costs.

Timing of the Levy

12. The Legal Services Board proposes that 70% of all establishment costs for the LSB and OLC should be paid in February 2010. The Law Society considers that to be inconsistent with the Ministerial commitment given to recover implementation costs in a phased way, over at least three years. Any sensible interpretation of that commitment would lead to the levy being collected in equal instalments over the collection period.
13. Furthermore, it is far from clear that 70% of the costs of implementing OLC would be spent by February 2010, let alone by November 2009 when the Law Society would need to collect the sums from its members. It cannot be right for the approved regulators or their members to be expected to pump prime the establishment of the OLC.
14. There would also be significant practical implications from the proposed front loading collection of the levy. In the Law Society's case, significant additional expenditure in relation to regulation is already likely to be needed over the next 10 months. The Law Society faces its own costs arising from the closure of the Legal Complaints Service, as well as a need for substantial additional investment in the SRA Enabling Programme, and in the SRA's work to prepare to be a licensing authority for alternative business structures, and to improve the way in which corporate firms are regulated. These demands come at a time when the Law Society's income from Practising Fees is likely to decline sharply, as a result of the reduced number of solicitors following the impact of the recession on law firms.
15. For these reasons It is not reasonable to expect Law Society members to meet the costs of implementing the new regulatory arrangements on a significantly faster time table than had been assumed as a result of the Ministerial commitment.

Next Steps

16. The Law Society would be happy to expand on its views in further discussion with the Legal Services Board, if that would be helpful.