CLC Response to the Legal Services Board's consultation on proposed practising fee rules

October 2020

Introduction

The draft revised practising fee rules provide greater clarity around the LSB's expectations in relation to applications from the frontline regulators to set practising fees. However, setting out so much of the application process in rules may prove an obstacle to proportionality as it limits the ways that regulators can achieve the LSB's desired outcomes from the application process.

A large part of the thrust of the rules relates to ensuring that the fees that are collected by front line regulators are for use within the permitted purposes. This is not an issue at all for the CLC which only carries out regulatory work and is not part of a larger organisation that runs other activities that may or may not fall within the permitted purposes. As such, we hope and expect that a lighter touch approach could be taken by the LSB to practising fee applications from the CLC. There is an explicit statement that Rule 14 only applies to those approved regulators that discharge both regulatory and representative functions. This implies that all the other rules apply equally to all approved regulators, which seems potentially disproportionate.

Some of the requirements set out in the new rules appear unnecessarily onerous, especially in the context of the LSB's other work to assess the performance of the frontline regulators (FLR) and measures that the regulators themselves may have in place. For example, the CLC has a rigorous rolling programme of internal audit and has its accounts externally audited in line with International Finance Reporting Standards. Again, we hope and expect that the LSB's work assessing practising fee applications could take account of such measures as well as the findings of its own regulatory performance assessment as part of the practising fee application process rather than requiring the creation and reporting of new data or the repackaging of information already provided to the LSB for other purposes.

It would be useful to have an understanding of the LSB's assessment of the impact of the draft rules and an assurance that the burden they will place on regulators is proportionate to the benefits that will accrue to the client and public interest. The extensive scrutiny of FLR's activity planning and budgeting that is set out in the draft rules risks being over-prescriptive and limiting the FLR's freedom to meet the regulatory objectives in the ways that seem best to that FLR.

Responses to consultation questions

Question 1: Do you have any comments on the above draft Rules 1 to 12? Do you have any comments on the associated Guidance?

Draft rule 8 h provides helpful clarification. We do not have any other comments on rules 1 to 12 or the associated guidance

Question 2: Does the overarching criteria in draft Rule E13 adequately set out the LSB's expectations of Approved Regulators when considering a practising fee application? Are there other criteria which should be included? Do you have any comments on the associated draft Guidance?

Rule E13 is clear in setting out the LSB's expectations however, as they seek to define the approach to the application, it might be more appropriate for the contents of this rule to be transferred to guidance to allow FLRs to meet the outcomes in the ways that align best with their own policies and procedures. This rule appears in places to duplicate provisions elsewhere in the rules. For example, 13 a appears to be covered by rules 15, 16 and 17, 13 b by rules 24 and 25.

Question 3: Do you have any comments on draft Rules F14 to 16? Do you have any comments on the associated draft Guidance?

We note that Rule 14 will not apply to the CLC but can see the importance of his provision in relation to other approved regulators.

We consider that the CLC is accountable both to the LSB and the regulated community for the effective discharge of its functions in several ways that make the provisions of rules 15 and 16 unnecessary. We account directly to the LSB through the annual regulatory performance assessment. Our published accounts are prepared to the International Financial Reporting Standards and published alongside our annual report that sets out the work that we have undertaken in the previous year.

Rule 15 seems to be intended to enable the LSB to second-guess the resource allocation to different activities that has been agreed by the FLR's staff and governance. This seems to militate against an outcomes-focused approach that gives FLRs flexibility. If the LSB believes it needs this information to police the separation of representative and regulatory work, then it should be applied only to the relevant approved regulators.

Rules 17 and 18

The consultation document does not pose any questions in relation to draft rules 17 and 18. In the current state of economic uncertainty, we must recognise that accurate forecasting may be very difficult. The CLC makes such forecasts and indeed considers a range of possible scenarios to inform its fee-setting. This is especially important as we have implemented a policy of setting a deficit budget for a number of years to reduce excess reserves. However, we hope that the LSB will recognise that medium-term forecasts such as these cannot be used to bind FLRs in the coming years.

Question 4: Are draft rules H19 to 23 clear? Do you have other comments on these draft Rules or comments on the associated draft Guidance?

These draft rules are clear. However, we must recognise that the global economy is currently in uncharted waters and the impacts on the legal services the CLC regulates, the regulated entities and their clients are still subject to a very wide range of possible scenarios. There is every possibility that receipts could be impacted significantly just as costs increase as regulated entities come under stress and risk to clients may increase. Public policy responses to the economic situation could have a very significant positive impact, however. In setting our reserves policy, we are acutely aware that we

may need to respond quickly to changing circumstances and the LSB must recognise that our planning assumptions and thus our policies may evolve rapidly. We cannot be held to medium-term forecasts made today when we come to set future practising fees.

As with budget setting, this draft rule seems intended to provide information to allow the LSB to decide whether the reserve setting policy is appropriate.

The LSB seems to take a narrow view that reserves levels need to be reduced, whereas the governing body has to consider the wider economic position of the organisation and whether the 'going concern' assertion is met. This is an important consideration as our unqualified audit opinion from external auditors under the International Financial Reporting Standard is dependent on it. It is important that the governing body has the freedom to ensure that it is able to apply unfettered and appropriate governance of the organisation without outside interference. This of course includes the responsibility to the regulated community to ensure fees (and reserve accumulations) are kept at the lowest sustainable levels in the client and public interest.

Having the LSB make its own determination on that issue seems not to meet the test or proportionality nor allow for independent decision making by FLRs. If the LSB believes it needs this information to police the separation of representative and regulatory work, then it should be applied only to the relevant approved regulators.

Question 5: Do you have any comments on draft Rules I 24 and 25? Do you have any comments on the associated draft Guidance?

Our only comment on these rules is to observe that they do not seem to require a disaggregation of costs by each activity. An overall budget envelope to set alongside the planned activities seems the right level of detail for consultation purposes and for reporting to the LSB in place of the line-by-line costing require by draft rule 15.

Question 6: Are Rules J 26 to 30 regarding initial and full impact assessments clear? Do you have any comments on the associated draft Guidance?

These rules are clear and the guidance is helpful. We consider that the LSB could usefully convene a cross-regulator group to develop best practice in this area and to look at how EIA and RIA can be applied to the work of the LSB as the impact of the LSB's requirements on FLRs cascades to regulated entities, authorised persons and their clients.

Question 7: Does the criterion set out at draft Rule K 31 adequately explain the matters which the LSB requires to be satisfied to approve a practising fee application? Are you content that the Rule on the interim collection of practising fees has been omitted from the draft Rules? Do you have any comments on draft Rules K 32 and 33?

We are content with the provisions in these draft rules.