



MASTER OF THE FACULTIES

THE FACULTY OFFICE OF THE ARCHBISHOP OF CANTERBURY

A RESPONSE TO THE LSB PROPOSED PRACTISING FEE RULES

Introduction

The Legal Services Board (LSB) launched a consultation on its proposed Practising Fee Rules 2020 to replace the Practising Fee Rules 2016 inviting responses from, inter alia, Approved Regulators. The Master of the Faculties (MoF) is the Approved Regulator for Notaries Public in England & Wales. The day to day regulatory functions of the MoF are carried out through the Faculty Office of the Archbishop of Canterbury (FO) of which the Master is the senior officer. There are approximately 750 Notaries Public practising in England and Wales and the MoF is, therefore, one of the smaller Approved Regulators with a commensurately small staff team at the FO.

Any significantly greater requirements imposed on Approved Regulators as a whole on a 'one-size-fits-all basis' has a disproportionately greater impact on the resources of the smaller regulators requiring either additional resources to be bought in, with the commensurate additional regulatory costs which must be borne by the regulated community and, ultimately, the consumer or diverting existing resources away from other aspects of the work of regulation.

Whilst the MoF/FO broadly support the outcomes which the LSB are seeking through the bringing in of the new Rules and Guidance, we have concerns that some of the proposals are disproportionate and will result in significant additional costs and potential problems as regard the timetable for lodging applications for PCF approval and decisions.

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 Do you have any comments on the associated draft Guidance?

Rule A1: Definitions – we have no comments on this rule or the associated draft guidance.

Rules B2 to 4: Application and Guidance – we have no comments on this rule or the associated draft guidance.

Rules C5 to 8: Legal Framework – we are broadly content with these rules and the associated draft guidance. There are, however, two specific issues which we would raise:

- Rule 8b provides that the payment of a levy imposed on the approved regulator under the Act is a permitted purpose. The LSB will be aware that many of the approved regulators are also professional body supervisors under the Money Laundering and Counter Terrorist Financing Regulations and a levy is also imposed by the Office for Professional Body Anti-Money Laundering Supervision (OPBAS) and the government are considering additional levies to fund

SARs reform. Unless the LSB considers that payment of these levies and any associated costs fall within Rule 8a, it will be necessary to ensure that payment of all statutory levies imposed on approved regulators fall within permitted purposes.

- Whilst the provisions of draft Rule 8(h) provide, as indicated, enhanced clarity as to the ability of Approved Regulators to use the practising certificate fee income for the Permitted Purpose of *"prevent(ing) any person who is not a relevant authorised person and/or does not hold a current relevant practising certificate, purporting to be such a person or to hold such a certificate,"* in practice this does not address the lacuna in the Legal Services Act 2007 (the Act) as to the appropriate investigation and prosecuting authority for the offences set out in Sections 14 to 17 of the Act. We are aware of a single (and ultimately, unsuccessful) prosecution brought by the Police and Crown Prosecution Service against an individual who undertook a small number of notarial acts whilst not being in possession of a current relevant practising certificate. Other attempts by the FO and others to report incidences of breaches of Section 14 have not resulted in any action being taken. The FO and, we suspect, other smaller regulators do not have the staff resources nor the statutory authority to pursue investigations and/or prosecutions notwithstanding the inclusion of this provision amongst the Permitted Purposes.

Rule D9 to 12: Procedure – whilst we welcome guidance on the information which the LSB considers helpful in assisting it to determine applications for Practising Fee Approval we are concerned at the prescriptive nature of the required format for submitting applications and the information which must be provided. We do not consider that such a one-size-fits-all approach is proportionate or outcomes focussed.

Contrary to what the consultation document states, Rule 10 does not set out the time limit for the LSB to determine an application but rather provides that it will "notify the approved regulator.....of the estimated time period in which a decision will be provided." Whilst the draft Guidance notes that the LSB "will aim to make a decision within 28 calendar days." Given that Rule 11(b) gives the LSB broad scope to unilaterally extend its own estimated time period, we consider that Rule 10 ought at least to provide for a decision to be made within 28 days, unless rule 11(a) applies and that rule 11(b) ought to provide that there be 'good and substantive reason why the Board is unable to make a decision. Any substantial delay in a decision being made can have significant knock-on effects on the practising certificate renewal process itself.

Question 2: Does the overarching criteria in draft Rule 13 adequately set out the LSB's expectations of Approved Regulations when considering a practising certificate fee application? Are there other criteria which should be included? Do you have any comments on the associated draft Guidance?

Rule 13 – we do have some concerns at the level of detail which is being sought but we will address these under questions 3-5 below.

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

Allocation of the Practising Fee Funds and the Permitted Purposes – Rule 14 does not apply to the MoF/FO as we have never had any representative function. Rules 15 and 16 and the associated draft

Guidance require a degree of granular detail which, as a smaller regulator without an extensive staff working within clearly defined departments undertaking specific aspects of regulatory activity, will be difficult to distinguish and quantify. The Master, Registrar, Deputy Registrar, Chief Clerk and newly appointed Deputy Chief Clerk and our administrative support are a small and agile team all of whom are engaged in the full panoply of regulatory activity but allocation of the costs between the discrete activities would be extremely difficult.

Note that the largest regulatory cost will always be staff pay, employer's pension contributions and national insurance. Cost of premises, insurance, heating and lighting and IT will be often be fixed costs. To divide these costs amongst regulatory activities would be fraught with difficulty and largely artificial. Much of what the FO does and we suspect that it is the same for other approved regulators is to respond as effectively as possible to the situations to hand in an effective and intuitive manner. A hypothetical example may be worthy of mention:

A member of the team is invited to speak at a conference of notaries. 50% of all notaries are expected to be present. There is a cost of staff time to this and also a train fare to pay. Some printed materials are also made to hand out to the notaries with some guidance notes and regulatory news (this is a cost to stationery). While the team member is away, other staff members will cover that person's operations and are taken away from their usual work. It is an early start, and the team member was writing the speech the previous night (out of normal working hours). The team member decides that their speech will cover new transparency requirements, anti-money laundering and growing diversity in the profession. The subject of the written speech covers a myriad of permitted purposes and regulatory activity. In the question and answer session, further topics are raised. These engage the same and perhaps other permitted purposes and regulatory activities. After the speech, the team member is approached by several notaries who have questions or information to impart. One is concerned about a potential fraud that they have information about (someone has been using a facsimile of the notary's seal on documents). The team member expresses concern and takes down the information; later to share the information with the City of London Police. Another notary has been waiting for their practising certificate. The team member is able to confirm that the notary has sent in the previous year's PI cover confirmation and not the current year's and if they are able to send that to the team member by email, the practising certificate should follow. There is also some dead time and time taken to have lunch and make a personal phone call. On the way home on the train, the team member checks their email, takes some telephone calls (there is a cost to this) on a number of matters including an information request made by the Legal Services Board and another by HM Treasury. The team member also buys a coffee and roll at the train station and puts this down as an office expense as they are away from home, the connecting train has been delayed and the weather is cold.

The above is an everyday example of a "day in the office" of a member of the FO staff. The invitation to the conference was issued after the budget for the year was set. The FO staff member would have considered the day well spent, as it allowed the FO to make an in-person presentation to a large number of notaries and had some very helpful interactions where they got to learn more about the problems and opportunities facing notaries and imparted advice. Office life is full of these activities and it would be unrealistic ahead of each year to be able to anticipate them. Much of what a regulator does is to respond to events, and events which engage a myriad of permitted purposes and regulatory activities, all potentially having a cost to staff time, premises and other costs. For that reason we would encourage the LSB to adopt more holistic understanding to the work of a regulator and appreciate that not everything can and should be categorised, especially not before the budgetary year has even

begun. Clearly, big projects such as taking on a whole new staff member to do a dedicated piece of work or a significant spend on a new website can be clearly accounted for and tracked against budget but much of the worthwhile day to day work is less amenable to prescription.

Rules G17 and 18

Although no specific question is asked about draft rules G17 and 18, or the related guidance, we would make the following points:

- Rule 17 – we would question whether 2% represents a 'significant variance' in income or expenditure, particularly for smaller regulators where 2% in real monetary terms represents a relatively small sum. We accept that a significant variance ought, properly, to be explained but to prescribe what the LSB considers significant rather than allowing approved regulators to determine for themselves what represents a significant variance seems disproportionate.
- LSB and OLC levy – see also our comments about other statutory levies above

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?

We believe the rules are clear.

Question 5: Do you have any comments on draft Rules I24 and 25? Do you have any comments of the associated draft Guidance?

We regard the aims of the Rules and Guidance as being sound. However, the challenges around obtaining meaningful engagement from busy professional people should not be underestimated. The example given of barriers to participation, short consultation periods, is not in our experience relevant. Most people who respond to our consultations tend to do so within the first week or so and the longer and more detailed a consultation is prepared, the lower the level of response we would normally achieve.

The level of engagement is not, in our view, always proportionate to the level of resources put into preparing the consultation and pursuing engagement and should not necessarily lead to, or equate, to concerns about meaningful and effective consultation and engagement.

Question 6: Are Rules J26 to 30 regarding initial and full impact assessments clear? Do you have any comments on the associated draft Guidance?

This is the aspect of the new draft Rules about which we have the greatest concern. Whilst we are very supportive of the aim of ensuring that approved regulators give meaningful consideration to equality issues, the new requirement to undertake an initial Equality Impact Assessment and an initial Regulatory Impact Assessment (and thereafter and full EIA/RIA if the initial EIA/RIA finds an adverse impact) regardless of whether any increase (significant or otherwise) in the level of practising fee is proposed is itself potentially disproportionate and no explanation of how it is intended to achieve its aim of ensuring that approved regulators strive to deliver better, proportionate regulation is provided. The draft Guidance gives no information on what the LSB expect an initial EIA/RIA should include.

The timescale between the end of our financial year, the finalisation of annual accounts, budget setting processes, consultation and application to the LSB for approval in time for the annual round of practising certificate renewal is already extremely tight. In a small profession, made up principally of sole practitioners whose practising certificate fee is now based on annual turnover the time and cost of conducting an EIA in our submission disproportionate. We accept that an RIA may be of more relevance, particularly if a significant increase in the annual practising fee is proposed but this should only be a requirement in such circumstances. We would urge the LSB to reconsider this requirement so that it applies in a proportionate way so that the Regulatory Burden, and related Regulatory Cost, can be kept in check.

Question 7: Does the criterion (sic) set out at draft Rule K31 adequately explain the matters which the LSB requires to be satisfied to approve a practising fee application? Are you content that the Rule for the interim collection of practising fees has been omitted from the draft Rules? Do you have any comments on draft Rules K32 and 33?

The criteria set out in draft Rule K31 are clear although there is scope for conflict between criterion c. and criterion d. but it is accepted that both are necessary.

The omission of a rule permitting collection of an interim practising certificate fee has the potential for being problematic. In the event that the LSB refused to accept the entire practising certificate fee as provided for in draft Rule 32a, the impact on the timescale for the annual practising certificate renewal round would be very difficult. Whilst the challenges of collecting part of the annual fee and then going back to the regulated community for a 'top-up' fee later in the year cannot be underestimated, the knock-on effects of amending the entire timetable for the annual collection of practising certificate data, in addition to the fee, would be very substantial, particularly for a smaller regulator such as the MoF.

The practising certificate is valid for a year and the annual renewal is not only the opportunity for us to collect the fee, but also to ensure that CPE requirements have been met, to collect information on complaints, turnover and other regulatory information such as calling in risk assessments, diversity data etc. If this were delayed it would significantly affect resourcing for the following year.

The Faculty Office
8 October 2020