Tunbridge Wells, Tonbridge and District Law Society

Response to the Legal Services Board Consultation on proposed rules to be made under sections 173 and 174 of the Legal Services Act 2007.

This response to the consultation has been prepared for and on behalf of the Council of the Tunbridge Wells, Tonbridge and District Law Society. Due to the time available for responses to be given to the consultation, these responses have not been considered by the full council of the Tunbridge Wells and Tonbridge and District Law Society.

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

Answer:

It is our view that the LSB should act in accordance with the rules of natural justice and these require that it should be transparent in all its dealings in connection with the levy. As a general principle we would disagree with the manner in which the LSB has decided to impose separate levies for each of the expenditures distinctly incurred pursuant to sections 173 (1) (a), (b) and (c). In this respect we considered the wording of section 173(1) of the statute to be unambiguous. That there should be one levy which is calculated in accordance with the principles of the section, "… rules providing for the imposition of a levy … for the purpose of raising an amount corresponding to the aggregate …". It might assist here to set out section 173(1) in its entirety.

> 173 The levy
>
> (1) The Board must make rules providing for the imposition of a levy on leviable bodies for the purpose of raising an amount corresponding to the aggregate of—
>
> (a) the leviable Board expenditure,
>
> (b) the leviable OLC expenditure, and
>
> (c) the leviable Lord Chancellor expenditure.
>
> (2) A levy imposed under this section is payable to the Board.
>
> (3) Before making rules under this section, the Board must satisfy itself that the apportionment of the levy as between different leviable bodies will be in accordance with fair principles.
>
> (4) The Board may not make rules under this section except with the consent of the Lord Chancellor.
>
> (5) "Leviable body" means—
>
> (a) an approved regulator,
>
> (b) the person designated under section 5(1) of the Compensation Act 2006 (c. 29) (the Regulator in relation to claims management services), or
>
> (c) any other person prescribed by the Lord Chancellor by order.
>
> (6) The "leviable Board expenditure" means the difference between—
>
> (a) the expenditure of the Board incurred under or for the purposes of this Act or any other enactment (including any expenditure incurred in connection with its establishment and any expenditure incurred by it in its capacity as an approved regulator or its capacity as a licensing authority), and

(b) the aggregate of the amounts which the Board pays into the Consolidated Fund under section 175(1)(a), (c) to (e) and (k) to (m) or by virtue of regulations under paragraph 7(g) of the Schedule to the Compensation Act 2006.

(7) The "leviable OLC expenditure" means the difference between—

(a) the expenditure of the OLC incurred under or for the purposes of this Act (including any expenditure incurred in connection with its establishment), and

(b) the aggregate of the amounts which the OLC pays into the Consolidated Fund under section 175(1)(g), (h) or (n).

(8) But subsection (7)(a) does not include such proportion of the expenditure of the OLC incurred under or for the purposes of this Act as may reasonably be attributed to the exercise of its functions under sections 164 to 166.

(9) The "leviable Lord Chancellor expenditure" means any expenditure incurred by the Lord Chancellor in connection with the establishment of the Board or the OLC (including expenditure incurred under or for the purposes of paragraph 10 of Schedule 22 (Interim Chief Executive of the OLC)).

(10) But the leviable Lord Chancellor expenditure does not include any expenditure under section 172 (funding of Board and OLC).

(11) In subsection (5) the reference to "an approved regulator" does not include the Board where it is designated as an approved regulator under section 62.

We take the view that the LSB may not be entitled to adopt the proposed separate levies.

Further, we are concerned that where there are distinct sources of funding that each of the LSB and OLC will compete with one another in terms of creating a permanent establishment; perhaps also wishing to compete with the Lord Chancellor's department. Placing a single levy on the entirety of the work of regulation would, in our considered view, lead to lower costs than having three organisations with separate and distinct sources of funding.

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?

Answer:

We are of the view that the rules should be clear and unambiguous and apply to all regulated functions. The Consultation suggests that there may be a distinction drawn between one Approved Regulator and another, which would be unacceptable. In these circumstances the LSB needs to make clear the reasons why it believes there should be a need for separate memoranda of understanding (MOUs) between it and the various Approved Regulators.

In the experience of those of us responding to this Consultation MOUs are statements of basic principle creating a framework for subsequent detailed contractual negotiation. We are of the view that despite the tight timetable for implementation a set of rules understood by all the Approved Regulators would be preferable to a kind of civil law approach, whereby principles are asserted and the detail imposed by the organ of the state. We question why the LSB wishes to negotiate several MOUs with the various Approved Regulators when this is likely to involve greater resources over a longer period than agreement of one set of rules. The details for the mechanisms for the collection of the levy should be readily ascertainable in order to be transparent.

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

Answer:

This is a question directed at Approved Regulators, although we are of the view that proposals are now made in such a hurried manner that it is very difficult for busy members of the profession to keep on top of the various consultations and proposals.

Question 4 – Are there other options in terms of timetabling we should be considering?

Answer:

This is a question directed at Approved Regulators.

Question 5 – We would welcome views on what timetable the 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?

Answer:

Bearing in mind the current economic conditions the proposal in relation to the recovery of costs appears somewhat misguided. We would have anticipated that these costs would either have been recovered on a straight line basis over three years at 33.3% per annum or they would have been recouped over a longer period in view of the additional burdens on the practitioners who will be required to pay for the costs of the SRA in addition to the establishment of the LSB and OLC from the outset.

We see a considerable danger in the costs of regulation remaining steady for the first three years as the huge contribution of 70% reduces in years two and three but the costs of running the bodies increase over that period. In our view there will be an incentive to remain at a stable figure which will, no doubt, lead to calls from the LSB and OCL for increases in the levy thereafter.

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?

Answer:

There is no evidence concerning suitable metrics for the assessment of regulatory risk to enable it to be used as an apportionment tool for LSB costs in the Consultation. The apportionment of LSB costs in the short-term is not something upon which we can take a considered view at present nor in the absence of evidence. This is something which can be considered further after the first three years.

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 in the short-term?

Answer:

There is no evidence concerning suitable metrics for the assessment of volume activity to enable it to be used as an apportionment tool for LSB costs in the short-term. Nevertheless, over time the time spent in dealing with particular Approved Regulators must be something to be borne in mind in any apportionment of the costs of running the LSB. We are of the view that the question of suitable metrics for the assessment of volume activity can be revisited after three years, and in the light of experience.

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

Answer:

It appears to be a sensible approach to apportion the costs of the implementation and running of the LSB be based on number of authorised persons in each of the regulated

professions. As to the date, the Practise Year commences on 1st November and we question whether either date is preferable for these purposes.

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

Answer:

We do not think it is within our competence to comment on matters of detail in respect of one aspect in isolation of others. We think this should be a matter which is given due consideration by representatives of the Law Society of England and Wales.

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?

Answer:

It is our view that the costs of the OLC should be self-funding, as far as practical, and the the incidence of complaints and not the number of professionals should be the basis of any apportionment of costs. Nevertheless we remain of the view that there should not be a separate levy in respect of the OLC and any shortfall should be met out of the single LSB levy.

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

Answer:

We are in agreement with the principle of the apportionment of the costs of implementation of the OLC to all Approved Regulators based on the number of complaints.

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?

Answer:

Quite possibly there are other options other than those canvassed in the Consultation which should be explored further for the apportioning of implementation costs for the OLC. However, we have not been given time or resources to explore this aspect further. We suggest this should be a matter which is given due consideration by representatives of the Law Society of England and Wales.

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

Answer:

We do not think it is within our competence to comment on matters of detail in respect of one aspect in isolation of others. We think this should be a matter which is given due consideration by representatives of the Law Society of England and Wales.

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

Answer:

We think this should be a matter which is given due consideration by representatives of the Law Society of England and Wales.

Robert Ryder, President,

Tunbridge Wells, Tonbridge and District Law Society

and

Martin Varley, Chairman Regulatory Sub-Committee,

Tunbridge Wells, Tonbridge and District Law Society

1st July 2009