



## **The Levy: funding legal services oversight regulation**

Comments from ACCA  
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### ***General comments***

1. ACCA welcomes the opportunity to comment on the consultation on the proposed rules (leviable operational expenditure) to be made under sections 173 and 174 of the Legal Services Act 2007 ('the Act').
2. Three options have been suggested for apportioning the leviable operational costs between the approved regulators, and we believe that these options should provide a useful range of alternatives on which to base a productive consultation. We also believe that it is right to observe the principles of better regulation when allocating costs in accordance with 'fair principles'. Most importantly, we believe that the allocation of costs should be proportionate, and the work done by the Legal Services Board (LSB) and the Legal Ombudsman to generate those costs should also be proportionate and targeted.
3. A proportionate allocation of costs may best be achieved by identifying:
  - a. how those costs have been generated, and
  - b. who has benefitted from the activities giving rise to the costs.

In gathering this data, it will, inevitably, be necessary to rely on approximations, and this understanding has shaped our views expressed below.

4. An allocation of costs based solely on the volume of activity generated by each approved regulator may result in a relatively high absolute cost being allocated to an approved regulator with very few authorised persons (especially likely in the early years of authorisation). There is a risk that such an approved regulator would not be able to recover all of its allocation of the levy from its authorised members, and such a risk might deter an approved regulator from entering the legal services market. This would not be compatible with the recommendations of Sir David Clementi, and the subsequent opening up of the legal services market.
5. ACCA believes that the basis on which the costs of the LSB and the Legal Ombudsman are allocated, during the period covered by this consultation and subsequently, must show sufficient regard to those approved regulators that do not fall within the definition of 'Applicable Approved Regulator'.

## ***Specific questions***

**Question 1:** Do respondents agree that the LSB's levy should be calculated on the estimated leviable expenditure and paid by 31 March 2011?

6. ACCA believes that it is important for the approved regulators to be able to budget for the levy and, therefore, estimated leviable expenditure would appear to be the preferred basis for the levy. However, the consultation paper is unclear concerning the recovery of any under/over estimates. It does not state whether these would be dealt with by way of:

- retrospective adjustments,
- being brought forward into following years' estimates and calculations, or
- some other means.

ACCA would not be in favour of a retrospective adjustment to the levy being collected by way of separate demand, but would prefer any under-recovery of costs to be collected with the subsequent year's levy. This would minimise the administrative burden of the approved regulators recovering the levy from members.

**Question 2:** Do respondents agree that the Legal Ombudsman's levy should be calculated on the estimated leviable expenditure and paid by 31 March 2011?

7. We agree with the proposal in the consultation paper, for the same reasons as set out under question 1 above. We anticipate that, in the early years, there may be a greater variance between the estimated and actual costs of the Legal Ombudsman, compared with the variance in respect of the LSB. Therefore, it may be necessary to update estimates prior to collection of the levy (particularly in respect of any costs already recovered by way of case fees) in order to minimise the extent of any under/over recovery of costs.

**Question 3:** Do respondents consider the risk-based approach is the most appropriate way of calculating the levy? If yes, can you suggest ways in which the risk for each approved regulator could be easily calculated and verified without adding additional costs burdens to the LSB, approved regulators and individual regulated entities and individuals?

8. We do not consider the risk-based approach to be an appropriate way of calculating the levy, as its administration would be disproportionately complex. Each approved regulator will have different regulatory systems, and while equally high regulatory standards are expected of each approved regulator, the means by which these standards will be achieved will not be by way of a 'one size fits all' method of oversight. The risk of noncompliance by an approved regulator cannot be measured objectively, as their procedures will differ, as well as the nature of the legal services provided by those they regulate.

**Question 4:** Do respondents consider the volume of activity generated by each approved regulator approach is the most appropriate way of calculating the levy? If yes, can you suggest ways in which we could easily and accurately apportion the current costs of our activities with the future benefits and/or work future arising from our activities?

9. A fair basis for charging the levy should take account of both the cost to the LSB of overseeing each approved regulator and the value of authorisation to the persons authorised by each approved regulator. Therefore, the apportionment of the levy on the basis of the volume of activity generated by each approved regulator merits consideration. However, we believe that practical considerations may impede this approach and, in particular, the administrative costs of recording the volume of activity generated by each approved regulator may outweigh the benefits accruing.
10. Nevertheless, ACCA believes that it would be reasonable to use an approximation to assess the volume of activity generated by each approved regulator, and this might best be achieved through option 3. With proportionality in mind, the LSB would still be expected to focus its work on those aspects of the legal profession that pose the greatest risk.
11. We do not agree that aspects of the LSB's planned work for 2010-11, such as research activities, could be fairly apportioned by even allocation across all the approved regulators. The extent of the LSB's activities should depend on the number of individuals carrying out reserved legal activities and the number of reserved legal activities each individual is authorised to undertake. Therefore, we are content that the allocation of all costs should be on the basis of numbers of members authorised by each approved regulator. (We are prepared to concede that, for reasons of administrative simplification, the number of reserved legal activities for which members

may be authorised may be disregarded, but please see our response to Question 5.)

**Question 5:** Do respondents consider the number of authorised persons per approved regulator approach is the most appropriate way of calculating the LSB's levy?

12. In order to achieve a fair apportionment of the levy, there must be a proportionate approach to both regulatory oversight activities and the allocation of the costs incurred between the approved regulators. Therefore, the demands on the resources of the LSB generated by each approved regulator will vary with the number of members authorised by the approved regulator and the number of reserved legal activities undertaken by those authorised individuals.
13. However, for reasons already explained, and on the assumption that a more detailed basis of apportionment is administratively impractical, we believe that apportion of the levy on the basis of the number of authorised persons per approved regulator is broadly fair. In order to accept this view, we are obliged to disregard the fact that each approved regulator authorises its members in respect of a different range of legal activities (in the case of ACCA, probate service only).
14. We also believe that the final apportionment of the levy should have regard to the number of persons authorised by each approved regulator, in order to ensure that the levy per authorised person is not prohibitively high for any approved regulator.
15. We do not agree with the explanation in paragraph 4.19 of the consultation paper of why 'there is no necessary correlation between the amount of work undertaken by the LSB and the size of the population covered by an approved regulator'. To a great extent, there should be such a correlation if the activities of the LSB are to be risk-based and proportionate.

**Question 6:** Do respondents consider levying on the numbers of authorised persons per approved regulator is the most appropriate way of recovering the Legal Ombudsman's leviable costs?

16. We note the comment, in paragraph 5.6, that the number of authorised persons regulated 'would be used as a proxy for the volume of work

generated by each approved regulator', and we agree that the relative volume of work generated should be the basis for the apportionment of the levy.

17. Using the number of persons authorised by each approved regulator as an approximation would be consistent with ACCA's preferred option for apportioning the LSB levy. However, we do not believe that this suggested option is the most appropriate method of apportioning the costs of the Legal Ombudsman. Most significantly, we do not agree that it meets the regulatory principle of proportionality, as some approved regulators (such as ACCA) will only authorise their members in respect of a single legal activity (which occupies a small part of their professional lives), while others (particularly the Applicable Approved Regulators) authorise their members for a range of activities.
18. While we agree that the number of persons authorised is a reasonable approximation on which to base the apportionment of the LSB's costs, in view of the anticipated level of costs of the Legal Ombudsman, the volatility of those costs, and the uncertainty surrounding the proportion of costs to be recovered via case fees, we believe it is important to apportion the costs of the Legal Ombudsman on a more accurate basis, and in proportion to the work generated by persons authorised by each approved regulator.

**Question 7:** Do respondents consider that there are more appropriate ways to estimate the likely number of service complaints and/or cases during the first few years of the Legal Ombudsman's operation (that is, the period from the anticipated commencement in late 2010 to approximately 2013)?

19. We are in agreement that the operational costs of the Legal Ombudsman should be levied on the basis of service complaints about authorised persons regulated by each approved regulator. This basis is both proportionate and targeted, and it has the added benefit of motivating approved regulators to encourage authorised persons to deal efficiently with complaints in-house.
20. The consultation paper suggests that the basis period for allocating costs incurred in 2010-11 should be service complaints received during the three years to 31 December 2009. A long-term basis for allocating the costs of the Legal Ombudsman is not considered, but we consider a fair basis in the future might be actual complaints received in the previous period.

21. The statutory instrument must make it clear that the service complaints that form the basis of this allocation method must be only those potentially chargeable complaints in respect of reserved legal activities. This is relevant to the principle of proportionality when considering the complaints received by those approved regulators that are not Applicable Approved Regulators. However, we note that the consultation paper states that ACCA, ICAS and new approved regulators will not be required to contribute to the costs of the Legal Ombudsman until a new methodology is adopted.
  22. It is not clear whether a complaint meeting the conditions set out in paragraph 6.3 of the Legal Ombudsman Scheme Rules would be included among the complaints forming the basis for the apportionment of the levy.
- Question 8:** Do respondents consider that levying specific approved regulators for costs attributable to them above a given threshold is the most appropriate way of recovering costs that are beyond the “business as usual” costs? If yes, can you suggest how such a threshold should be calculated and/or what its level should be? If no, can you suggest ways in which these costs should be cost-recovered?
23. Although the consultation paper states that ‘business not as usual’ costs may be incurred by both the LSB and the Legal Ombudsman, it is difficult to imagine what costs may be incurred by the Legal Ombudsman that would not be recovered fairly by considering the number of service complaints received in respect of each approved regulator. This is because the activities of the Legal Ombudsman only relate to the investigation of complaints, and any ‘disproportionate level of work’ could only be in respect of an increased volume of complaints.
  24. When considering any disproportionate level of work necessarily performed by the LSB, we agree that specific approved regulators should be levied for costs attributable to them that are costs beyond those of ‘business as usual’.
  25. If it is decided that the LSB levy should ordinarily be recovered on the basis of the number of persons authorised by each approved regulator (option 3), there would need to be in place an alternative means of recovering from approved regulators any costs attributable to them that are beyond those of ‘business as usual’. In this case, we agree that there should be a threshold



below which such costs should simply be allocated between the approved regulators in the usual way. However, as situations in which specific costs will have to be quantified and levied are expected to be exceptional, we recommend that the threshold be set at a low level.

26. ACCA considers that the threshold suggested by way of example of £100,000 would appear reasonable. For the avoidance of doubt, this threshold should apply to specific costs incurred in any financial year.
27. Paragraph 6.11 of the consultation paper provides the example of costs incurred in defending an 'unfounded' legal action taken by an approved regulator, stating that such costs would be levied against that approved regulator alone. However, there would, on occasions, be difficulty determining whether or not the legal action was unfounded. This might deter an approved regulator from taking any legal action to defend one of its members, and so such a policy may be considered to impede access to justice. While we consider this example to be inappropriate, there may be occasions, not involving legal action, where costs incurred should be directly recoverable by the LSB.
28. However, the expression 'business not as usual' needs to be defined, in order to provide the necessary degree of certainty for the approved regulators. It is assumed that costs incurred by the LSB in response to the reasonable behaviour of an approved regulator will not be directly passed on to that approved regulator and, therefore, any costs levied on specific approved regulators must be both 'business not as usual' and 'unreasonable'. Therefore, clarity is also required concerning how 'reasonableness' will be assessed.

**Question 9:** What are your views on the proposed approach for the cancellation of designation of an approved regulator?

29. We agree with the proposal regarding cancellations in respect of all reserved legal activities. We are also content with the proposal in respect of cancellations in relation to one or more, but not all, reserved legal activities. However, we believe that approved regulators that are not Applicable Approved Regulators should generate less activity of the LSB, and our concurrence with the proposed approach is driven by the need for transparency and pragmatism.

**Question 10:** What are your views on the proposed approach with regard to ensuring that 100 per cent of the levy is collected from all the remaining approved regulators?

30. As stated in paragraph 6.24 of the consultation paper, the occurrence of this situation is anticipated to be rare. However, its impact could be significant, especially if the approved regulator suffering the severe financial difficulties was one of the larger ones. We note that the consultation paper does not set out the proportion in which any shortfall would be recovered from the remaining approved regulators, but it is assumed that this would be in the same proportion as their main contributions.
31. In addition to the 'normal' levy to be recovered, there are likely to be costs that were 'business not as usual', which also could not be recovered from the bankrupt approved regulator.
32. We are concerned that the proposal set out within the consultation paper appears inflexible, and presents an unacceptable risk for the smaller approved regulators. In the light of the significant reservations expressed above, we believe it to be unfair to seek to recover the unpaid levy from the remaining approved regulators, and contrary to the objectives of the Legal Services Act to expect the approved regulators to adopt this risk. While the risk is thought to be low, the impact could be significant. For these reasons, in such exceptional circumstances, we would expect to see emergency funding from some other means. For example, it would not be unreasonable to expect Government to underwrite the levy.

**Question 11:** What are your views on the proposed approach with regard to the levy arrangements for new approved regulators?

33. A new approved regulator would not have any authorised persons at the time it gained designation as an approved regulator. It is also unlikely that it would authorise a large number of its members within the first year of designation as an approved regulator. Therefore, we are content that a new approved regulator should not be required to contribute to the payment of the levy in its first year.
34. Although this approach gives rise to a lack of symmetry between the proposals in respect of commencement and cessation as an approved regulator, this is not unreasonable, as the activities of a new approved

regulator are likely to be expanding, but those of a body ceasing to authorise its members are likely to be contracting. Therefore, this approach is likely to be compatible with the volume of work generated by each approved regulator.

**Question 12:** Is the proposed payment date (by 31 March) workable for approved regulators?

35. The illustration in paragraph 4.29 relates to the 2010/11 budget, and the LSB levy will be based on numbers of authorised persons as at 1 April 2010. This levy must be collected by 31 March 2011, and it is assumed that it will be collected as just one payment from each approved regulator.
36. Each approved regulator's contribution is dependent upon data relating to the other approved regulators, and so there can be no certainty of the levy payable until the LSB and the Legal Ombudsman have calculated the relative shares (in the fourth quarter of the year).
37. Given that the allocation of the levy will not be calculated until the final quarter of the year, it may be possible to publish a flexed budget during the third quarter. In this way, any under/over recovery of costs may be kept to a minimum.
38. On the assumption that transparency is achieved by timely and effective communication of budgeted expenditure and variances, we anticipate that the proposed payment date of 31 March is workable.

**Question 13:** Do the draft rules accurately reflect the preferred approach (as set out in the consultation paper)?

39. We believe that the draft rules largely reflect the LSB's currently preferred approach, as set out in the consultation paper.
40. Rule 3(2)(b) states that a new leviable body will only be required to pay a levy in respect of LSB expenditure, and implies that it will never be required to contribute to the costs of the Legal Ombudsman. We do not believe that this is the intention of the LSB.
41. Rules 2(3)(b) and 2(4)(b) serve to enable recovery of any shortfall between the amount levied on the approved regulators and the amount actually

received from those approved regulators. However, the draft Rules do not provide for the recovery of any shortfall between the estimated expenditure for a particular 12 month period (levied on the approved regulators) and the actual expenditure of the LSB and the Legal Ombudsman during that period.

42. Rule 6, paragraph 4 states that, generally, each approved regulator must state the number of its authorised persons as at 1 April by the following 1 May (ie within one month). This may be difficult for some approved regulators. Why does the information have to be provided so early, given that the LSB will not calculate the levy of each approved regulator until the fourth quarter of the year?
43. There is an error in the explanatory note in that it refers to the basis period for service complaints as ending on 31 March 2009 rather than 31 December 2009.

