



**The Levy:
Funding legal services oversight regulation**

1. The Legal Services Board has issued a consultation on the proposed rules (leviable operational expenditure) to be made under sections 173-74 of the Legal Services Act 2007. This consultation paper was issued on the 8th July 2010 and closes on the 29th September 2010. This is the response of the General Council of the Bar, the Approved Regulator (AR) for the profession of Barristers.
2. The consultation seeks views on the levy for what is described in the paper as “business as usual” and then for what might be termed “new in year unforeseen events”.¹
3. The consultation is, in effect, to secure the in-year funding of the Legal Services Board [LSB] and the Office for Legal Complaints [OLC] until a “fundamental review of the options for the LSB and Legal Ombudsman in 2013-2014.”² That review will enable, quite properly in the view of the Bar Council, the LSB to take account of how ABS changes and complaint case fee recovery impact on the funding landscape. The LSB makes clear, which is appreciated and accepted, that it holds the final authority on

¹ This is for disproportionate AR work, cancellation of a designation, bankruptcy of an AR and, or the approval of new AR.

² See paragraph 1.10

setting the recoverable levies and accordingly making the decision as to the most appropriate funding sources for the recovery.³

The proposed and preferred options

LSB Funding

4. In respect of the funding of the LSB, the proposal (as is the position at the moment for defraying set up costs) is that the costs are recovered on a per capita basis consistent with the total number of persons regulated across the legal services profession by the ARs. The Bar Council agrees with this proposal.

OLC Funding

5. The proposal is that the OLC funding is based upon an apportionment of the number of service complaints about authorised persons (being people who have been granted a practising certificate by an AR) that are regulated by each of the ARs over a fixed three-year period being January 2007 to December 2009. Subject to some refinements, which are addressed in answer to the specific questions posed in the consultation paper, and are answered in this response, the Bar Council agrees with this proposal.

New in-year unforeseen events

6. As to the 4 unforeseen in-year events the Bar Council observes:
 - a. *Approved Regulator specific costs.* The Bar Council agrees that the costs of this eventuality should fall on the AR(s) that incurred the additional costs. There will need to be a completely transparent accounting mechanism to justify to the regulated persons of the surcharged AR that such costs as were incurred were indeed extra and specific to the surcharged AR(s). The Bar Council would like clear and explicit references to circumstances where the LSB and/or the OLC are subject to legal challenge by an AR. It would not be equitable for other ARs to bear the burden of legal costs arising as a result of

³ See paragraph 1.4 of the consultation paper

the LSB or OLC defending a case brought by another AR. However, see also paragraph 14 below in response to Question 8.

- b. *Cancellation of designation.* The Bar Council agrees that in the unlikely event that an AR's designation is cancelled the amount to be paid to the LSB should be the amount that is required to meet pro-rata the obligations of that AR to the point of cancellation. Such an approach, in the view of the Bar Council, would significantly reduce any risk of surcharge on the remaining ARs whose designation is not cancelled. This would also militate in favour of a non-refund policy for any in-year designation cancellation.
- c. *Bankruptcy of an Approved Regulator.* The Bar Council does not support the subsidy of bankrupt or financially strapped ARs unless the LSB has pursued all appropriate legal avenues to recover costs due to LSB from a failed AR. It might be that the LSB would wish to consider requiring the ARs to keep funds collected on behalf of the LSB and OLC in special ring-fenced accounts. In this context, it is to be noted that the Bar Council has opted to collect both the LSB and OLC levy from those whom it regulates in an open and transparent way so that the amount collected is clear on the demand for payment and can easily be identified and separated, which it is. Indeed, it would be somewhat poor management by any AR if they had to "dip" into the monies collected on behalf of the LSB and OLC for other purposes. Therefore, there should never be a risk to the LSB and OLC in respect of monies due not being paid. The Bar Council suggests that whatever perceived risk there is should be resolved by a rule obliging the ARs to segregate and keep separate funds collected on behalf of the LSB and OLC.
- d. *New Approved Regulators* – The Bar Council does not agree that a post April 1 designation of a new AR should result in that new AR being relieved from any obligation to pay until the following 1st April. It follows that, unless there is a surcharge of the kind envisaged in the case of 6a. above in the year

following designation, the very ill that 6a. above is seeking to cure will, in the most acute case, not apply and that the established ARs will be required to subsidise the “business not as usual” of another AR.

Answers to the Questions posed in the Consultation Paper

Questions One and Two

7. The Bar Council agrees that the amounts to be raised by the LSB and OLC in each year should be calculated on the basis of the estimated leviable expenditure provided that there has been sufficient time for each of the ARs to be consulted and for any dispute to be resolved about the proposed expenditure.

8. In both the spirit of openness that the LSB and OLC espouse, as well as in accordance with the budget and fee setting principles that the LSB expects of the ARs, the LSB and OLC budgets should similarly be made open to scrutiny and comment by the ARs prior to finalisation.

9. The Bar Council is intending to regularise the collection timing of the Practising Certificate Fee. Currently, the self-employed Bar pays by the 31st December for the practising certificate to be issued for the following calendar year; the employed Bar is invoiced to permit certificates to be issued with effect from the 6th April. In order to bring consistency, and also to overcome the complaint of the self-employed about the current timing of the payment, we intend (subject to LSB agreement on the necessary rule changes) to have all regulated persons annually billed for payment by the 31st March. Accordingly, in order to avoid any unfair or disproportionate impact on the Bar Council finances, it is requested that the final payment due date for LSB and OLC costs should be deferred from 31st March to 30th April in each year. The Bar Council is seeking assistance from the LSB in dealing with these Rule changes and it is hoped that the *de minimis* procedure will be invoked for these Rules to have a smooth and swift passage.

Question Three

10. The Bar Council does NOT agree with the risk-based approach to the LSB's leviable running costs. The LSB, like the independent ring-fenced regulators within the ARs, has to exist whatever the risks. The new world order is that there are to be ARs plus an oversight regulator. They need to be paid for and in the case of the LSB levy may be paid for in the same proportion by all the regulated persons by per capita collection by their individual AR.

Question Four

11. The Bar Council does not consider that a levy based upon the amount or volume of work/activity generated by each AR is either practicable or sensible. Moreover, such an approach would necessarily incur additional costs in trying to determine who incurred what cost, unless it is a specific special additional cost (which then could be levied on the relevant AR). Any additional costs arising from litigation involving an AR should only be recovered from that regulator. However, see paragraph 15. below.

Question Five

12. The Bar Council supports as the most appropriate way of calculating the LSB levy by reference to the number of approved persons per AR. The number of approved persons should be agreed with the AR within a reasonable and specific timeframe.

The recovery of the costs of the OLC [Legal Ombudsman]

Question Six

13. Whilst the costs of the oversight regulator should be apportioned in accordance with the proposal in question 5 above, the same approach is inappropriate in determining the funding for the OLC (Legal Ombudsman). In the case of the OLC the fair and appropriate recovery plan is by reference to the adage 'polluter pays'. Therefore, the answer to question six is 'no'.

Question Seven

14. The Bar Council agrees with the proposal of the LSB that the funding of the OLC should be based on a calculation of the number of service complaints received by the ARs in a period as identified in paragraph 5.14 of the consultation paper.

Question Eight

15. The Bar Council considers that any AR that is the direct cause of "business not as usual" specific additional expenditure by the LSB or OLC may expect to pay the whole or part, depending upon the circumstances, of that specific cost. However, several matters arise. Firstly, the associated work and costs should be demonstrably 'additional' rather than 'instead of'. Alternatively, if 'instead of', the LSB or OLC must identify what planned and budgeted activity did not take place because of the need to address "business not as usual". In short, there is a need to prove there was a 'cost' in terms of outlay or foregone planned activity. Secondly, there is a need to be absolutely clear what falls within the parameters of "business not as usual" otherwise it can simply be used as a device for concealing deficiencies in budgeting and financial management. Thirdly, more specifically and staying with the examples given in paragraph 6.11 of the consultation paper, the cost of defending an "unfounded legal action" by a particular AR should, of course, be borne, by that AR. However, it would be wholly inappropriate for the AR in question to bear the cost of legal action that was vindicated. There is also the possibility of a shared culpability. In both of these instances, the LSB would need to address its funding problem to the MoJ. Fourthly, there is indeed the need for an auditable threshold of expenditure. Whether that should be £100k or £20k merits careful formulation and one size might not fit all. On the one hand, an unanticipated £100k bill would have a disproportionate impact upon the finances of the smaller ARs. On the other, a £20k threshold would, in creating the prospect of a higher number of incidents falling into the category, of itself generate attendant activity and cost. A parallel to consider might be insurance 'excess'. Consequently, the answer is probably a mid range threshold figure and some accompanying early warning system that alerts the AR to

a potential liability. In all events and as indicated above, the LSB and OLC will need to prove the figure.

Question 9

16. The Bar Council addresses and answers this question at paragraph 6.b above.

Question 10

17. The Bar Council addresses this question at paragraph 6.c above. In addition to the foregoing, there should be an assurance given that the LSB could not fine an AR into bankruptcy. Some of the smaller ARs would find it hard to withstand LSB intervention of any significance as they have a smaller critical mass.

Question 11

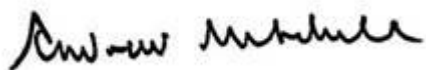
18. The Bar Council addresses and answers this question at paragraph 6.d above.

Question 12

19. For the reasons outlined at paragraph 9. above, the Bar Council would prefer 30th April as the collection date for the payment of the LSB and OLC.

Question 13

20. Should the LSB decide to accept the Bar Council's response to Question 12 of the consultation paper then Rule 7(1)(a), regarding the time by which payment is to be made, will require amendment.



Andrew Mitchell QC
Treasurer
For and on behalf of the Bar Council

29 September 2010