



LSB consultation
The Levy:
funding legal services oversight regulation
The CLC's response
September 2010

The CLC's response to the LSB consultation The Levy: funding legal services oversight regulation

Introduction

1. The Council for Licensed Conveyancers ("the CLC") was established under the provisions of the Administration of Justice Act 1985 as the Regulatory Body for the profession of Licensed Conveyancers. As set out at section 28 Legal Services Act 2007 the CLC must, so far as is reasonably practicable, act in a way—
 - (a) which is compatible with the regulatory objectives (set out at section 1 of the Legal Services Act 2007), and
 - (b) which it considers most appropriate for the purpose of meeting those objectives.
2. Further, the CLC must have regard to-
 - (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
 - (b) any other principle appearing to it to represent the best regulatory practice.

The purpose of the CLC

3. To set entry standards and regulate the profession of Licensed Conveyancers effectively in order to:
 - secure adequate consumer protection and redress;
 - promote effective competition in the legal services market, and;provide choice for consumers
4. The CLC welcomes the opportunity to respond to the LSB's consultation on The Levy: funding legal services oversight regulation.

Consultation 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?

5. Yes.

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?

6. Yes.
7. The CLC has concerns that one of the effects of the transfer of the resolution of service complaints from the CLC to Legal Ombudsman is to increase by a factor of three the costs payable by its regulated community and does not believe that the apportionment of the levy as between different leviable bodies will be determined in accordance with fair principles.
8. On the assumption that the contributions to the running costs of the Legal Ombudsman will be apportioned in the same ratios as determined by the LSB

for the setting up costs of the Legal Ombudsman and that the running costs of the Legal Ombudsman will be £19.9million per annum the costs per Authorised Person is broken down as follows:

	No complaints per AR	Per cent contribution per AR	Contribution per AR	Number of AP	OLC levy per AP	LSB levy per AP	Total levy per AP
Law Society	14,140	94.66	18,836,926	113,031	166.65	35.19	201.84
Bar Council	571	3.82	760,671	15,104	50.36	35.19	85.55
CLC	227	1.52	302,403	989	305.77	35.19	340.96
Other ARs					Nil	35.19	35.19
Total	14,938	100	19,900,000				

AR = Approved Regulator

AP = Authorised Person

9. In addition, we are concerned with the proposal to make adjustments to the levy arising from in-year increases in the Legal Ombudsman's cost without any indication of the level of increase in the volume of complaints which should necessitate such an increase. It seems to us that a well run organisation which the Legal Ombudsman is set up to become should be able to absorb a certain level of increase in the volume of complaints without any corresponding adjustment in 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, ARs and individual regulated entities and individuals?

10. The risk-based approach should be a factor in calculating the levy.. Having regard to the contribution per Authorised Person as set out in the response to Question 2, the CLC believes that further work is required to determine the fairest way in which costs should be apportioned using a risk-based approach.

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?

11. The CLC agrees that the volume of activity should be one of the factors taken into account in determining the levy payable by a particular Approved Regulator. However, for the reasons set out below, it is not appropriate that this should be the only factor taken into account.
12. To an extent the volume of activity has already been taken into account because fees are payable where applications are made either to become an Approved Regulator or Licensing Authority, or to extend the reserved legal activities regulated by an Approved Regulator or Licensing Authority.

13. The CLC does not agree that volume of activity should become the only determinant:
- One unintended consequence of such a policy may be to reduce interactions or particular interactions with the LSB if such interactions generate a charge; for instance, if there is a direct cost to an Approved Regulator for seeking advice from the LSB (even though there may be direct benefit to consumers and/or a reduction in costs payable by its regulated community).
 - A number of the functions of the LSB relate either to matters of public policy or do not relate to a specific Approved Regulator.

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?

14. As the CLC set out in its response to the LSB's April 2009 Levy Consultation, and as noted at paragraph 4.10 of the LSB's Consultation, the CLC favours "a hybrid option of authorised persons and regulated practices...which should be explored in the future".
15. We remain of the view that the levy should reflect the discharge of the LSB's oversight responsibilities and the current approach does not adequately reflect that reality.

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. The CLC believes that each Approved Regulator (and in the future each Licensing Authority) should make a contribution to the Legal Ombudsman's leviable costs. As the CLC stated in its response to the LSB's April 2009 Consultation (which related to the setting up costs, but we believe applies equally to the running costs of the Legal Ombudsman) "We consider that such an approach is equally simple and reflects the true value of setting up the OLC to the profession as a whole".

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)?

17. The CLC repeats the view previously expressed that the number of services complaints should be one of the factors taken into account in determining the proportion payable by Approved Regulators.
18. We are concerned that the approach used to calculate the Legal Ombudsman's 2009-10 share of the implementation costs is being adopted without proper consideration of necessary adjustments. For example, if the lack of complaints data is the reason for suggesting the use of data over a three period, why is the reference date not 30 September 2010 which is closely aligned to the 'go live date' for the Ombudsman.

19. Furthermore, we remain concerned that the historic complaints data as proposed from December 2006 to December 2009 will be used to determine the levy for the running costs of the Ombudsman which seems very unfair. It seems more appropriate to base the levy on actual complaints received by the Legal Ombudsman which more directly cost causation.
20. Whilst we support a simple approach to calculating the levy, we do not consider it is appropriate that the objective to minimise data calculation should result in a disproportionate burden on some Approved Regulators.
21. We accept to some degree the argument that the historic complaints resulted in the creation of the new regulatory framework including the Legal Ombudsman and hence the contribution to the implementation costs. However, to apply the same argument to the running costs for the next two years is not appropriately targeted and is disproportionate.
22. We are concerned that the proposed approach is considered proportionate and consistent because it replicates the way complaints are handled at the point of initiation which is clearly not accurate because our costs of handling the complaints for which the levy has been applied has gone up by 300%.

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. The CLC believes that the circumstances in which such costs are recoverable from an Approved Regulator should be clearly defined and that there should be a transparent procedure whereby the Approved Regulator would be put on notice that one of the likely consequences of a particular course of action (or failure to act) would be that additional costs would be levied. The CLC does not believe that a specific threshold is appropriate. It would be dependent on the circumstances of each case and a matter for the LSB to justify.
24. We are also concerned about the inherent conflict in the justification for not adopting the option to allocate the levy based on the volume of activity and this proposal. If it is possible to attribute activity to a specific Approved Regulator in this proposal why is it deemed so unworkable earlier in this consultation?
25. Furthermore, we are concerned by the example used to describe a ‘business not as usual’ activity. On whose judgment is a legal action classified as ‘unfounded’. Does this approach make it almost impossible for smaller regulators to legitimately challenge the LSB and Legal Ombudsman in the courts? We assume that this is not the unintended consequence of the proposed approach which would be similar to the challenge for many people in terms of access to justice with regard to the constraints on the legal aid budget.
26. Furthermore, it is unclear, what happens in the circumstances, if the legal action by the Approved Regulator is successful and whether the remaining Approved Regulators would be required to pay the associated costs through the levy in those circumstances.

Question 9: What are your views on the proposed approach for the cancellation of designation of an Approved Regulator?

27. The CLC agrees the approach proposed in the Consultation Paper.
28. We assume that the cancellation of the designation of an Approved Regulator is likely to result in reduced workload for the LSB with a corresponding reduction to its running costs.

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?

29. The LSA is drafted on the basis that consumers, as opposed to the public purse, ultimately pay the costs of the LSB and the Legal Ombudsman through the fees they pay to the Authorised Persons they instruct. The levy is recovered from Authorised Persons (not from consumers) on behalf of the LSB from Approved Regulators who for this purpose are acting as proxies for their regulated community.
30. On the insolvency of an Approved Regulator the likelihood is that its regulated community will be transferred to one or more of the remaining Approved Regulators or in default to the LSB acting as an Approved Regulator. The CLC believes that in those circumstances the outstanding levy contributions of the failed Approved Regulator should be transferred to that regulated community's new Approved Regulator(s) in proportion to the transferred regulated community. For example, on the failure of AR1 70% of its regulated community transfer to AR2 and the remaining 30% to AR3, as a result of which AR2 becomes liable for 70% and AR3 30% of the outstanding levy contributions of AR1.
31. Continuing this example, the CLC believes that the LSB should have contingency arrangements in place to avoid a domino effect whereby the additional levy imposed on AR2 or AR3 as a result of the insolvency of AR1 does not in itself result in the insolvency of another Approved Regulator. Such arrangements may include spreading the additional levy contributions over a number of years.
32. Furthermore, this proposal assumes that the bankrupt Approved Regulator is a small regulator or that its proportion of the levy is less than 20%. Otherwise, it would be almost impossible to collect the levy from the remaining Approved Regulators.
33. One option which the LSB should also consider is the extent to which it should absorb a degree of the lost revenue through its efficiency program. As most other business organisations have to deal with this situation from time to time, it seems sensible that the LSB's automatic response should not be to always collect 100% of the levy. It is possible that the LSB may need to look for ways to run the organisation more efficiently to absorb the loss (subject to the amount).

Question 11: What are your views on the proposed approach with regard to the levy arrangements for new Approved Regulators?

34. It seems to us that the rationale for this proposal conflicts with the rationale for allocation of the levy for the LSB on the basis of Authorised Persons as it stated in paragraph 4.19 'that 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'
35. It seems to us that the LSB's oversight responsibilities commences from the date that an Approved Regulator is designated and as such a contribution to the levy appears appropriate.
36. Likewise the rationale for new Approved Regulators not paying a levy on the basis that no service complaints were received before 31 December 2009 further highlights the inherent flaw of this approach to apportion the running costs of the Legal Ombudsman. Theoretically firms overseen by a new Approved Regulator could be responsible for service complaints in the first year of their operation resulting in cost causation to the Legal Ombudsman and yet make no contribution to the levy.
37. As a variance to the example given in the response to Question 10 the LSB should consider the possibility that a number of Authorised Persons regulated by an existing (or a failed) Approved Regulator transfer to a new Approved Regulator. One consequence might be to reduce dramatically (and unfairly) the regulatory costs payable by the regulated community which has transferred to the new Approved Regulator.

Question 12: Is the proposed payment date (by 31 March) workable for Approved Regulators?

38. Yes.

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

39. The CLC has no comments on the draft rules.

Summary

40. We recognise the continuing limitations on information available to the LSB in developing a fair scheme for apportionment of the costs of the LSB and the Legal Ombudsman. The apportionment of the costs attributable to the LSB has less uneven consequences because they are apportioned among the entire regulated community and they are relatively modest. The apportionment of the costs of the Legal Ombudsman because they are significantly greater and determined on a different basis lead to costs being distributed disproportionately.
41. We hope the LSB will take into account the probability that the failure of one Approved Regulator will result in the transfer of its community to another Approved Regulator(s) in determining how the outstanding levy contributions of the failed Approved Regulator should be distributed.