

**A RESPONSE BY THE FELLOWSHIP OF PROFESSIONAL WILLWRITERS AND
PROBATE PRACTITIONERS**

THE LEGAL SERVICES BOARD CONSULTATION ON COMPLIANCE AND
ENFORCEMENT STRATEGY (INCLUDING MAXIMUM FINANCIAL PENALTY),
DRAFT STATUTORY INSTRUMENT AND RULES.

DATED: 23rd October 2009

INTRODUCTION

The Fellowship of Professional Willwriters and Probate Practitioners has been formed to act as a representative and regulatory body for its members. The Fellowship will be applying for approved regulatory status under the Legal Services Act 2007 for probate activities.

1. This response has been prepared by the President of the Fellowship, after consultation with the Chair of the Regulatory Board and members of the Executive Committee.
2. The Fellowship is pleased to be given the opportunity to consider the Legal Services Board (LSB) approach to compliance and enforcement and provides its considered opinion below.

Question 1 – What are your views on the LSB’s proposed compliance and enforcement strategy? If you think we should have other or additional aims, please say what you think they should be and explain why you think we should have them.

Opinion:

The Fellowship considers that the compliance and enforcement strategy is reasonable and fair in its approach.

Question 2 – What are your views on the matters that the LSB proposes to take into account in deciding whether (and if so what) action is appropriate? In particular, what are your views on how the LSB should judge whether an Approved Regulator’s acts of omissions have been unreasonable?

Opinion:

We agree that where advice is obtained the process must allow for the submission of an unbiased view.

We believe that if the financial penalty is in excess of £20,000 or it is a matter that would necessitate a decision by the regulator's adjudication panel, then a right of appeal should be made available.

Question 3 – What are your views on the informal resolution process and the timescales set out above? If you have alternative suggestions please say what they are and why you consider they are more appropriate.

Opinion:

The Fellowship agrees with the informal resolution process and the given timescales however; as this is an informal process then dialogue should take place between the LSB and regulator.

Question 4 – What should the LSB publish about informal resolution of an issue? Will publication help to spread learning in the regulated community or do you consider that it may hamper informal resolution of an issue? Are there alternatives that you consider would be more appropriate? Please explain your answer.

Opinion:

Whereas the Fellowship agrees that it could be useful to publish the 'issues' and corresponding decisions, as this is intended to be an informal process then this information should remain private and confidential, otherwise it could inhibit rather than encourage informal resolution.

Question 5 – What are your views on how performance targets could be used?

Opinion:

Targets should be easily measurable with clear time limits of dealing with process to ensure matters are dealt with in appropriate timescales. This should have the effect of raising standards.

Question 6 – What are your views on how directions should be used?

Opinion:

Directions could be used to direct regulators to spend money on a certain area that requires improvement, as long as there is a right of appeal.

Directions should be used to ensure specific actions are carried out within an appropriate timescale. The Fellowship favours this approach over financial penalties as we believe that this better meets the regulatory objectives.

Question 7 – What are your views on using directions to require an Approved Regulator to spend money on a specific issue?

Opinion:

In respect of the regulatory objectives we agree that the use of Directions could be used for this purpose, however amounts over £20,000 should be subject to a right of appeal to an independent tribunal of lay people should be available to judge whether the amount is reasonable.

Question 8 – What are your views on how censure should be used?

Opinion:

Directions are a better method of gaining compliance; censure would not help improve the public's confidence.

The Fellowship considers that censure will not fulfil a purpose as it will not in itself change behaviour. An informal dialogue led resolution process is preferred.

Question 9 – What do you think the LSB’s aims should be in imposing financial penalties?

Opinion:

The aim in imposing financial penalty should be to instil consumer confidence and to act as a deterrent. Guidance is needed on the levels of seriousness of potential regulator non-compliance.

Question 10 – What are your views on what the maximum amount of a financial penalty should be?

Opinion:

If exceptionally high fines are deemed necessary, then the regulator in question should not be a regulator and should be shut down.

In non-profit making organisations such as the Fellowship then all that fines will achieve is to penalise the members . Again, the Fellowship believes that any fine above £20,000 then the regulator should have the ability to appeal against decision, rather than just the amount.

Question 11 – Is the formula proposed the right one or is there another more appropriate measure?

Opinion:

The amount of fine should be measured by the seriousness of the case with set amounts published.

Question 12 – Can you identify any circumstances when the proposed formula may be inappropriate to use?

Opinion:

Non-profit organisations where it does not meet objectives. This would only have the effect of penalising its members.

Question 13- What are your views on whether the maximum should be linked to the total value of the services being regulated?

Opinion:

The Fellowship does not agree with this formula as it does not make any distinction between non-profit making bodies and profit making bodies.

The formula should be based on the seriousness of the matter in hand.

Question 14- What are your views on the amounts suggested in the formula? What other amounts do you think might be appropriate, bearing in mind the need for a financial penalty to act as a credible deterrent? Please explain your answer.

Opinion:

Censure is a deterrent without the need for huge fines.

Question 15- What are your views on the process that the LSB proposes to use to arrive at an appropriate amount for a financial penalty?

Opinion:

The process is acceptable subject to the ability to appeal against both the actual decision and the size of the penalty.

Question 16- What are your views on the examples of the factors that the LSB may take into account when deciding what level of penalty is appropriate? What other factors do you consider that the LSB should take into account? Please explain your answer.

Opinion:

Consideration must be given to non-profit making bodies, as the penalty should take regard of whether there has been any financial gain from the breach.

Question 17 – What are your views on the LSB’s aims for using intervention directions? Are there other circumstances when you consider that the exercise of this power might be appropriate?

Opinion:

The Fellowship agrees with the LSB’s aims for using intervention directions.

Question 18 – What are your views on the LSB’s aims for cancelling the designation of an Approved Regulator? Are there other circumstances when you consider that the exercise of this power might be appropriate?

Opinion:

The Fellowship agrees with the aims for cancelling the designation of an Approved Regulator however we believe that the threat of cancellation is more effective than imposing substantial penalties.

Question 19- Do you think the draft statutory instrument is appropriate? If not, please say why. If you think that it should be changed, it would be helpful if you could suggest drafting changes and explain the reasons for them.

Opinion:

The Fellowship does not agree that the draft statutory instrument is appropriate. Sub section 2 that outlines the maximum penalty, as highlighted earlier, the Fellowship do not agree with the method of calculation.

Question 20- What are your views on each of the initial impact assessments? If you have any evidence to support your view, in particular on the possible costs involved, please provide that information.

Opinion:

As per Statement of policy s.29.- Access to justice, it is deemed appropriate that a proportionate approach is taken to small regulators, however this should include proportionate financial penalties.

Question 21 – Do you agree with the approach taken to oral representations?

Opinion:

Yes but oral representations should be allowed by new regulators who are relatively unknown entities.

Question 22 – Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the process.

Opinion:

Yes as highlighted above.

Question 23 – Do you agree with the Board’s approach for making nominations for the purpose of Section 41(2)(a)?

Opinion:

Yes

Question 24- If you do not agree with the Board’s approach, what alternative approach would you suggest?

Opinion:

N/A

Question 25 – Do you agree for the Board’s approach for making nominations for the purposes of Section 42(3)?

Opinion:

Yes

Question 26 – If you do not agree with the Board’s approach, what alternative approach would you suggest?

Opinion:

N/A

Question 27 – Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the Board’s approach to its requirements for the content of Applications?

Opinion:

Yes

Question 28- If you do not agree with the Board’s approach to its requirements for the content of Applications, what alternative approaches would you suggest and why?

Opinion:

N/A

Question 29 – Do you agree with the approach taken to oral representatives?

Opinion:

No , oral representations should be allowed by new regulators who are otherwise relatively unknown.

Question 30 – Bearing in mind the Regulatory Objectives and the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the process.

Opinion:

We suggest improvements to allow for oral representations to be made by new regulators.

Question 31 – Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the Board’s approach to its requirements for the content of Applications?

Opinion:

Yes

Question 32 – If you do not agree with the Board’s approach to its requirements for the content of Applications, what alternative approaches would you suggest and why?

Opinion:N/A

Question 33 – What do you think the appropriate level of, and method of calculation of the Prescribed Fee should be?

Opinion:

The fee should be fair and proportionate and should be calculated by taking into account what is considered to be a reasonable amount of time involved in properly considering an application. The suggestion that the fee should be

calculated to recover the LSB's direct costs of the staff resources and the associated overheads deployed on considering a typical application is therefore considered appropriate.

Question 34 – Do you agree with the Board's approach for making nominations for the purposes of Section 48(3)?

Opinion:

Yes

Question 35 – If you do not agree with the Board's approach, what alternative approach would you suggest?

Opinion:

N/A