

COMPLIANCE AND ENFORCEMENT – STATEMENT OF POLICY

RESPONSE ON BEHALF OF THE MASTER OF THE FACULTIES,

AN APPROVED REGULATOR

1. We wish to restrict our comments to the fixing of a maximum penalty under section 37 of the Legal Services Act 2009.

2. Question 10 – We agree that the LSB should have the power to impose a financial penalty which has the effect of causing a significant deterrent impact to an Approved Regulator. We also agree that this penalty should not have a serious budgetary effect so as to impair an Approved Regulator’s ability to carry out its regulatory responsibilities. The Act gives the LSB the discretion to decide the level of the penalty to be imposed in any particular case, and the LSB could take into consideration the size of an Approved Regulator’s budget. However s.37(4) of the Act is intended to impose limits on the LSB’s discretion, by setting an upper limit beyond which it would be unreasonable to go. The maximum penalty might also serve as a guide so that serious breaches of regulatory rules are given the maximum penalty. Therefore, an Approved Regulator’s ability to pay should be taken into consideration in deciding the maximum limit. In EU competition law the threat of a penalty of up to 10% of annual turnover is considered a sufficiently severe and proportionate sanction and we believe that this Rule should follow a similar principle.

3. Questions 11 & 14 - The Faculty Office has no reserves from which it could pay large penalties and it is unlikely that such amounts could be reclaimed from insurers.

Instead, such a penalty would have to be passed onto the members of the notarial profession in the form of an increase in the practising certificate fee. The cost would then be transmitted to the consumer.

4. No fixed lump sum can take into consideration the respective sizes of the legal professions and the financial value of the services that they provide. The use of a fixed sum would be a departure from competition law principles. Such a formula is disproportionate to the purpose of the penalty, which is to create a sufficient deterrent. Any such calculation must therefore take into consideration the effect such a penalty will have on an Approved Regulator, which in turn will be determined by the size and value of the profession.

5. We agree that the maximum penalty could be fixed on a per capita basis. However, the proposed formula does not take into account the different financial value of the several legal reserved activities. Most notarial work is, on average, far less remunerative than, for example, work in a solicitor's practice.

6. We believe that the appropriate formula would involve imposing a maximum penalty which forms a percentage of annual income, or a percentage of the practising certificate fee, whichever is the greater. We do not see in what circumstances it would be considered appropriate to impose a penalty which is not proportionate to an Approved Regulator's available income, unless it was to demonstrate to the consumer or other (perhaps larger) Approved Regulators that the LSB considers infractions of the regulatory objectives seriously and as such considered it necessary to impose a significant sounding figure. However, the penalty of censure is the appropriate

mechanism in cases where the LSB wishes to advertise the seriousness of a Regulator's behaviour, combined with an explanation that the fine reflects a percentage of the Regulator's income.

7. Question 13 – We agree that the maximum penalty should be linked to the value of the services being regulated. If for some reason an Approved Regulator's annual income or practising fee costs were artificially low in comparison with the value of the services being provided, the penalty could be passed down in terms of a large increase in the practising certificate fee. However, we recognise the difficulty in making such a calculation which would be highly speculative and therefore suspect that the penalty will have to be based on a combination of a proportion of the practising certificate fee and annual income. We consider that it would be a sufficient deterrent to threaten a maximum penalty which reflected a proportion of the Approved Regulator's annual budget.

8. Question 14 - A maximum penalty of £10 million would amount to a charge of approximately £11700 per notary. Regulators of the smaller professions could not afford such a penalty.

9. The proposed penalty of £250 per practicing certificate would double the current cost of a notarial practising certificate. This penalty would persuade many notaries that it was not economical to renew their practicing certificate, and would cause a contraction in the availability of notarial services.

10. Both fixed figures are arrived at by using formulas inappropriate to the mix of legal activities that the LSB seeks to monitor. See answer to Questions 11 and 14.