

**Response by Irwin Mitchell to the Legal Services Board  
Consultation paper  
"The Levy: funding legal services oversight regulation"**

**Introduction**

1. As a major National firm providing a wide range of legal services to consumers of all kinds Irwin Mitchell has taken an active interest in the post Legal Services Act (LSA) regulatory reforms and, in support of the general thrust of the LSA reforms, has responded to all consultations since the first report by Sir David Clementi. Irwin Mitchell also has a substantial regulatory practice which provides insight and understanding of how the SRA (and other regulators) deal with the clients we represent on regulatory matters.
2. By way of general comment we believe that regulators of the legal profession should behave in a manner that is proportionate, fair and reasonable, coupled with a clear understanding of the commercial drivers likely to influence practitioners as they face up to the most significant challenges and changes in the legal services market for generations. If regulators are to be able to carry out their responsibilities in a flexible, professional and pragmatic manner, they should acquire a good understanding of the real issues facing the individuals, firms, and 'entities' subject to regulation. Indeed, the priority approach of legal regulators should be to convey to those whom it regulates that its principal aim is to assist them to 'get it right' in a manner that will encourage them to take advantage of the opportunities offered by the LSA rather than being restrained from development of their businesses by over-regulation that inhibits the provision of legal services to consumers.
3. We responded to the earlier consultation and as there is an overlap between the two consultations, we enclose our earlier response for reference.
4. We echo the LSB's own comments at paragraph 4.12 about the need for further consideration after ABS have been established. Our response is equally an interim response pending ABS experience.

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

**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?**

5. Yes and we agree that the "fair principles" approach should be used for the calculation of operational costs. We note the LSB's comments that the size of the levy should be proportionate and that the collection should not put undue administrative burdens on approved regulators.
6. We would encourage the LSB to work with the Approved Regulators to ensure collection of the Levy and the Approved Regulator's own regulatory costs are co-ordinated. That will keep administrative costs as low as possible. As solicitors' firms will be paying the vast majority of the Levy it would be proportionate, in our view, for the LSB to co-ordinate collection of the Levy with the Solicitors Regulation Authority's current arrangements for the collection of practising certificate fees.

**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 can be easily calculated and verified without adding additional costs burdens to the LSB, Approved Regulators and individual regulated entities and individuals?**

7. We can see the advantages of the risk based approach. The challenge is, as identified, to obtain a detailed understanding of the operations of each Approved Regulator and determine a way of identifying and quantifying the risks. That is more challenging at present given the changes that the Approved Regulators are making internally to prepare for the post ABS era. We agree with the proposal to undertake a more detailed consideration for 2013/14.
8. We suggest that a starting point will be to review the Approved Regulators' own risk assessments of their regulated community. We believe that the SRA's work on their Risk Centre will provide much valuable information on the real risks posed by those whom they regulate. Whilst we agree with the LSB's concerns about using cumulative individual risk assessment, it does seem to us that by extrapolating this information, it should be possible to assess the risk posed by an individual Regulator. Given that this approach would build on the existing work being carried out by the Approved Regulators, whilst it may not be cost neutral, it may not result in significant additional costs.

**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 the risk for each Approved Regulator can be easily calculated and verified without adding additional costs burdens to the LSB, Approved Regulators and individual regulated entities and individuals?**

9. No. We agree with the arguments put forward by the LSB that there are too many weaknesses in this approach to justify further investigation, for the foreseeable future.

**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?**

10. Yes. We believe that this approach is fair. However, we would sound a note of caution that this approach must be kept under review with the advent of ABS. It is important that the additional costs to businesses of employing regulated individuals does not create a commercial disadvantage for existing businesses in comparison to new entrants to the legal services market. As the Legal Services Act emphasises, there must be a level playing field between different forms of legal practice.

**Question 6 - Do respondents consider levying on the numbers of authorised persons per Approved Regulator approach is the most appropriate way of calculating the Legal Ombudsman's leviable costs?**

11. No, please see our response to question 7.

**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 date in late 2010 to approximately 2013)?**

12. We agree with the proposal that the number of complaints be calculated as an average of service complaints over a fixed three year period ending 31 December 2009 as this seems a fair approach. However, we believe that some thought should be given as to how to ensure that the system is fair both for the consumer and the profession as not all complaints made are valid. However, there are a number of complexities, for example, should the calculation be on the basis of complaints upheld as against complaints made or should the test be whether there is any validity to the complaints and if so, how will that be assessed. We suggest that further discussion with the current complaints handling bodies may help on this definition.
13. We note that service complaints generated by new Approved Regulators e.g. ICAS etc, will not be captured, presumably because there is no historical data available regarding legal service complaints. However, in our view, that should not mean that those Approved Regulators make no contribution to the

LeO's operating costs. We would suggest that a nominal minimum contribution towards the LeO's operating costs be charged to new Approved Regulators.

**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" cost? 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?**

14. We agree that there may be exceptional circumstances in which costs should be recovered from Approved Regulators where those costs are beyond "business as usual". The starting point must be to follow the Law Society's suggestion of identifying those activities which would be attributable to a particular Approved Regulator. However, it seems likely that until the LSB has had an initial period of operation, it will not be feasible to identify what types of activity will be regarded as "business not as usual" and therefore to calculate a threshold or what the level should be.

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

15. We believe that the proposed approach is fair. It is not clear how that cost will be recovered by the Approved Regulator particularly where the cancellation relates to all reserved activities and what impact that might have on regulated persons.

**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 Regulator?**

16. Whilst we can see the logic of the LSB's approach, the LSB is responsible as oversight regulator for ensuring that the Approved Regulators are properly governed and managed. The Approved Regulators must be able to satisfy the LSB that they are financially viable, in the same way as the regulated entities must be financially viable. Recovering the Levy share owing by a bankrupt Approved Regulator from the remaining Approved Regulators must be a last resort only to be taken when the LSB has taken all other reasonable steps to recover those monies.

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

17.As indicated above it is our view that new regulators should be asked to make a minimum contribution towards regulatory costs in their first year of operation.

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

18.As we are not an Approved Regulator, we are unable to answer this question. We do however welcome the clear commitment from the LSB and the LeO to ensure that the Approved Regulators are aware of the cost early enough to be able to incorporate the costs into their planning cycles. This was a point that we made in our last response as firms do need to be able to plan and budget their expenditure to reduce prudential risk which could impact financial viability.

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

19.No comment

Irwin Mitchell LLP

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