

The Levy: Funding Legal Services Oversight Regulation

Law Society response to the LSB consultation

Introduction

1. The Law Society welcomes the opportunity to respond to the Legal Services Board consultation on apportionment of the levies for the running costs of the Legal Services Board and of the Legal Ombudsman.
2. The Law Society regrets the fact that, in the course of Parliamentary debate on the Legal Services Act, the then Government was determined that all the cost of the LSB and of the Legal Ombudsmen should be met by the legal profession. In other comparable sectors, the Government meets some of the costs of the oversight tier of regulation. There are some situations in which the then Government's approach may cause real practical difficulty, as described below. Nevertheless, the Law Society recognises that the Legal Services Board had no alternative but to consult on the basis it has.

LEGAL SERVICES BOARD COSTS

General Approach

3. The Law Society agrees with the Legal Services Board's conclusion that the levy for running costs of the Legal Services Board should be allocated primarily on the basis of the number of authorised persons regulated by each approved regulator. We do not think there is any practical basis on which a risk based approach could be implemented at present. It is impossible to find an objective measure for the damage which would be done if particular approved regulators took actions which were inappropriate in terms of the regulatory objectives of the Act. Even if it were possible to assess that, that would not provide a sensible basis for allocating costs between the different approved regulators.
4. The Law Society recognises that there is a strong case in principle for basing the levy on the volume of activity generated by each approved regulator. However, a large part of the LSB's work will be carried out in relation to the regulatory system as a whole, rather than to an individual approved regulator. Accordingly, the volume of activity generated by each approved regulator cannot be satisfactory as the primary basis for apportioning the costs.
5. The Law Society therefore agrees with the Legal Services Board that the primary mechanism for allocating the costs of the Legal Services Board should be a per capita basis, based on the number of authorised persons holding Practising Certificates or equivalents regulated by each approved regulator.

Approved regulator specific costs

6. The Law Society agrees that where particular activity has to be taken in regard to an individual approved regulator, those costs should be levied only on the approved regulator concerned. The Society agrees also that it would be sensible to have a minimum threshold for costs before that principle is

invoked, so as to avoid a situation in which the process for calculating the levy significantly added to the overall costs involved. The Law Society thinks the threshold should be a little lower than the level floated in the consultation paper, at perhaps £50,000 rather than £100,000.

7. The Law Society would however wish to draw attention to a particular difficulty arising in respect of legal actions which approved regulators may bring (or defend) against the Legal Services Board. It is clearly right that where the Legal Services Board is successful in such litigation, the LSB's costs should be attributed only to the approved regulator (or approved regulators) involved, rather than shared amongst all the approved regulators. But what is to happen if the Legal Services Board should be unsuccessful in litigation, whether in defending a judicial review brought by an approved regulator, or when the Board seeks unsuccessfully to enforce directions?
8. It would plainly be wrong for the individual approved regulator concerned to bear the Legal Services Board's costs in these circumstances. For a regulator to be expected to bear the LSB's costs when the LSB has misused its powers could not accord with any recognisable principle of justice. But nor would it be satisfactory for these costs to be borne by the other approved regulators. Why should they bear the costs of a dispute in which they have no part?
9. In the Society's view, if this situation were to arise, the Government will need to meet the costs since it is the Government which is responsible for establishing the regulatory structure. If a change to primary legislation is needed to ensure that the Government meets the costs in those circumstances, then it should be dealt with promptly, rather than awaiting a situation in which the Legal Services Board issues demands in respect of the levy which none of the approved regulators are prepared to meet.

New approved regulators

10. The Law Society does not agree that new approved regulators should be exempted from contributing to the costs on LSB in their first year of operation. That would effectively give them a free ride for up to a year at the expense of other approved regulators. The Law Society considers that new approved regulators should pay in proportion to the part of the year for which they hold approved regulator status, on the basis of the number of qualified persons they have on the date designation comes into effect.

LEGAL OMBUDSMAN COSTS

General Approach

11. It would be attractive from the Law Society's point of view for the levy in respect of the Legal Ombudsman also to be apportioned on the basis of the number of authorised persons regulated by each approved regulator. The fact that a high proportion of solicitors provide services direct to lay consumers makes the solicitors branch of the profession inherently more likely to attract consumer complaints than some other sectors. Nevertheless, the Law Society accepts that that would not be the fairest basis for apportionment.

12. The Law Society therefore supports the proposal that apportionment should be based on the number of service complaints about authorised persons regulated by each approved regulator.

Using Historical Information

13. However, the Law Society does not consider it acceptable to base the apportionment on historical information for any longer than is absolutely necessary. The information collected by approved regulators in the past has not been collected on a consistent basis. Neither the definition of a service complaint nor the counting rules for determining the number of separate complaints have been consistent between the approved regulators.
14. The Law Society recognises that there was no alternative but to use this historical information when apportioning the costs of implementing the Legal Ombudsman. But that does not apply to the Legal Ombudsman's running costs. The Law Society believes that the running costs for the period from October 2010 to March 2011 should be based on the number of complaints received in respect of the different approved regulators over that period. That is a six month period, which is sufficient to get a reasonably sound impression of the relative proportions of complaints arising in respect of different approved regulators. It would certainly be much sounder than basing the apportionment on the basis of a long past three year period which is in any event unreliable for the reasons given above.
15. Furthermore, the approach proposed would give new regulators a free ride for an extended period, which could not be justifiable.
16. The Society considers the proposal to base apportionment of the levy on historical information to be so seriously flawed that it is unlikely to be lawful. The Society would welcome further discussion of alternative approaches.

Relationship with Case Fees

17. The consultation paper does not discuss the relationship between case fees and apportionment of the levy. The purpose of apportionment is to ensure that the costs are divided between approved regulators in proportion to the share of Legal Ombudsman's costs for which those regulated by each approved regulator are responsible. That principle is best achieved by apportioning the levy on the basis of the Legal Ombudsman's gross costs, and then abating each approved regulator's share to give credit for the case fees paid by those regulated by the approved regulator concerned.

OTHER ISSUES

Cancellation of designation

18. We agree with the Legal Services Board's proposals concerning the effect of cancellation of designation.

Bankruptcy of an approved regulator

19. We do not agree that it is acceptable for the remaining approved regulators to pay the share of the levy due from an individual approved regulator which

becomes bankrupt. In that situation – as when an approved regulator successfully brings or defends legal action against the Legal Services Board – the cost should be met by the Government.

Timing for collection

20. The proposal payment date of 31st March is workable from the Law Society's point of view.

Statutory Instrument

21. We have no immediate comments on the drafting of the statutory instrument beyond those we have made above about the underlying policy.