REGULATORY INDEPENDENCE

Consultation on proposed rules to be made under sections 30 and 51 of the Legal Services Act 2007

Response by the Faculty Office on behalf of the Master of the Faculties, an Approved Regulator

Section 30 of the Legal Services Act

The Consultation Paper correctly recognises that the Master of the Faculties, who regulates the notarial profession, has no representative functions (paragraphs 1.5 and 3.4) and states that rules under section 30 "would probably not impact significantly" (para. 3.4) on the Master. As the purpose of the rules will be to deal with separation of regulatory and representative functions they should be inapplicable to the Master of the Faculties, and there would be no justification for extending them beyond their authorised purpose. Accordingly this response does not address Questions 1 to 8 arising under Chapter 3, "Internal Governance".

Section 51: Practising Fees

Responses to the questions in chapter 4 are set out below.

The Permitted Purposes

Question 9: Do you agree that the mandatory permitted purposes currently listed in statute should be widened to include explicit provision for regulatory objective (g) i.e. "increasing public understanding of the citizen's legal rights and duties"?

Response

The Board has discretion to add to the list of permitted purposes which it must provide for under section 51 (4) so that regulatory objective (g) could be included in this list. Whether an approved regulator relies upon a particular permitted purpose in determining the practising fee will depend upon the individual circumstances as between that regulator and its authorised persons. It is however, necessary to ensure that the list is clear and comprehensive.

Question 10: Should any other (general or specific) purpose be permitted under section 51 rules?

Response

Because of the constraint imposed by section 51(2) that the practising fees may only be applied "for one or more of the permitted purposes," we believe that it is essential for the rules to specify that the regulatory arrangements defined in section 21 of the Act are permitted purposes. Although section 51 (1) refers to "the approved regulator's regulatory arrangements", section 51 (4) (a) simply uses the word "regulation". If the words "regulatory arrangements" are not included in the rules as permitted purposes, it will be necessary to mention individual matters such as 'discipline' to ensure that they are recognised as permitted purposes . It is important both to an approved regulator in dealing with its authorised persons, and in the general interest of transparency, that the range of matters which can be covered by the practising fee is specified in the rules. The Board should aim at this clarity as it is not fettered by the terms of section 51 (4), which merely particularises certain matters which are definitely to be permitted purposes, leaving others to be identified by the Board.

Another matter which needs to be covered by the rules is the question of the cost of administration incurred by the approved regulator. It could be said that it must be implied that all reasonable costs of administration incurred in carrying out one or more of the permitted purposes is permissible in itself. However, in the interest of clarity there should be a rule stating that the amount raised by practising fees approved by the Board may be applied in respect of the cost of administration in carrying out one or more of the permitted purposes.

The Application Process

Question 11: What do you think about our proposal to seek evidence that links to the regulatory objectives in the Act?

Response

We consider that the Board's responsibility under the section 51 rules will be to check that the practising fee proposed for the ensuing year is to be applied for one or more of the permitted purposes. This is a specific task, albeit within the overall framework of the regulatory objectives in section 1 of the Act. We have grave doubts as to whether in practice it will be beneficial or workable to link the information about expenditure directly to these general objectives rather than to the fulfilment of the regulatory arrangements under section 21, which are recognised in section 51(5) as the basis for the practising fee.

Question 12: What criteria should the Board use to assess applications submitted to it?

Response

Paragraph 4.15 of the Consultation Paper rightly suggests that over time the Board will be concerned to have an explanation of a variation in a regulator's annual budget resulting in a change in the amount of the practising fee. Further, in paragraph 4.16 it is correctly emphasised that "the overall budget funded through the collection of the fee receipts" should neither be too high nor too low. The Faculty Office has long recognised both of these principles in fixing the practising fee for notaries. It is recommended that the Board does not tie itself to strict criteria when in the initial stages of its approval system it will be considering the different budgeting schemes used by approved regulators. Overall the test should be whether the information provided by that regulator demonstrates a reasonable approach to the cost of carrying out the various aspects of their regulatory arrangements.

Question 13: If they are adopted what should Memoranda of Understanding between the Board and approved regulators contain? For approved regulators in particular, are there any particular implications for your organisations?

Response

We favour the proposed Memoranda of Understanding, which should contain a date for the submission of the application for approval and a date for the

decision of the Board on that application, which are compatible with the timescale used by the Faculty Office. This timescale is geared to 1 November each year when notaries are required to renew their practising certificates.

Question 14: Should there be a requirement on approved regulators to consult prior to the submission of their application each year – and if so, who should be consulted, and on what? Should there be a distinction drawn between approved regulators with elected representative councils or boards; and those which have no such elected body?

Response

So far as the Faculty Office is concerned, consultation prior to submission of an application to the Board would simply add to the cost of administration with the undesirable consequence of increasing the cost of the practising certificate, and thence the cost ultimately borne by the consumer.

As our concern is to keep costs as low as is practicable we consider that it would be fairer and more cost effective to draw a distinction between a regulator such as the Master of the Faculties without such an elected body and other approved regulators with elected representative councils or boards.

Question 15: What degree of detail would be most appropriate to require when seeking to maximise transparency but be proportionate in terms of bureaucracy? Have we got the balance right?

Response

It is noted that under paragraph 4.21 approved regulators will be required to set out information about the practising fee for each authorised person. Bullet points 3, 4, and 5 would have no application to the Faculty Office accounts so that any obligation in a rule in respect of these points should be expressed to be 'where applicable'. The Faculty Office provides the notarial profession with accounts for the previous year and this is a straightforward and cost effective way of informing all authorised notaries about the total sum raised and expended on regulatory matters. Each notary is advised as to the amount of the practising fee payable from the 1 November of each year, and the total sum to be raised can readily be calculated by reference to the number of notaries anticipated to be in practice (allowing for small discrepancies due to

retirement or death). There should be no greater detail required than those matters proposed in paragraph 4.21, of which some will be relevant to some regulators and not to others.

Question 16: Are there any issues in respect of practising certificate fees that you think we should consider as part of this consultation exercise?

Response

We endorse the point made in paragraph 26 of the Impact Assessment at Annex C, namely that in relation to smaller approved regulators policy principles must be proportionately applied. The small notarial profession is not part of the mainstream of legal service providers dealing with English law. Notaries offer specialist knowledge and assistance in respect of notarial acts required by civil law jurisdictions in the rest of Europe and further afield. If the practising certificate fee were to increase rapidly it could adversely affect the consumer by adding to the cost to be paid for the services of a notary , and additionally, and most importantly, could deter some notaries from renewing their practising certificates thus depriving the consumer of the availability of a local notary in some parts of the country. Therefore, limiting the amount of bureaucracy, and consequentially limiting the increase in the cost of the practising certificate for notaries, should be the aim of the Board in its dealings with the Faculty Office.