

# Proposed practising fee rules

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A consultation on new draft rules to replace the Practising Fee Rules 2016 made under section 51 of the Legal Services Act 2007

This consultation will close **at 5pm on 8 October 2020**

## **This Consultation Paper will be of interest to:**

Approved Regulators

Regulatory Bodies

Legal representative bodies

Consumer groups

Members of the legal profession

Legal service providers

Accountancy bodies

Government departments

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## Executive Summary

1. The Legal Services Board (“LSB”) is the oversight regulator for legal services. It is responsible for regulating the Approved Regulators of legal services. The LSB was established by the Legal Services Act 2007 (“the Act”), which provides that in discharging its functions, the LSB must comply with and thus promote eight regulatory objectives.
2. In exercising its functions, the Act requires the LSB to approve or refuse applications from Approved Regulators for the practising fee that they intend to charge to those that they regulate.
3. This consultation seeks views on the LSB’s proposals for draft Rules on applications for approval of practising fees. The draft Practising Fee Rules (“draft Rules”) and supporting draft statutory Guidance (“draft Guidance”), are to be made by the LSB under section 51(3) and (6) and section 162 of the Act. These will replace the Practising Fee Rules 2016 and Guidance.
4. The draft Rules specify the permitted purposes that the practising fee may be applied to, the criteria and material the LSB will consider before deciding to grant the application in whole or part, and the application process and procedure.
5. Under the draft Rules, applications made by Approved Regulators for approval of the practising fee level must:
  - address five overarching criteria on transparency, accountability, proportionality, consistency, and action targeted where needed.
  - provide information on:
    - the proportion of the practising fee to be allocated to the Regulatory Body (if any), the programme of activity the fee will fund, and which “permitted purpose(s)” (regulatory and public interest activities set out in section 51 of the Act and the draft Rules) are relevant to each activity
    - income and expenditure forecasts including practising fee income for the next three years, and budgeted and actual income for the previous year
    - a reserves policy setting out how reserves will be managed, held and targets
    - consultation and engagement
    - equality and regulatory impact assessments.
6. The draft Rules are intended to provide a clear practising fee application and approval framework for Approved Regulators and their Regulatory Bodies,

including on the criteria that applications must satisfy. A key aim is to increase transparency about the Approved Regulators' and Regulatory Bodies' programmes of activity, which are funded in whole or in part by the practising fee, enabling those who pay the practising fee to drive accountability for its expenditure. This should lead to a more meaningful debate on the purpose, benefits, costs and value of regulation, which ought to result in ongoing improvement of standards across the sector. The proposals also aim to inform the LSB's oversight responsibilities, including better integration with the LSB's wider performance assessment framework.

7. The consultation period begins on 30 July 2020 and runs until 8 October 2020. Please ensure that your response reaches us by that date as any replies received after this may not be taken into account.
8. We intend to implement the final Rules and Guidance by December 2020, in time for the 2021 practising fee application cycle.
9. This consultation will close at 5pm on **8 October 2020**

## Introduction

### *About the Legal Services Board*

10. The LSB is the independent body that oversees the regulation of legal services in England and Wales. The LSB was created by the Act to hold regulators for the different branches of the legal services profession to account.
11. The Act provides that in discharging its functions, the LSB must comply with and thus promote eight regulatory objectives. These are:
- Protecting and promoting the public interest
  - Supporting the constitutional principle of the rule of law
  - Improving access to justice
  - Protecting and promoting the interests of consumers
  - Promoting competition in the provision of services
  - Encouraging an independent, strong, diverse and effective profession
  - Increasing public understanding of the citizen's legal rights and duties
  - Promoting and maintaining adherence (by authorised persons) to the professional principles.
12. In exercising its functions, the Act requires the LSB to approve or refuse applications from Approved Regulators for the practising fee that they intend to charge to those that they regulate. This consultation paper is focussed on new draft Rules and Guidance that the LSB has developed for this process.

### *About the sector*

13. The legal services sector:
- supports the rule of law and access to justice, which are fundamental pillars of a fair society and central to our unwritten constitution;
  - underpins the operation of English and Welsh law, which in turn supports all economic activity including the growth and development of new businesses and protection of employee and consumer rights; and
  - employs 348,000 people and has an annual turnover of over £35.5 billion<sup>1</sup>.

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<sup>1</sup> ONS figures for 2018.

14. Authorised persons providing legal services must hold a current practising certificate from the relevant Approved Regulator. For 2020, the total practising fee income collected by the Approved Regulators was approximately £124.7m<sup>2</sup>.

### **The practising fee**

15. A practising fee is payable by authorised persons to Approved Regulators only if the LSB has approved the level of that fee. Under section 51 of the Act the practising fee may only be used for permitted purposes and section 51(4) lists a number of activities which must be considered permitted purposes. The LSB must make rules with provisions on the material, criteria, process and procedure for applications and also specifying the permitted purposes (section 51(3) and (6) of the Act).

16. This consultation seeks views on our proposals for draft Rules on applications for practising fee approval. The draft Rules and supporting draft Guidance will revoke and replace the current Practising Fee Rules 2016 and Guidance to Approved Regulators on Practising Certificate Fee (PCF) applications.

17. Although we last amended the existing Rules and Guidance in 2016, our process for assessing practising fee applications remains largely unchanged since it was first introduced in 2011. In this time, the LSB's overall approach to regulation has evolved significantly. In particular, we introduced our regulatory performance framework in 2018 for assessing the Regulatory Bodies' performance against a common set of standards, and new Internal Governance Rules in 2019 on the delegation, and separation of, an Approved Regulator's regulatory functions to an independent Regulatory Body.

### **Reviewing our framework**

18. In our 2019/20 Business Plan, we announced our intention to review the practising fee approval process, including a targeted review of non-regulatory permitted purposes. This section briefly explains what we have done so far to inform the proposals set out in this consultation.

19. Initially, we assessed all practising fee applications for 2018/19 and 2019/20 and identified key themes, which underpinned and informed the development of some initial working proposals for discussion with Approved Regulators and their Regulatory Bodies. In particular, we identified the following areas of potential improvement:

- Development of overarching criteria setting out the key principles and expectations for each Approved Regulator and their Regulatory Body when preparing their practising fee applications

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<sup>2</sup> This figure has been calculated on the basis of the estimated total practising fees each regulator would collect, as set out in each 2019 practising fee application.

- Improving transparency and accountability on the allocation of practising fee income to, and expenditure on, permitted purposes activities and better ensuring the allocation of practising fee income is compliant with section 51 of the Act
- Greater clarity on how Approved Regulators and their Regulatory Bodies determine and manage their reserves, the considerations they have taken into account and how much practising fee income has been accumulated in their reserve funds
- More focus on meaningful equality and regulatory impact assessments
- The need for meaningful consultation and engagement with the regulated community on the proposed level of practising fee and the activities that it will fund

20. In February 2020, we commenced the first round of our engagement with all Approved Regulators and Regulatory Bodies on our initial working proposals. We also held workshops with stakeholders in March 2020. We received constructive feedback, which helped to inform our emerging thinking on the proposals.

21. In developing the new framework we have sought to address the key themes which have arisen through the review and to introduce draft Rules only where we have identified that they would provide greater clarity on the LSB's expectations and improve the overall practising fee application and approval process.

### **The outcomes we are seeking**

22. Through the review process we have developed and refined our objectives for revising our Rules and Guidance. Overall, through the draft Rules introduced in this consultation paper, we are seeking the following outcomes:

- To increase transparency around Approved Regulators' and Regulatory Bodies' programmes of activity and how these will be funded, allowing those that pay the practising fee to drive accountability for its expenditure.
- To support more meaningful discussion and debate across the sector on the purpose, benefits, costs and value of regulation, which ought to result in improved standards.
- To allow Regulatory Bodies to demonstrate that they have sufficient funds and financial resilience to regulate and operate efficiently and cost effectively
- Supporting the LSB's wider oversight responsibilities, including greater integration of the process into the LSB's wider performance assessment framework.



## The draft Practising Fee Rules

23. Following the engagement outlined above, we prepared the draft Rules and draft Guidance on which we now seek views in this consultation. The draft Rules are included in Annex A and the accompanying draft Guidance in Annex B.

24. This section introduces the draft Rules and draft Guidance, and explains changes as compared to the existing Rules.

### *Overview*

25. The draft Rules apply to all Approved Regulators who levy a practising fee and provide a new framework to set out requirements for the practising fee approval process. They prescribe the permitted purposes that the practising fee may be applied to, the criteria and material the LSB will consider before deciding to grant the application in whole or part, and the application process and procedure.

26. The key new requirements are that applications made by Approved Regulators for approval of the practising fee level must:

- address five overarching criteria on transparency, accountability, proportionality, consistency, and targeted where action is needed
- provide information on:
  - the proportion of the practising fee to be allocated to the Regulatory Body (if any), the programme of activity the fee will fund, and which permitted purpose(s) are relevant to each activity
  - income and expenditure forecasts including practising fee income for the next three years, and budgeted and actual income for the previous year
  - a reserves policy setting out how reserves will be managed, held and targets
  - consultation and engagement
  - equality and regulatory impact assessments.

27. The draft Rules set out the matters that the Approved Regulator must address before the LSB may approve an application.

28. Certain provisions in the existing Rules dealing with definitions, procedure and permitted purposes have been retained with modifications in the draft Rules.

## **Rule A1: Definitions**

29. The definitions have been updated to reflect the changes in the draft Rules.

## **Rules B 2 to 4: Application and Guidance**

30. Draft Rules 2 and 3 (modified from rules 2, 7 and 8 of the existing Rules) refer to the statutory basis for the LSB to make the draft Rules under section 51 of the Act, providing for the LSB to approve a practising certificate fee before it can be levied by an Approved Regulator.

31. Draft Rule 4 introduces a requirement for Approved Regulators to have regard to Guidance issued by the LSB under section 162 of the Act when preparing its application. The draft Guidance is intended to assist Approved Regulators (and their Regulatory Bodies) to comply with the draft Rules in making practising fee applications. Under section 162(5) of the Act the LSB is entitled to consider the extent to which an approved regulator has complied with relevant Guidance in exercising its function to approve the practising fee.

## **Rules C 5 to 8: Legal Framework**

32. Draft Rule 5 states that a practising fee is only payable under the regulatory arrangements of an Approved Regulator if the LSB has approved the level of the fee, mirroring section 51(5) of the Act and rule 7 of the Rules.

33. Draft Rule 6 provides that the setting of the practising fee and the application to the LSB for approval of that fee are regulatory functions and must be discharged in accordance with section 28 of the Act. This draft Rule further restates section 28(2) of the Act: when discharging its regulatory functions, the Approved Regulator has a duty to act in a way that is compatible with the regulatory objectives so far as reasonably practicable to do so. In addition, the Approved Regulator must have regard to principles of best regulatory practice: transparency, proportionality, accountability, consistency and targeting only at cases in which action is needed (these are further addressed in draft Rule 13).

34. Draft Rule 7 provides that an Approved Regulator may only apply amounts raised by the practising fee for one or more of the permitted purposes, as required under section 51(2) of the Act and preserving rule 5 of the Rules.

35. The effect of Rules 6 and 7 is that the approved regulator should have two aims in setting the level of the practising fee 1) the fee may only be applied for permitted purposes and therefore the activities that the practising fee will fund, in whole or part, must fall within permitted purposes and 2) the fee must be set and applied in accordance with section 28 of the Act i.e. compatibly with the regulatory objectives, so far as reasonably practicable.

## Rule 8: Permitted purposes

36. Draft Rule 8 sets out the permitted purposes, as required by section 51(4) of the Act. This draft rule retains the approach in rule 6 of the existing Rules, which is to largely restate the activities that section 51(4) states must be permitted purposes. We have not sought to introduce new permitted purposes. The draft Guidance (at Rule 16) explains that where an Approved Regulator seeks to apply funding to the less clearly defined permitted purposes, it should explain in more detail why this activity achieves this purpose. This recognises that some of the permitted purposes, such as draft Rule 8(e) to (f), are less clearly defined than others, such as draft Rule 8(a).

37. There is one notable drafting modification to improve clarity, as explained below.

38. Rule 6 (a) and (d) of the existing Rules make provision (amongst other things) for activities of an Approved Regulator relating to persons “holding themselves out as applicable persons”, with the intent to include such activities within the permitted purposes. This is to ensure that Approved Regulators may act to prevent persons who are not authorised from purporting to be so and from conducting reserved legal activities.

39. Draft Rule 8(h) is intended to clarify the existing Rule (as it applies to non authorised persons holding themselves as such) as follows:

*Preventing any person, who is not a relevant authorised person and/or does not hold a current relevant practising certificate, purporting to be such a person or to hold such a certificate*

40. We consider that this modification of the current rule is important to clarify that Approved Regulators may take action against those unregulated individuals who purport to be relevant authorised persons, to ensure consumers are protected.

## Rule D 9 to 12: Procedure

41. Draft Rule 9 prescribes the procedure, form and manner of practising fee applications. This draft Rule states that an Approved Regulator must make its practising fee application in writing in the form set out in Annex A of the Guidance and attaching such evidence as specified in the form.

42. The current Rules do not specify the form in which a practising fee application must be made. As part of our review, the LSB introduced a proforma for 2019 practising fee applications, to ensure consistency in the information provided by Approved Regulators. This was well-received for it provided clarity on application requirements and assisted Approved Regulators to improve the transparency and overall quality of information in their applications. As a consequence, we have provided for a similar proforma in this draft Rule and Annex A to the draft Guidance.

43. Draft Rule 10 sets out the time limit for determining a practising fee application - on receipt of an application, the LSB will notify the Approved Regulator in writing of the time period in which a decision will be provided. The draft Guidance notes that the LSB will aim to make a decision within 28 calendar days.
44. Draft Rule 11 sets out the circumstances in which the LSB will require further time to consider an application. First, where the LSB requires the Approved Regulator to re-submit the application in whole or in part and second, where the LSB is unable to provide a decision within the notified time. The draft Guidance provides examples of circumstances where draft Rule 11 might apply.
45. The draft Rules omit the provision in current Rule 14(d) for Approved Regulators to charge a limited practising fee as an interim measure, where an application is rejected pending resubmission and approval. We have decided not to carry over this provision following consideration of stakeholder feedback that it was redundant because collecting an interim practising fee would be both costly and cause reputational damage. Most stakeholders were of the view that if their practising fee application is refused, they would consider other options such as drawing on their reserves to cover operating costs, pending approval of a revised practising fee application (this position is reflected by draft Rule 33, as set out below).
46. Draft Rule 12 mirrors rule 12 of the existing Rules which allows for the LSB to consult any person it considers appropriate, in particular the Consumer Panel, about the impact of the practising fee on those which provide non-commercial services such as solicitors working in charitable entities, or law centres. This reflects section 51(7)(a) of the Act.

**Question 1: Do you have any comments on the above draft Rules 1 to 12?  
Do you have any comments on the associated draft Guidance?**

### **Rule E 13: Overarching criteria**

47. Draft Rule 13 introduces five overarching criteria – which reflect the principles applicable to the discharge of an Approved Regulator’s regulatory functions in section 28(3)(a) of the Act. Applications need to demonstrate transparency, accountability, proportionality, consistency and appropriate targeting of action. The criteria in draft Rule 13 provide the foundation for draft Sections F to K and reflect the LSB’s overarching expectations of Approved Regulators in the practising fee approval process.
48. Draft Rule 13(a) on transparency, requires an Approved Regulator to be clear about how they propose to apply the fees to the programme of activity they intend to carry out during the practising fee year, which will be funded (in whole or in part) by the practising fee. ‘Programme of activity’ is defined in draft Rule 1 as activities

which the Approved Regulator intends to carry out during the practising fee year funded by the practising fee. Rule 13(a) requires that Approved Regulators make clear what these activities are, and how they will assess the benefits of these activities. The draft Guidance provides detail on what is meant by programme of activity and on assessing the benefits of the programme of activity.

49. Draft Rule 13(b) on accountability requires Approved Regulators to engage effectively with their regulated community when setting the practising fee, report on the application of the practising fee for the previous year (including anticipated versus actual benefits) and address any areas of concern raised by the LSB. The latter refers to how an Approved Regulator has addressed concern raised in the previous year's practising fee application or in relation to the regulatory performance assessment framework during that year.
50. Draft Rule 13(c) on proportionality requires that the practising fee is adequate to effectively discharge the Approved Regulator's regulatory functions in an efficient and cost-effective manner. This reflects the LSB's objective that the Approved Regulator has sufficient funds and is financially resilient so as to regulate and operate efficiently and cost effectively.
51. Draft Rule 13(d) on consistency, requires Approved Regulators to apply funds in a way that follows a clear plan with identifiable priorities. This conveys the LSB's expectation that Approved Regulators should carefully plan their programme of activity, and make clear and act consistently with their strategic objectives and priorities.
52. Draft Rule 13(e) on targeted where action is needed, requires the Approved Regulator to apply the practising fee in a way it considers most appropriate to meet the regulatory objectives, consistent with section 28 of the Act.
53. As set out above, the desirability of developing overarching criteria was identified in our review. The review found there was a need and scope for greater clarity in the practising fee application approval process, around the purpose of our assessment and expectations for each Approved Regulator and their Regulatory Body. The overarching criteria in the draft Rules aim to address these issues and assist Approved Regulators and Regulatory Bodies in preparing their practising fee applications. The provisions which follow in the draft Rules, set out below, flow from the overarching criteria.

**Question 2: Does the overarching criteria in draft Rule 13 adequately set out the LSB's expectations of Approved Regulators when considering a practising fee application? Are there other criteria which should be included? Do you have any comments on the associated draft Guidance?**

## Rules F14 to 16: Allocation of Practising Fee Funds and the Permitted Purposes

54. Our review demonstrated that there was a lack of transparency and accountability on the allocation of practising fee income to permitted purposes in practising fee applications. As a result, draft Rules 14 to 16 aim to increase transparency and accountability around the allocation of practising fee income to permitted purposes.
55. This part of the draft Rules requires an Approved Regulator to justify all elements of the practising fee, by the activity to be funded and the permitted purpose which this activity is for. The LSB recognises that some of the permitted purposes including those in draft Rules 8(e) to (f) are less clearly defined than others such as draft Rule 8(a), and that the former is more likely to go towards representative functions. The Approved Regulator who intends to fund an activity from the practising fee for any of these less clearly defined permitted purposes will be expected to explain in more detail how the activity will support this purpose. The LSB can only authorise the PCF if assured that all funding will be applied in accordance with section 51(2) of the Act.
56. Draft Rule 14 makes clear that an Approved Regulator which discharges both representative and regulatory functions must state the amounts raised by the practising fee which will be allocated to the Regulatory Body and the amounts which will be retained by the Approved Regulator. The draft Guidance provides guidance on how this applies to Approved Regulators who share some services, and thus costs, with the Regulatory Body.
57. Draft Rule 15 requires the Approved Regulator to clearly set out the programme of activity which the practising fee will fund and which permitted purpose each activity is for. In forming the programme of activity, each Approved Regulator must identify which permitted purpose or purposes that activity is for.
58. Draft Rule 16 requires an Approved Regulator to make clear if it intends to apply funds to an activity which has multiple purposes, one or more of which is not a permitted purpose. The Approved Regulator must explain why the activity cannot be delineated to only be applied for permitted purposes and the basis upon which it nonetheless complies with section 51(2) of the Act (which provides that an Approved Regulator may *only* apply amounts raised by the practising fee for one or more of the permitted purposes).

**Question 3: Do you have any comments on draft Rules F 14 to 16? Do you have any comments on the associated draft Guidance?**

## Rule G 17 and 18: Financial Information

59. The provision of sufficient financial information in practising fee applications aids transparency as it provides the basis for a more meaningful discussion on the costs, benefits and value of regulation. Draft Rules 17 and 18 are to provide clarity

to Approved Regulators on the type of information required and ensures consistency in the form of information in practising fee applications.

60. Draft Rule 17 modifies a requirement in the existing Rules which require the Approved Regulator to provide the following information:

- Income and expenditure forecasts, including practising fee income for three years from and including the year for which the proposed practising fee is to be levied and
- Financial information for the previous year including a comparison of actual and budgeted income and expenditure.

61. In addition, existing Rule 11(b) provides that the LSB and Approved Regulators should 'have regard' to income forecasts for a three year period only if there is a proposed increase in the practising fee. The draft Guidance provides detail on the financial information required under draft Rule 17.

62. With the benefit of our review and experience of the practising fee approval process under the existing Rules, the LSB considers that the provision of forecasts for both income and expenditure for a three year period for all applications will provide a valuable longer term planning horizon. This horizon will provide a better opportunity to engage the regulated community and others in a more meaningful debate on the costs, benefits and value of regulation, which should lead to improvements in standards across the sector. It will also allow the LSB to make a more informed evaluation of the Approved Regulator's financial position. We recognise that under the proposals, forecasts for years 2 and 3 will be indicative and will be re-evaluated in advance of future applications.

63. The draft Guidance sets out that the LSB expects Approved Regulators to set out an accurate presentation and representation of the LSB and Office for Legal Complaints (OLC) levies so the regulated community is clear about the proportion of practising fee attributable to the levies.

64. Draft Rule 18 introduces a new requirement that information must be prepared on the basis of accruals rather than cash, if reasonably practicable. Accruals accounting means that transactions are recorded when goods or services are received, creating an obligation to pay, rather than when the cost is actually paid. For example, a quarterly rent payment straddling a year end should be split according to the number of months falling into each financial year, as the cost is settled evenly over the period of charge.

65. The rationale for this draft Rule is to address one of the most significant factors that can cause a misunderstanding of reported figures, which is ambiguity as to whether those figures are addressing the cash position or the strict accounting position. This is important for both the LSB's assessment and for the regulated community. The LSB notes that statutory statements of income and expenditure



must be prepared on the basis of the accounting position, known as accruals accounting and therefore this draft Rule reflects this.

66. The draft Guidance sets out that the LSB expects the figures provided:

- should not include VAT, unless the VAT on a particular cost will not be recoverable. If this is the case, the approved regulator should make this clear and explain why they will not be able to recover VAT and
- that a recognised indexation (inflation) rate to, should be applied to all figures. In most applications the LSB would expect the indexation rate to be the Consumer Price Index (CPI).

67. The LSB expects the figures provided not to include VAT unless the VAT on a particular cost will not be recoverable.

### **Rules H 19 to 23: Reserves**

68. Draft Rules 19 to 23 collectively, are intended to emphasise the importance of Approved Regulators having well managed reserves and being financially resilient. Well managed reserves provide confidence that Approved Regulators have adequate financial resilience, even in unforeseen adverse circumstances, such as the impact of Covid-19, which is in the public and consumers' interests.

69. Draft Rule 19 allows Approved Regulators to hold reserves generated from surpluses of practising fee income, only if they are held separately from other reserves. The Guidance provides detail on the LSB's expectation that practising fee reserves be held in a separate account and subject to separate budgeting from other reserves or income held by the Approved Regulator.

70. Draft Rule 20 provides that if an Approved Regulator has a separate Regulatory Body, the Regulatory Body should manage its own practising fee reserves, as far as reasonably practicable. This reflects the LSB's obligation to ensure that regulatory functions are independent of representative functions as far as reasonably practicable.

71. Draft Rule 21 requires an Approved Regulator to have a clear policy on how it sets the target for the level of its reserves and manages those reserves. Draft Rule 21(a) sets out that the policy should address the different types of reserves held (which must clearly distinguish practising fee reserves from other reserves), the target level for both committed and uncommitted reserves and how any accumulated reserves will be managed. Draft Rule 21(b) requires the Approved Regulators to account for any variance at the end of the previous year between the target level for reserves and the accumulated reserves. The LSB expects this to inform the Approved Regulator's target levels for the following year. The draft Guidance provides a detailed guide on reserve targets, types of reserves and what is expected to be in an application in this regard to assist Approved Regulators and their Regulatory Bodies comply with draft Rule 21.



72. Draft Rule 22 provides that an Approved Regulator must satisfy the LSB that the practising fee reserves are sufficient to ensure the Approved Regulator is reasonably financially resilient even in adverse circumstances.
73. Draft Rule 23 provides that draft Rules 19 to 22 do not apply to reserves which would not be made available for the discharge of regulatory functions.
74. The existing Rules currently do not specifically refer to reserves, although they require that the LSB and Approved Regulators 'have regard' to evidence which demonstrates that reasonable care was taken in settling the application in the context of the budget necessary for the immediate and medium term (existing rule 10(c)). The existing Rules also state that the LSB and Approved Regulators should 'have regard' to factors including an explanation of contingency arrangements where unexpected regulatory needs arises in-year (existing rule 11(e)). Neither of these existing rules are framed as requirements.
75. Draft Rules 19 to 23 address concerns raised during the review about the need for Approved Regulators to have a clear policy on reserves; improve transparency and accountability around their reserves arrangements, and clarity on how much (if any) practising fee income is accumulated in their general reserves. Our review identified instances where it appeared that Approved Regulators had accumulated reserves in excess of their policies but it was unclear why. The draft Rules emphasise the importance of Approved Regulators having well managed reserves, and the requirement for them to satisfy the LSB that they are reasonably financially resilient, without unnecessarily inflating the costs to the regulated community, which could ultimately be passed on to consumers.

**Question 4: Are draft rules H19 to 23 clear? Do you have other comments on these draft Rules or comments on the associated draft Guidance?**

### **Rule I 24 to 25: Consultation and Engagement**

76. Consultation and effective engagement are important for transparency, accountability and for Approved Regulators to understand the impact of their proposals on their regulated community. The LSB intends this to encourage meaningful engagement, to promote debate and discussion, and ultimately to support ongoing improvement in standards of regulation across the sector.
77. Draft Rule 24 requires Approved Regulators to consult their regulated community prior to making an application for approval of its practising fee. Draft Rule 24(a) requires Approved Regulators to consult on the programme of activities that the practising fee will fund and draft Rule 24(b) requires the level of the practising fee and any change in the fee for the previous year to be consulted on. Draft Rule 24(c) requires Approved Regulators to consult on the distribution of the practising

fee across the regulated community (for example according to authorised persons' income band or turnover) and explain any changes to that distribution.

78. Draft Rule 25 provides that Approved Regulators should engage effectively with as many of its regulated community as reasonably practicable. The LSB will consider how the Approved Regulator has endeavoured to engage with and consult its regulated community, rather than only taking into account the number of responses received, as a measure of whether there has been effective engagement.
79. The existing Rule 11(a) provides that the LSB and Approved Regulator should have regard to factors such as a description of how the application was developed and settled, including any consultation carried out, whether or not such consultation was required by the Board.
80. Our review demonstrated that although all Approved Regulators generally consult annually on the practising fees, most failed to adequately engage the regulated community which was evidenced, in part, by the overall lack of responses to the consultations. There was also a lack of transparency around how consultation responses were considered and whether they resulted in changes to the practising fee proposal. The draft Rules aim to address these concerns and ensure meaningful and effective consultation and engagement on proposed practising fees.

**Question 5: Do you have any comments on draft Rules I 24 and 25? Do you have any comments on the associated draft Guidance?**

### **Rule J 26 to 30: Impact Assessments**

81. Meaningful consideration by Approved Regulators of equality issues, is relevant to the regulatory objective to encourage an independent, strong, diverse and effective profession. Similarly, meaningful consideration of the regulatory impact of practising fee proposals demonstrates that the Approved Regulator has given appropriate consideration to the impact that its proposed fees will have, taking into account relevant risks such as the COVID-19 pandemic.
82. Draft Rule 26 requires Approved Regulators to conduct an initial equality impact assessment (EIA) and initial regulatory impact assessment (RIA).
83. Draft Rule 27 requires Approved Regulators to conduct a full EIA if the initial EIA finds an adverse impact on persons with (any of the) protected characteristics.
84. Draft Rule 28 requires Approved Regulators to conduct a full RIA if one of the following conditions are met:

- a. The initial RIA finds that the practising fee may reasonably be considered likely to:
  - i. adversely affect a significant proportion of Relevant Authorised Persons or
  - ii. be prejudicial to any of the regulatory objectives
- b. The practising fee involves a more than minimal change in the amount payable by any relevant authorised person(s) than was payable by the practising fee of the previous year; or
- c. A significant and unforeseen event or circumstance has arisen during the previous year which has had a substantial impact upon the conduct of Legal Services by relevant authorised persons.

85. Draft Rule 29, states that EIAs and RIAs must have regard to factors set out in the Guidance. The draft Guidance provides more information and explains the LSB's expectations of these assessments.

86. Draft Rule 30 requires Approved Regulators to provide specific information in relation to the EIA and the RIA:

- a) a summary of the assessments carried out under and the findings of those assessments;
- b) details of any action taken as a result of those findings or, if no action has been taken, an explanation of why this was not necessary or practicable; and
- c) any other information about the assessments required by the Guidance.

87. Existing Rule 11(g) notes that the LSB and Approved Regulator should have regard to factors including a regulatory and diversity impact assessment but does not make it mandatory.

88. The purpose of draft Rules 26 and 27 requiring Approved Regulators to conduct EIAs, is to address the fact that our analysis has found that they have not conducted them in the past (or on the few occasions when they have it has been a very limited assessment) despite at times proposing significant practising fee increases or changes to the methodology for charging the practising fee. This is important because meaningful consideration of equality issues is relevant to the regulatory objective to encourage an independent, strong, diverse and effective profession. We expect Regulatory Bodies to have an understanding of barriers to access or progression for those with any protected characteristics and practising fees may be relevant in this regard.

89. Draft Rules 28 and 29 require Approved Regulators to conduct RIAs as a matter of good regulatory practice. This will allow them to balance the costs and benefits of the proposed level of practising fee and demonstrate a clear understanding of

the context in which they operate to ensure any changes or risks to the sector have been considered. To date, Approved Regulators have not conducted these assessments. Draft Rule 30 seeks to ensure that the Approved Regulator provides evidence in its practising fee application that it has conducted these assessments which will provide reassurance to its regulated community as well as the LSB.

**Question 6: Are Rules J 26 to 30 regarding initial and full impact assessments clear? Do you have any comments on the associated draft Guidance?**

### Rule K 31 to 33: Decision by the Board

90. The existing Rules lack clarity on how the LSB will make decisions on practising fee applications. Our review identified that greater clarity on what will inform the LSB's decisions will aid transparency and support the objectives that are being sought through the review.
91. Draft Rules 31 to 33 provide that in making a practising fee application the Approved Regulator must satisfy the LSB of all the matters specified for approval. The draft Rules make clear the basis upon which the LSB may refuse an application in whole or in part. Approved Regulators will be required to set out in their application their contingency measures in the event that an application is refused and they cannot collect the practising fee until, and subject to, the application being resubmitted and approved by the LSB.
92. Draft Rule 31 specifies all the matters that an application by the Approved Regulator must satisfy for the LSB to approve the application:
- a) The Approved Regulator has complied with these Rules and had regard to the Guidance;
  - b) The Approved Regulator will only apply the amounts raised from the proposed practising fee for one or more of the permitted purposes;
  - c) Any proposed increase in the fee, or any part of the fee, is reasonable and proportionate;
  - d) The fees to be allocated to regulatory functions are sufficient to effectively discharge those functions; and
  - e) The Approved Regulator has addressed any significant areas of concern raised by the Board in the previous year's application for approval, or if it has not, provided a reasonable explanation as to why not.
93. Draft Rule 32 provides that if the Approved Regulator fails to satisfy the LSB of any of the matters in draft Rule 31, the LSB may refuse to approve the entire or

part of the practising fee and/or require the Approved Regulator to resubmit the application addressing the matter(s) set out in draft Rule 31.

94. Draft Rule 33 requires Approved Regulators to set out in their application the contingency measures in place should the LSB not approve the practising fee in whole or part.
95. Draft Rule 31(a) and (b) reflect matters that appear in the existing rules. Draft rules 31(c), (d) and (e) address new issues which have been identified in past applications (such as shortcomings in the consultation process) and provide clarity for future applications.
96. Similarly, the existing Rules currently lack clarity on the basis upon which the LSB may refuse an application and that it may do so in whole or in part – this is now provided for in draft Rule 32. The draft Rules do however adopt with modification the provision in existing Rule 14(c) which allows the LSB to require the Approved Regulator to resubmit the application to address the issues raised by the LSB.
97. As noted in paragraph 42 above, Rule 14(d) which allows for the interim collection of a practising fee pending consideration of an application has been omitted from the draft Rules because stakeholders considered it was of limited value. Instead draft Rule 33 requires an Approve Regulator to set out what arrangement it has in place to continue to operate effectively, should its application be refused.

**Question 7: Does the criterion set out at draft Rule K 31 adequately explain the matters which the LSB requires to be satisfied to approve a practising fee application? Are you content that the Rule for the interim collection of practising fees has been omitted from the draft Rules? Do you have any comments on draft Rules K 32 and 33?**

## Equality Act assessment

98. The LSB has given due consideration to its obligations under the Equality Act 2010, including the public sector equality duty<sup>3</sup>, in reviewing our existing Rules and Guidance and developing a new framework.
99. In particular, the draft Rules introduce a requirement that Approved Regulators and Regulatory Bodies conduct an initial assessment of the anticipated impact of the practising fee level on members of their regulated community with any protected characteristic (as defined in the Equality Act). If there is a negative impact, Approved Regulators must conduct a full equality impact assessment. The

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<sup>3</sup> [Public Sector Equality Duty](#): public authorities must consider all individuals when carrying out their day-to-day work – in shaping policy, in delivering services and in relation to their own employees. It also requires that public authorities have due regard to the need to: eliminate discrimination, advance equality of opportunity, and foster good relations between different people when carrying out their activities. The LSB is a public authority listed in [Schedule 19](#) of the Equality Act 2010.

aim of these provisions in the draft Rules is to ensure Approved Regulators fully consider the equality impact of their practising fee proposals and enhance their accountability for expenditure of practising fee funds. It will also inform the LSB's oversight responsibilities and give the LSB a better understanding of the impact of the proposals on different groups with protected characteristics. This is relevant to the regulatory objective to encourage an independent, strong, diverse and effective profession, in particular.

100. We welcome any comments respondents may have on any equality issues they believe arise as a result of the proposals in this consultation.

## Regulatory Impact assessment

101. The LSB has considered the likely impact of the new draft Rules on Approved Regulators and their regulated communities. We recognise that in some instances, changes in our approach to the practising fee approval process, reflected in the draft Rules, may result in an increased regulatory burden on Approved Regulators. However, we consider that any costs associated with compliance with the new draft Rules are outweighed by the anticipated benefits, as they will enhance transparency to allow those that pay the practising fee to drive accountability for the expenditure of practising fee income, assist the Approved Regulator and/or Regulatory Body to ensure that the practising fee is proportionate and does not lead to any negative unintended consequences, and will inform the LSB's oversight responsibilities. This should lead to a more meaningful debate on the purpose, benefits, costs and value of regulation which ought to result in improved standards across the sector. On this basis, we consider that the new draft Rules are a proportionate, transparent, targeted and effective means of achieving this.

102. We invite respondents to comment on the impact of the new draft Rules and quantify the likely costs and anticipated benefits, to further inform the LSB's assessment of the regulatory impact of the draft Rules.

## Next steps

103. This consultation closes on **8 October 2020**. Once the consultation has closed, we will consider all responses received and make any resulting amendments to the draft Rules and Guidance. Responses received after the deadline may not be considered.

104. We will publish our response to the consultation, alongside any changes to the draft Rules and Guidance, by **December 2020**.

## Responding to the consultation

105. The questions posed in this consultation are listed below for reference:

**Question 1: Do you have any comments on the above draft Rules 1 to 12? Do you have any comments on the associated Guidance?**

**Question 2: Does the overarching criteria in draft Rule E13 adequately set out the LSB's expectations of Approved Regulators when considering a practising fee application? Are there other criteria which should be included? Do you have any comments on the associated draft Guidance?**

**Question 3: Do you have any comments on draft Rules F14 to 16? Do you have any comments on the associated draft Guidance?**

**Question 4: Are draft rules H19 to 23 clear? Do you have other comments on these draft Rules or comments on the associated draft Guidance?**

**Question 5: Do you have any comments on draft Rules I 24 and 25? Do you have any comments on the associated draft Guidance?**

**Question 6: Are Rules J 26 to 30 regarding initial and full impact assessments clear? Do you have any comments on the associated draft Guidance?**

**Question 7: Does the criterion set out at draft Rule K 31 adequately explain the matters which the LSB requires to be satisfied to approve a practising fee application? Are you content that the Rule on the interim collection of practising fees has been omitted from the draft Rules? Do you have any comments on draft Rules K 32 and 33?**

106. Any representations should be made to the Board by 5pm on **8 October 2020**. Please ensure that responses reach us by the closing date as we cannot guarantee that responses received after this date will be considered.

107. We would prefer to receive responses electronically (in MS Word format). Please let us know if you would like the ability to provide a hard copy response so that we can make arrangements for this.

108. Responses should be sent to:

- Email: [consultations@legalservicesboard.org.uk](mailto:consultations@legalservicesboard.org.uk).

109. We intend to publish all responses to this consultation on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We will record the identity of the respondent and the fact that they have submitted a confidential response in our summary of responses.

110. If you wish to discuss any aspect of this paper or need advice on how to respond to the consultation, please contact the LSB by one of the methods described above or by telephone (020 7271 0050).

111. Any complaints or queries about this process should be directed to the Consultation Co-ordinator, Tim Borthwick, at the following address:

Consultation Co-ordinator, Legal Services Board, 3rd floor, The Rookery, 2 Dyott Street, London WC1A 1DE

Email: [consultations@legalservicesboard.org.uk](mailto:consultations@legalservicesboard.org.uk)