



The Bar Council

Bar Council response to the Legal Services Board's consultation paper titled Proposed practising fee rules, A consultation on new draft rules to replace the Practising Fee Rules 2016 made under section 51 of the Legal Services Act 2007

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board's (LSB) consultation paper titled, 'Legal Services Board's consultation paper titled Proposed practising fee rules, A consultation on new draft rules to replace the Practising Fee Rules 2016 made under section 51 of the Legal Services Act 2007'¹.
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Overview

4. We support the principle that the LSB ought to have sufficient information to ensure that regulation and its cost is proportionate. We have consistently been

¹ [Legal Services Board's consultation paper titled Proposed practising fee rules, A consultation on new draft rules to replace the Practising Fee Rules 2016 made under section 51 of the Legal Services Act 2007](#)

transparent and detailed in our Practising Certificate Fee (PCF) applications to the LSB and will continue to uphold these high standards in future applications. We are concerned, however, that the proposed process is significantly more time consuming than the current one due to greater and more detailed evidence being required. For example, the consultation requirement, that is currently only necessary if we intend to increase the PCF, is now mandatory, regardless of whether the proposed level of PCF has increased, decreased or remained the same. Similarly, the requirement to conduct a regulatory impact assessment is new. Although this is only required when certain criteria are met, the criteria are broadly drafted, meaning it will likely be required every year. We would expect it to be mandated this year because the impact Covid19 has had on the profession satisfies the criterion listed at 28(c). We are a relatively small organisation and the increase in workload generated by new elements to the proposed PCF application process will undoubtedly divert resources from other crucial activities.

5. The point that the rules come into effect is ambiguous. The new rules are due to be published in December, “in time for the 2021 practising fee application cycle”.² It is not clear if it is referring to the application for the practising certificate fee levied in 2021, which will begin for us in December 2020 or the 2021 application process, which would begin for us in December 2021. If it is the former and the new rules do apply to our December 2020 application, there is insufficient time to adapt to and comply with them. Budget setting requires significant planning and adherence to internal governance processes. We cannot consult with barristers before this has been accomplished and to maximise engagement with barristers we would ideally consult with them for a minimum of four to six weeks before finalising our PCF application and submitting it to the LSB. Similarly, we will need to amend some internal policies and procedures to achieve compliance with the proposed rules, and this may not be fully achievable in the timeframe. We will of course do our best to comply with any new rules but kindly request that the LSB understands the time constraints we are working under, if the rules apply to our submission this December.

6. It would be much easier to comply with the rules if they take effect in a year’s time, when we submit our PCF application in December 2021. Such a timeframe would give us sufficient time to adapt our policies and processes.

² [Legal Services Board’s consultation paper titled Proposed practising fee rules, A consultation on new draft rules to replace the Practising Fee Rules 2016 made under section 51 of the Legal Services Act 2007](#) 2020: 5

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

7. The rules are clear, and the application form in the annex clearly lays out the information and evidence required.

8. The omission of the current rule 14(d) is worrying for us. Although we have not had cause to use the fall-back mechanism, its removal takes away our ability to charge an interim PCF to the profession if the LSB's approval of our PCF application was to be delayed. The removal of this safety net poses a potential risk to the financial viability of the Bar Council and Bar Standards Board, notwithstanding the fact that we are making every effort to mitigate such a risk from materialising. The removal of this safety net is particularly concerning in light of Covid19. The negative impact of Covid19 on our financial health and resilience means that we anticipate we will not have the usual reserves to fall back on in times of financial stress. If we were unable to collect the PCF in part or full at the normal Authorisation to Practice time in February 2021, we would find our operations severely impacted. Without adequate PCF income the only way the organisation could continue as a going concern would be to cut costs. The only costs that can be reduced in the short term are staff costs. This would severely impact organisational deliverables. We would therefore ask the LSB to consider retaining a modified version of rule 14(d) which would permit an AR to collect the same fee as it had the year before, if it were asking for an increase and that increase had not yet been approved by the LSB.

9. At paragraph 29 in the guidance note³ that accompanies the rules it says that the LSB will aim to make a decision about a PCF application within 28 days but this may not be possible if there are errors in the application or if more information is required. It would be helpful and reassuring to the ARs for an upper time limit to be set as there would be troubling financial consequences to significant delays to our ability to collect PCF monies. If we cannot collect the PCF this changes the cashflow of our operations, requiring reforecasting and running the risk that we have to rapidly reduce staffing levels (50% of our costs and the only costs available for reduction in the short term), with significant consequences to the operations of us and the regulatory body. Further, we want to avoid the position where barristers are unable to renew their practicing certificate and risk practicing without authorisation. It would be helpful if in the future we could give barristers a firm date for the beginning of ATP well in advance. This would support them with their financial planning, something

³ <https://www.legalservicesboard.org.uk/wp-content/uploads/2020/07/Annex-B-Draft-PCF-Guidance.pdf>

particularly pertinent for those who are struggling financially as a result of the impact of Covid19 on their practices. We note the strict time limits that are required of approved regulators in submitting the PCF application, and would hope that the LSB could accord itself the same values and responsibility in approving the PCF in a strict and timely fashion.

10. We agree with the introduction of the additional permitted purpose at rule 8(h) that clarifies that PCF funds can be used for, “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”. This is an area that needs regulation and it is important it is adequately funded.

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?

11. Yes, the rules and guidance are clear and we agree that the overarching criteria should be consistent with s. 28 of the LSA07.

12. In terms of meeting 13(b) we would like the ideal of practitioners’ views being taken into account to be tempered with the potential practical difficulty of taking them into account if they are diametrically opposed to one another or our reasonable plans.

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

14. We understand these rules. As already stated, we consider that we already provide this type of information to the level required in our PCF applications. We have been clear and transparent about how PCF funds are apportioned between the AR and regulator and which permitted purposes AR activities aim to achieve.

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?

15. These rules are clear. We would like to highlight that the Covid19 crisis has made predicting PCF income very challenging. Whilst we are trying to mitigate against any adverse consequences by conducting extensive research into likely impacts upon barristers’ ability to work, setting up systems whereby the PCF payments by barristers can be spread into two transitions at different times of the year,

investigating ways to mitigate the anticipated large PCF shortfall and being prudent with our budget, the situation remains unpredictable. We would ask that the LSB bears this in mind and demonstrates flexibility when it comes to meeting the rules on reserves.

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

16. We agree that consultation and effective engagement are important for transparency and accountability. To this end, we are keen to engage with rule 24 requiring approved regulators to consult their regulated community prior to making an application for approval of our practising fee. As an approved regulator, we regularly keep our community informed about the work the Bar Council carries out. We do this through regular communication with the profession by way of press releases, articles in Counsel magazine, a fortnightly email update called “BarTalk”, a training and events email and regular email updates by the Chair. The five-year strategic plan is available on our website⁴. We make the annual report available on the website every year. We have also consulted regularly on our budget as part of the PCF submission process.

17. For draft rule 25, we have considered the various methods for how we can engage with our regulated community to meet the requirements of draft rule 24. Our plans might include, for example, putting regulatory updates in ‘BarTalk’ (a fortnightly email sent to all barristers); holding open forums (at this stage online to maximise engagement); and publishing a consultation on our website.

18. We do have concerns with the wording of draft rule 25 that the “the approved regulator should engage effectively with as many relevant authorised persons as reasonably practicable”, without further notes on what constitutes “effectively” or “as reasonably practicable” in the LSB’s view. In the draft PCF guidance at paragraph 113, it states that “the LSB will consider the efforts made by the approved regulator to engage, not only the response rates”. When considering these efforts, we are keen that the LSB is mindful of the fact that despite our best efforts, it may be difficult to engage the regulated community in budget plans due to limited interest. We do welcome, however, that the LSB are more interested in how we have engaged rather than how many consultation responses we receive. To that end, we are open to trying new

⁴ <https://www.barcouncil.org.uk/uploads/assets/86520690-7ab5-4cb1-93e63c26bc300c9f/Bar-Council-Strategic-Plan-2019-24.pdf>

methods of engagement. That said, we hope there is acknowledgment from the LSB that as a small organisation, we have limited time and resources.

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?

19. We understand the importance of Equality Impact Assessments (EIAs) and are committed to carrying them out.

20. In terms of the Regulatory Impact Assessment (RIA), which would be carried out by the BSB, we note that according to paragraph 132 of the Guidance, “the RIA should be prepared in a suitable form and within adequate time to gain input from stakeholders and inform the approved regulator’s decision making.” It would be helpful for the LSB to provide some further detail on how far reaching that input needs to be and what forms of input would be acceptable.

21. As already stated, we and the BSB are relatively small organisations with limited resources and carrying out a full RIA will require the regulator to allocate resources to what could be a significant piece of work. This puts pressure on their existing programme of work and could increase the cost of regulation if they are required to hire new staff to carry out the task. There is therefore a question to be asked about the impact and proportionality of this new requirement.

22. Whilst we will endeavour to engage with the profession to conduct EIAs and RIAs, we would hope that the LSB credits us and the BSB where we have tried to engage with stakeholders yet have received limited feedback.

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?

23. As stated in our response to the LSB ‘Changes to the rules made under section 51 of the Legal Services Act 2007’ consultation paper in 2016,⁵ we agree that the principle of clarity and transparency is sound and as a result we have endeavoured to follow this as best practice in our submissions to the LSB.

⁵ [Consultation response](#)

24. We are concerned about draft Rule K32 that permits the LSB to refuse to approve the entire practising fee or refuse to approve any part of the practising fee. While recognising that the exercise of this power is not mandatory, it is a draconian power and its exercise may have a disproportionate and damaging effect on the ability of the organisation to operate as well as the BSB to carry out the regulatory objectives. Draft Rule K 32 makes no provision for exemptions or waivers in the case of exceptional circumstances. As drafted Draft Rule K32 does not take account for the unique financial situation we find ourselves in as a result of Covid19 and the repercussions that would follow from the LSB refusing part or all of the practising certificate fee during this challenging and uncertain period. We hope the LSB will exercise some discretion in this regard.

25. Draft Rule K33 also neglects to appreciate the impact of Covid-19. We are making efforts to put in place arrangements to ensure we can operate in the event the Board does not approve the practising fee in in part or in whole. Our success is not certain, and we consequently may struggle to show that we could continue to operate “effectively”.

26. With regards to the proposed removal of Rule 14(d) please see our response to question 7 above.

Bar Council

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