



Bar Council response to the Fees and Charges Consultation 2015 paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the BSB's consultation paper entitled Fees and Charges Consultation 2015.¹
2. The Bar Council represents over 15,000 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.

Overview

4. The Bar Council generally thinks that the Practising Certificate Fee (PCF) should be kept as low as possible and that all BSB activities should be delivered in an efficient and cost effective manner. The research that underpins any fee level decision ought to be thorough and evidence-based. Where BSB regulatory services are optional and confer a benefit primarily to the user we are of the view that the user should pay the full cost, calculated on a full cost recovery basis, unless there is a reason for an exemption, for example it would be in the public interest by helping create a more diverse profession. We believe the waiver system should be retained in some service areas and continued to be funded by the whole profession via the PCF as there is currently a low number of applications. This means that the increase in PCF cost per barrister is extremely low, as calculated in the BSB's consultation paper. However we would like to see clear waiver eligibility criteria published. We would also like to see all fee information made more clear and accessible. However if the waiver system is not continued then we think that a discounted system (subsidised via the PCF) would be desirable, provided it were set at the appropriate level and again, that applicants to it were subject to clear and published criteria.

¹ [BSB 2015 Fees and Charges Consultation](#)

Question 1- Please tell us who you are, or if you are responding on behalf of an organisation.

1. The General Council of the Bar of England and Wales. For further information, please see the introductory three paragraphs of this response.

Question 2- Do you think the BSB should continue to charge for delivering certain services?

2. The Bar Council argued, in its response to the consultation paper² on the cost of licensing of a Bar Standards Board regulated Alternative Business Structure that the whole of the practising Bar should not subsidise the few who decide to set up an ABS. This principle should be applied more widely to other services save for circumstances where there is a wider benefit to either the public interest or the Bar as a whole. An instance of this might be where the diversity of the profession would be enhanced with a waiver system in place. For example, where the fee for the waiver from the requirement to undertake the new practitioner programme within the first three years of practice would prevent or discourage a woman returning from unpaid maternity leave. We know that retention of women is an issue at the Bar and that it is in the public interest for the Bar to be more diverse, hence a waiver of the fee would be in the public interest.

Question 3- In your opinion, should the PCF funds cover all of the BSB's activities?

3. No. The starting principle should always be that the individual benefitting from a qualifications type service should pay for the provision of that service on a full cost recovery basis and only if a wider public interest benefit is established should the PCF be considered as a funding source. We would add that all BSB activities funded through the PCF should fall within the permitted purposes as required by s51(4) of the Legal Services Act 2007 and Rule C6 of the LSB's Practising Fee Rules 2009.

Question 4- If the BSB is to charge for certain services, do you agree that the Full Cost Recovery principle should normally be applied?

4. Yes, this is consistent with our view that the PCF should not be used to fund regulatory services that are optional for barristers (e.g. application to establish a BSB authorised entity, authorisation to conduct litigation). We would add that the BSB should seek only to cover their costs and not to make a profit or a loss from the profession for such regulatory activities.

Question 5- Are the Principles set out in table 5.4.2 the right ones to consider when deciding fee levels?

5. Yes, these principles ought to be considered in conjunction with the BSB's regulatory objectives.

² http://www.barcouncil.org.uk/media/417490/cost_of_licensing_bsb_abs.pdf

Question 6- What else do you think should be considered when deciding on fee levels?

6. The following factors should be considered:
 - 6.1. The cost of delivering the service.
 - 6.2. The cost of equivalent services provided by other regulators, to avoid regulatory arbitrage.
 - 6.3. The quality of services provided (e.g. time taken to process applications, ability to respond to questions from applicants).

Question 7- Should the BSB use a “sliding scale” (see illustration 5.4.7) to make a decision on fee levels?

7. Yes, the principle is correct and we agree that fee level decisions should be evidence-based.

Question 8- In your opinion, should the BSB publish more detail than it does currently with regard to fees or funding?

8. Yes, we strongly think that clearer information about fees is required. Information about fees and funding is frequently located in many different word documents linked to the website and is consequently currently difficult to locate. We would like to see all fees more prominently and clearly displayed on the relevant webpages and a new consolidated list of all the fees charged on a designated webpage. It should also be made clearer to whom the various information and application forms are aimed at (e.g. domestic barrister/foreign lawyer). All documents should include information about when they were last updated and clearer information is needed about the full range of services the qualifications team offers (ideally on one webpage). This should include information about who to contact for specific queries and services, with full contact details.

Question 9- Is the BSB’s website the right place to make fees and charges information available?

9. Yes, subject to our answer to question 8 and making the information available in other formats to those who need it if requested.

Question 10- Would you expect the BSB to consult on fee changes in any additional circumstances other than those listed in paragraph 5.6.1?

10. Yes, if they were likely to impact on the amount of PCF income required by the BSB.

Question 11- Do you think the BSB should continue with its fee waivers policy?

11. Yes, based on the low levels of waivers currently being sought, the relatively low cost of the system to the rest of the profession when spread amongst the whole profession (via the PCF) and the benefits to the profession of doing so. However we think there should be a high threshold for approving waiver applications and clear and published criteria used to assess applications. The process ought to be transparent.

Question 12- What are the arguments for and against continuing with the fee waivers policy?

12. For:

- 12.1. Low financial impact on rest of profession if funded through PCF;
- 12.2. Low administrative burden;
- 12.3. Currently a low level of demand;
- 12.4. Supports barristers with protected characteristics which is consistent with the statutory regulatory objectives of promoting competition in the provision of legal services and encouraging an independent, strong, diverse and effective legal profession and the Bar Council's equality and diversity objectives³.

13. Against:

- 13.1. It contravenes the polluter pays principle and imposes a financial burden on members of the profession who may not believe it is fair, calling into question the legitimacy of the PCF level.

Question 13- In your opinion, should the BSB introduce discounts (instead of fee waivers)?

14. Perhaps. We think that for such a system to be meaningful there would have to be various levels of discount available. We are concerned that any change to a discount-based system could increase the administrative burden to the BSB, and consequently, the cost of implementation and could outweigh any potential benefits especially given the low numbers of applicants currently applying for waivers. If the number of applications increases dramatically for any reason, this policy ought to be reviewed. We suggest that the BSB explores the implications of fee discounts in greater depth.

Question 14- If discounting were to be introduced, in percentage terms, what level of discount do you think the BSB should set?

15. This is for the BSB to decide, based on research. Any discounts should be comparable to those offered by other approved regulators.

Question 15- What are the arguments for and against introducing discounts?

16. For:

- 16.1. Supports barristers with protected characteristics, albeit to a lesser extent than a waiver system. This is consistent with the statutory regulatory objectives of promoting competition in the provision of legal services and encouraging an independent, strong, diverse and effective legal profession and the Bar Council's equality and diversity objectives;

³ http://www.barcouncil.org.uk/media/292926/equality_objectives_and_action_plan_for_2015-16.docx

- 16.2. It is less contrary to the polluter pays principle than the waiver system and may be more acceptable to the wider Bar;
 - 16.3. The discounts can be set at a level that balances the need to support some individuals' access to BSB services at minimal cost to the rest of the profession.
17. Against:
- 17.1. The reduced fee may still be too high for individuals with protected characteristics and consequently act as more of a barrier to the waiver system;
 - 17.2. There may be an increase to the cost of regulation because of a greater administrative burden;
 - 17.3. It may be difficult to assess the correct level of discount.

Question 16- Do you think waivers or discounts should be funded by the users of the same service, or by the profession as a whole?

18. The profession as a whole on the basis that it meets the regulatory objective of encouraging an independent, strong, diverse and effective legal profession that is arguably to the benefit of the whole profession and because the cost per barrister is extremely low when spread across the whole profession. If it were only funded by users of the same service then the burden would be disproportionately high, particularly where a service had a low number of users and a high fee.

Question 17- In your opinion, should the BSB apply the Full Cost Recovery method to Qualifications Committee application fees?

19. Probably, subject to price elasticity particularly where any significant drop in demand (and subsequent increase in price) had a disproportionate impact on domiciled applicants with a protected characteristic – in particular BAME students/young practitioners and women taking or returning from a pregnancy related career break. We believe the profession has a responsibility to support diversity in the profession in the public interest. However we recognise that this issue could also be addressed by a waiver or discount system. Retention of women after a career break to have a family is a particular problem for the Bar.

20. Fees should reflect the cost of equivalent services provided by other European Bar Associations for the following qualifications services so as to not be discriminatory and to prevent breach of the EU directives on freedom of movement and establishment of lawyers:

- a) Registration as a European lawyer;
- b) Admission to the Bar for a European lawyer;
- c) Certificate of Academic Standing (Overseas or UK Non-standard).

Question 18- What reasons would justify the BSB not applying the Full Cost Recovery method for Qualifications Committee application fees?

21. If any of the following occurred:
- 21.1. Where any significant drop in demand (and subsequent increase in price) had a disproportionate impact on domiciled applicants with a protected characteristic (as stated above);
 - 21.2. Applying the method results in detriment to the regulatory objectives;
 - 21.3. The activity under consideration falls within the permitted purposes;
 - 21.4. The service is unaffordable and neither a waiver nor a discount system are in place.

Question 19 - In your opinion, which protected characteristic groups are likely to be negatively impacted by Qualifications Committee application fee increases?

22. BAME students; women taking a maternity career break (pregnancy) and younger students/barristers based on their likely income/earning capacity.

Question 20 - Why do you think particular protected characteristic groups would be negatively impacted by Qualifications Committee application fee increases?

23. The profile of those likely to require exemptions etc. will be disproportionately made up of people with these characteristics.

Question 21- Do you think the negative equality impacts are significant?

24. The impact of any fee increases will be dependent on the ability to pay the fees amongst those who commonly apply for exemptions. We would anticipate high fees might prove a barrier to those less able to pay, e.g. young lawyer starting out in practice, students or women returning from a career break having had a family.

Question 22- In your opinion, should the BSB take any action to mitigate any adverse impact to particular groups?

25. Where the BSB identifies that the fee significantly reduces demand for an exemption (based on comparison with average numbers of applications over previous years) the BSB should take steps to review the costing model particularly if there is evidence this has a disproportionate impact on BAME and women barristers practising at the Bar.

Question 23- What do you think the most appropriate mitigating actions might be?

26. The BSB might want to avoid imposing fees by making specific provision for career break returners with respect to CPD. Fee waivers or reducing the fees charged (discounts) should also be considered.

Bar Council
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