



Bar Council response to the LSB 'Changes to the rules made under section 51 of the Legal Services Act 2007' consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board (LSB) consultation paper entitled 'Changes to the rules made under section 51 of the Legal Services Act 2007'.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 welcomes the opportunity to respond to this consultation. Before we turn to the two substantive questions of the consultation, we would like to make a couple of general observations that are relevant but not explicitly covered by the consultation.
5. The first concerns the approach to Practising Certificate Fee (PCF) submissions to the LSB. Historically, the Bar Council has claimed for the part of the PCF that is reported in the profit and loss account for the coming financial year. However, we are aware that this is not the only approach and that other regulators have sought an agreement to claim the PCF based on the total cash spend on permitted purposes activity per year. The benefits of a standard approach are comparable fee levels between regulators and less variation between financial years.
6. Secondly, we note that the consultation refers to the 'cost of regulation' in paragraph six and that this is not defined. We are aware that this term is generally perceived to refer to

¹ Legal Services Board (2016) Changes to the rules made under s51 of the Legal Services Act 2007

the direct charge that an Approved Regulator levies on its practising members. We are concerned that this definition is too narrow and will give a distorted view of the true cost of regulation, which will also include indirect costs. Further, barristers are also subject to financial and tax regulation which will incur additional cost. Although this is not the subject of the consultation, we are aware from discussions with the LSB that the cost of regulation is considered by the LSB when reviewing a PCF application. Consequently, we consider that this should be clearly defined.

7. The Bar Council would welcome a more clearly defined timetable for the s. 51 application process from the LSB, detailing a date by which the application must be submitted by the Bar Council and a date by which the LSB must inform the Bar Council of its decision. This year's process prompted unexpected additional questions from the LSB and a delay of three weeks for authorisation of the PCF increase. The Bar Council's Authorisation to Practise process was delayed as a result.

Question 1: Do the two proposed additional criteria in Rule 10 adequately explain the matters that the LSB will take into account when considering a PCF application?

8. We propose to deal with each criterion in turn.

9. The Bar Council agrees that it is helpful to include a specific reference to the regulatory objectives.

10. The second of the two proposed new application criteria is 'clarity and transparency of all the Approved Regulator's financial resources, whether or not those resources arise from permitted purposes, and the impact on the proposed practising certificate fee.' Whilst we agree that principle of clarity and transparency is sound and should be followed, we are concerned that the criterion as drafted is not fit for purpose. We anticipate that this provision would require the Approved Regulator to demonstrate to the LSB the allocation of all its funds in advance for its entire operation, including income and expenditure that does not pertain to the Legal Services Act 2007 (LSA). It is crucial that, at the application stage, the LSB concentrates on scrutinising activity falling within the permitted purposes. This is likely to be a subset of the whole of the activities of the entity/group/organisation that is the Approved Regulator. Subsidiary companies, for example, that have no relevance to the LSB or LSA 2007, should not be included nor should any detail be required for activities that sit outside of "permitted purposes" as defined by the Act. Under the current rules, the Bar Council already provides the LSB with a high level forecast of all of its income and expenditure and this should be sufficient for the LSB's purposes. We consider that it would be an inefficient use of the LSB's resources to consider extensive detail about non-PCF (practising certificate fee) expenditure within a financial forecast.

11. However, that is not to say that we do not understand and fully support the principle of transparency and accountability in the public interest. We suggest that this principle could be better met through full, auditable financial reporting on all expenditure on an annual basis, both PCF and otherwise. This type of reporting is likely to give a more accurate picture than a financial forecast provided in advance, which is likely to be subjective and subject to change. The Bar Council currently publishes all of its financial reports, which provide detailed information about incomings and outgoings across all areas of the business. These reports are, therefore, matters of public record.

12. We note that there are additional considerations, mentioned in the consultation, that are also taken into account when considering a PCF application. These are 'Better Regulation principles' and 'best regulatory practice' although these criteria do not feature in the revised Rule 10. It is our view that Rule 10 should clearly set out all the factors that the LSB takes into consideration when considering a PCF application so that the criteria are entirely transparent and unambiguous to any prospective applicant. We are concerned that a reference to 'best regulatory practice' would be too subjective to constitute a formal application criterion. We therefore suggest that an additional criterion be added that refers to 'agreed and published best regulatory practice.' A further criterion should be added to include 'Better Regulation principles.'

Question 2: Are the LSB's proposed changes to the evidence requirements clear?

13. We have already outlined above, in our answer to the previous question, our view that the LSB should consider detailed financial forecasts only for PCF expenditure at the application stage. We note that the revised 11 (b) and 11 (c) make it clear that the requirement to provide detailed financial forecasts and estimates for the next three years (where available) only applies when there is a proposed increase in practising fees. We are concerned that the proposed timescale of three years for the budget is too prescriptive. Depending on the circumstances of the Approved Regulator, a timeline of three years may not be sufficient to demonstrate future risks or reward outcomes from investments. In certain cases, five years may be more appropriate.

Bar Council

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