

## **Approval of Practising Certificate Fee Allocation Methodology**

### **For approval by the Legal Services Board**

This application for a change to a regulatory arrangement is made in accordance with the requirements set out in the Legal Services Board's Rules for Rule Change applications. The Bar Standards Board wishes to provide the information below in support of the application.

Any queries about this application should be addressed to:

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#### **1. The proposed alteration**

- 1.1 The Bar Standards Board, is seeking approval for a change to a regulatory arrangement namely the methodology for the allocation of the Bar practising certificate fee (PCF). The change, if agreed and subject also to other matters identified in the application, will apply for the 2014/15 authorisation to practise renewal and beyond. The current arrangements have been substantively reviewed in consultation with the profession and are no longer considered to be fair and appropriate.
- 1.2 Under the new arrangements the PCF will be allocated in the following way:
  - The fee will be based on earnings rather than years of call;
  - There will be 6 rates of PCF related to income bands ranging from £100 for those whose gross fees are less than £30,000 to £1,500 for those whose gross fees are more than £240,000; and
  - Arrangements for employed and self-employed practitioners will be harmonised. Employed barristers will pay by reference to gross income, and self-employed practitioners by reference to gross fees received within a prior 12 month period. Dual qualified practitioners will pay by reference to gross earnings in both employed and self-employed capacities.

## 2. Details of existing PCF arrangements

- 2.1 Under the present arrangements the core PCF (which represents the direct contribution of the practising Bar to the costs of running the Bar Council's regulatory functions as undertaken by the BSB and those corporate and other functions that fall within the 'permitted purposes' under s51) is calculated by reference to year of Call. This arrangement has its origins circa 40 years ago and so predates Section 46 of the Access to Justice Act 1999 which enabled the introduction of a compulsory fee in 2001. Illustrated below are the 2013/14 fees, as approved by the LSB.

| <b>Self Employed Bar – Call Band</b> | <b>Core Fee (£)</b> | <b>Practitioner Headcount (June 2013)</b> |
|--------------------------------------|---------------------|---|
| QC                                   | 1,202               | 1,557                                     |
| Junior (13 years and over from Call) | 813                 | 6,720                                     |
| Junior (8 to 12 years from Call)     | 417                 | 2,082                                     |
| Junior (5 to 7 years from Call)      | 222                 | 1,276                                     |
| Junior (1 to 4 years from Call)      | 80                  | 955                                       |
| <b>Employed Bar – Call Band</b>      |                     |   |
| QC                                   | 877                 | 26  |
| Junior (13 years and over from Call) | 615                 | 1,844                                     |
| Junior (8 to 12 years from Call)     | 340                 | 429                                       |
| Junior (5 to 7 years from Call)      | 183                 | 212                                       |
| Junior (1 to 4 years from Call)      | 80                  | 109                                       |

## 3. Nature and effect of the proposed alterations

- 3.1 It is proposed that an income based model will replace the existing year of Call arrangements. There is a wide divergence in income of the practising Bar and we seek to design an income-based PCF model that is simple, fair and enforceable. This process therefore involves:
- A minimum level of fee;
  - A range of income bands; and
  - A capped maximum level of contribution.
- 3.2 As part of the authorisation to practise process, all practitioners will be required to declare historic gross annual earnings within bands. For self-employed barristers this will be the gross receipts figure most recently

declared to the Bar Mutual Indemnity Fund (BMIF). Therefore, for example, the practising certificate fee for the period 1 April 2014 to 31 March 2015 will, for a self-employed practitioner, be based upon gross fee income received 1 January 2013 to 31 December 2013. For the employed Bar, the figure will be gross earnings related to practise over the previous 12 months. All practitioners will be obligated to allow the Bar Standards Board to validate declared earnings with the BMIF, employers or by other means.

The proposed model

3.4 We have been able to determine how bandings within an income based model will look (based on an assumed PCF total income target of c £9.5 million). The bands have been based upon anonymised fee earnings declarations made to the BMIF for 2012 and 2013 fee plus other anonymised information provided by public-sector employers of barristers. Based on this, an income based PCF model would look as illustrated in the table below:

| <b>Gross Fee Earnings/Salary</b><br>(applicable to both self-employed Bar and employed Bar) | <b>PCF Core Fee</b><br>(i.e. excluding levies) |
|---|--|
| £1-30,000   | £100   |
| £30,001 - £60,000   | £200   |
| £60,001- £90,000  | £400   |
| £90,001 - £150,000  | £725   |
| £150,001 - £240,000   | £1,100   |
| £240,001 and above  | £1,500   |

3.5 Under the current PCF allocation arrangement, around 8,400 practitioners pay a core fee of £800 and above, while around 12,600 pay a core fee of £400 and above, Under the proposed new model it is estimated that around 4,300 practitioners will pay a core fee above £800, while around 10,200 practitioners will pay a core fee of £400 or above

3.6 For the purposes of this application, the figures above are likely but have to remain subject to confirmation pending finalisation of the budget for submission to the LSB for approval in December 2013.

#### 4. Why we wish to make the alterations

4.1 In deciding whether or not to adjust the way in which the PCF is calculated, the merits of the current system have been evaluated as follows:

##### Advantages of current system

- The system is tried and tested and despite anomalies (which to an extent are addressed through a low income waiver system) allows more senior practitioners to support those more junior without prejudicing the confidentiality of individual fee income.
- A significant recent investment has been made in introducing IT systems that support the current arrangements. Maintaining the current bandings would have avoided some further cost and risk associated with change.
- The current arrangements acknowledge, by a differentiated fee, that the employed bar places less demand, as compared to the self-employed bar, on the regulatory and other s51 functions of the BSB and Bar Council respectively.

##### Disadvantages of current system

- It is the long established custom of the Bar that the more established practitioners should support the more junior members. While at one point year of Call may have been a reasonable proxy for income that is demonstrably no longer the case. There is ample evidence of relatively junior members of the Bar paying a significantly smaller PCF than more senior and QC colleagues, despite earning more in fees.
- The current system arguably disadvantages those, (predominantly women), who take a career break, and those who enter practise some years after Call. Practitioners in these categories do not have necessarily have the level of earnings commensurate with their seniority in the profession.
- It is may also disadvantage those who practise predominantly in publicly funded areas as there is a direct correlation between the proportion of practice which is publicly funded and lower income levels as compared to other practitioners. Publicly funded practitioners are more likely to be woman and / or BAME practitioners. Emerging but as yet unpublished data from the Biennial Survey of the Bar 2013 demonstrates this.
- Whilst not necessarily the case, the approach favours younger members at the expense of older members and may no longer be appropriate in equalities terms.

## **5. A New Model**

- 5.1 Any new system needs to address the anomalies, including equalities impact, inherent within the existing arrangements. However, the choice of options has also been dictated by the limits on our data. For example, we do not currently hold sufficiently comprehensive data either on risk or the demand, from across all part of the profession, for either regulatory services or those other services that fall within the 'permitted purposes', accurately to allocate overhead to any particular grouping on a risk-based premise. As the BSB adopts the Regulatory Standards Framework it may be possible to refine the model on a risk basis, but that approach is much more likely to be found to be valid at an entity rather than individual level.
- 5.2 In designing the new system the principles of it being simple, fair, and enforceable have been key considerations:

### **Simple**

- The new system will operate within the existing Barrister Connect authorisation to practise arrangements and adopt a 'tick box' approach.
- The same bands will apply to both the employed and the self-employed Bar.
- There will be no requirement for maintaining the existing income based fee reduction arrangements.

### **Fair**

- The minimum payable by any practitioner will be £100. This will be payable by all barristers whose gross fees or gross salary is £30,000, or less.
- The fee to be paid by all other barristers will depend upon the income band in which they fall. All barristers in the same income band will pay the same fee. The highest income band will be that for barristers earning £240,001 and above (i.e. circa 17% of the practising Bar). This would have the effect of capping the PCF for barristers earning over £240,001.

### **Enforceable**

- All practitioners will provide the Bar Standards Board, through the 'Declaration of Truth' that is part of the authorisation to practise process, with the right of individual audit.
- False income declarations will amount to professional misconduct; in some circumstances it will amount to serious professional misconduct.

## **6. Impact Assessment**

- 6.1 Anonymised data obtained from the BMIF, plus data garnered from the Biennial Surveys of the Bar 2011 and 2013 and annual exit surveys indicate that there is a higher proportion of women, BAME and disabled practitioners amongst the less well remunerated members of the profession as compared to their % representation in the practising profession as a whole. An income based PCF is, therefore likely particularly to help the latter groups, promote retention and facilitate the BSB's equalities objectives. Moreover, a fee calculated on the basis of historic income, as opposed to level of seniority, will assist practitioners seeking to return to their practice after a career break, for example, to raise a family.
- 6.2 As women and BAME groups represent a higher proportion of the employed Bar than they do as a percentage of the profession as a whole, any decision to align the PCF paid by the self-employed and employed members of the Bar could theoretically penalise both a higher percentage of women than men as well as those in BAME groups as compared to the white ethnic group. Understanding the implications for this group is complicated by the fact that, for the majority of employed barristers, respective employers pay the PCF on the individual's behalf. However, in the above income based model it is likely that the majority of employed practitioners will be in the two lowest income bands and the majority should, therefore, actually benefit from the change.
- 6.3 The extant banding arrangements, which relate the PCF paid to years of Call, benefit, in general, the younger members of the profession at the expense of older members of the profession. An income based PCF removes this inequality.
- 6.4 The Bar Barometer 2012 indicates that over the previous 5 years the overall numbers of males obtaining pupillage is slightly higher than females (1204 v 1127). This is the group most likely to be affected by the increase in the lowest core fee from the current £80 to £100. The ethnic profile for those who obtained pupillage in the same period indicates that there is a higher percentage of BAME circa 16% in 1-4 years of Call group as compared to the 11% in the profession as a whole. Consequently, the proposed minimum fee of £100 could have a minor adverse diversity impact.

## **7. The regulatory objectives**

- 7.1 The BSB has not identified any significant adverse impact on any of the regulatory objectives as a result of altering the way in which the PCF is calculated. Indeed, there is likely to be a positive impact on the regulatory objective of encouraging an independent, strong, diverse and effective legal profession. Reduced regulatory cost for some practitioners, especially those who work in the publicly funded arena, may assist in the promotion of competition in legal services and in promoting and protecting the needs of consumers and improving access to justice, as those reduced costs may be a

factor in allowing them to continue to offer services or to offer them at competitive rates.

## **8. The better regulation principles**

### Transparency

- 8.1 The profession has been surveyed on the issue of PCF allocation in 2010, 2011, and 2012 and most recently in June /July 2013. The surveys have tracked a distinct shift away from retention of the status quo to a 2:1 support for change to an income based model in the most recent survey.
- 8.2 Further detail of the consultation processes undertaken can be found below.

### Accountability

- 8.3 In taking the decision to alter the arrangements in respect of the PCF, the BSB has acted in an accountable way. The profession has been consulted on the proposals and been given a clear indication of majority support. If LSB approval is forthcoming, practitioners will be advised individually as well as through the media and website. The new changes will be implemented through the authorisation to practise process and thereby engage every practitioner.

### Proportionality

- 8.4 The survey conducted in 2012 offered the profession a number of options for allocating the practising certificate. While none of the options received a majority, an income based model attracted the most support. It was the option that addressed most of the anomalies in the present arrangements. The idea was further refined and subjected to review within the Bar Council, the joint Finance Committee, the BSB's Planning, Resources and Performance Committee and the executive of the BSB prior to being offered to practitioners for consideration.
- 8.5 As indicated above, the system decided upon is thought to be the fairest and most proportionate in order to address the current inequalities and imbalances within the charging system.

### Consistency

- 8.6 An income based model for fee allocation will, in relation to that aspect, align our allocation processes more closely with those of the SRA and Law Society and will pave the way for income based fees for the regulation of entities. More significantly, the current system of allocating the PCF by reference to number of years of call is an antiquated and inconsistent with modern practice.

### Targeting

- 8.7 The new allocation structure for the PCF will be reviewed annually to ensure that is working as intended and issues that arise are addressed in a timely fashion.

## **9. Desired outcome**

- 9.1 The desired outcome is a new methodology for the allocation of the PCF that, by dint of being linked to ability to pay, addresses the inequities and inconsistencies in the present system and promotes retention and diversity in the profession.
- 9.2 The proposals will to some degree also simplify the present fee allocation arrangements and thereby be more efficient to operate and also provide for greater clarity for the Bar in the way in which their PCF is calculated.

## **10. Other regulators**

- 10.1 The PCF working group's initial research, and as referred to in the covering paper to the 2012 survey, included data gathered on the level and nature of the charges made by other regulators including the Law Society. Other regulators have not been invited to comment upon the PCF allocation proposals.

## **11. Date of implementation**

- 11.1 Subject to the impact, if any, of *Hemming v Lord Mayor & Citizens Westminster* [2013] EWCA Civ 591 (see below), the BSB would wish to implement the proposed new arrangements as part of the 2014/14 authorisation to practise renewal which will be initiated in mid February 2014.

## **12. Consultation processes undertaken**

- 12.1 A consultation and survey was conducted in late 2012. The consultation document and the results of the survey can respectively be found at the following links:  
[http://www.barcouncil.org.uk/media/200006/pcf\\_allocationsurvey2012report.pdf](http://www.barcouncil.org.uk/media/200006/pcf_allocationsurvey2012report.pdf)  
<http://www.barcouncil.org.uk/media/174220/pcfconsultation16102012.pdf>
- 12.2 In June/July 2013 practitioners were individually contacted by email and invited to participate in a survey that was predominantly designed to ascertain the level of support for a change to the system of allocation of the PCF from year of call to earnings based. Some 4061 responses were received representing circa 26% of the practising Bar. This level of response generates a high level of confidence in the statistical extrapolation of the results.

The survey was accompanied by an explanatory paper, a copy of which is at Annex A. The survey report is at Annex B. It is of particular note that 65% opposed the continuation of the present method of allocating the PCF by year of call. Some 62% supported the income based model outlined in the paper accompanying the survey.

12.3 Respondents were also offered the opportunity to email additional observations on the proposed model to the Treasurer of the Bar Council. Some 40 emails were received, which covered the following themes:

- The merits of the employed and self-employed Bar paying the same fee.
- The level of the fee income cap.
- The definition of 'earnings'.
- The implication of the potential extension of the Freedom of Information Act (FoIA) if the Bar Council holds earnings information for all practitioners.
- The impact on the more junior Bar.
- The relative fairness of an income based model.
- The legality of the proposals.

12.4 All respondents received an individual reply that predominantly addressed their concerns save for a particular issue pertaining to the legality of the proposals (see below). The issues in question were all further considered by the Officers of the Bar Council and aired at BSB Board and Bar Council meetings. A number of relatively minor changes were made as a result. Aside from the legality of the proposals challenge, the most significant area of concern was the suggestion the employed and self-employed Bar should be placed in the same bands. Some employed Bar practitioners assert that, as they ostensibly place a smaller demand upon regulatory and representative resources, they should pay less. That argument does not exclusively apply to the employed Bar. As and when the BSB and Bar Council hold more comprehensive data relating to the differentiated demands upon its resources a more risk based approach to PCF allocation might be considered. It was also suggested that, as self-employed practitioner fee earnings were not a reflection of personal income (due to the necessity to deduct chambers overheads and other costs of practice), the self-employed Bar should only have to declare a net fee figure. However, administration and monitoring of such an arrangement would be impractical. Moreover, there would be no financial benefit as any substantive overall decline in fee declarations would have to be offset by an increase in the fee level of the bandings.

12.5 A specific concern was raised as to whether the proposed new income based model, as also the current means of PCF allocation, were both contrary to the Service Directive (2006/123/EC) and the Services Regulations (SI2009/2999) as recently considered by the Court of Appeal in *Hemming v Lord Mayor & Citizens of Westminster* ([2013]EWCA Civ 591)

- 12.6 The issues in play in this case are matters of concern for all regulators and bodies with a statutory right or obligation to levy fees. The Court of Appeal decision in Hemming is now the subject of an application for permission to appeal to the Supreme Court. The BSB has made submissions together with other regulators in this application and seeks leave to intervene. If permission is granted, the Supreme Court will be invited to consider the lawfulness of income-based practising certificate fee models.

### **13 Other explanatory material**

- 13.1 The BSB Board considered and agreed the proposed income based PCF allocation arrangements at its meeting on 12 September 2013. The BSB has clearly endorsed an income based approach while stating that the matter is also for Bar Council approval. The papers which the Board considered on 12 September and the minutes are available on request.
- 13.2 The Bar Council also considered and agreed the proposed income based PCF allocation arrangements at their meeting on 21 September 2013. The minutes of that meeting are available on request.

### **Annexes**

- A. PCF Allocation Survey 2013 Report from Bar Standards Board Research Team.