16 January 2020

Approval of 2019 Practising Certificate Fee (PCF) application made by the Bar Council (BC) to the Legal Services Board (LSB) under section 51 of the Legal Services Act 2007 (the Act)

1. The LSB has approved an application made by the BC to the LSB under section 51 of the Act. Section 51 of the Act relates to the control of PCF charged by approved regulators.

2. A PCF is a fee payable by a person under an approved regulator's regulatory arrangements, in circumstances where the payment of the fee is a condition which must be satisfied for that person to be authorised by the approved regulator to carry on one or more activities which are reserved legal activities. An approved regulator may only apply amounts raised by PCF for one or more of the permitted purposes which are set out in section 51(4) of the Act.

3. A PCF is payable under the regulatory arrangements of an approved regulator only if the LSB has approved the level of the fee required by section 51 of the Act. The BC is an approved regulator and the Bar Standards Board (BSB) is the regulatory body to which the BC has delegated its regulatory functions.

4. In making an application, an approved regulator must comply with the provisions of the Practising Fee Rules 2016 (Rules)[1]. The Rules[2] set out the criteria against which the LSB will assess PCF applications, as well as the evidence required for the LSB to be satisfied the criteria is met. The LSB's Guidance to Approved Regulators on PCF applications (Guidance) provides approved regulators with the detailed criteria and evidence it requires to consider such an application[3].

5. This notice sets out the decision taken, including an assessment of the PCF application.

Overview of PCF application and decision

6. The application submitted by the BC (on behalf of the BC and BSB) provides that the income bands which determine the level of PCF to be charged to individuals will remain the same as in 2019[4], as set out in the table below. The BC's projected total PCF income for 2020 is £15.4m (an increase from £15.26m in 2019[5]), based on the average PCF and number of barristers expected to pay the fee[6].

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[1] https://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2016/20160601_Practising_Fee_Rules_2016.PDF

[2] Ibid, Rules 10 and 11.

[3] https://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2016/20160601_PCF_Rules_Guidance_June_2016.PDF

[4] The income bands were introduced in 2018.

[5] The BC has confirmed this is an actual figure for PCF income received in 2019/2020.

[6] Table 3 of the application.

Band	Income Band	2020/21 Fees
1	£0- £30 000	£100
2	£30001 - £60 000	£246
3	£60 001 - £90 000	£494
4	£90 001- £150 000	£899
5	£150 001 - £240 000	£1,365
6	£240 001 - £500 000	£1,850
7	£500 001 - £1 000 000	£2,500
8	£1 000 001 and above	£3,000

7. The LSB's decision is to approve in full the levels of the PCF for 2020 set out in the BC's application.

LSB assessment

Development of the overall budget and application

Evidence that the regulatory arm has led the development of the application

8. The application explains that the BSB has set its budget independently and it was prepared to align with the strategic aims set out in the BSB's strategic plan for 2019-22[7]. Budget options were scrutinised by the BSB Planning, Resources and Performance (PRP) Committee and the final bid was approved by the BSB Board. The joint BC Finance Committee agreed the parameters of an overall high-level budget that met all the regulatory needs and the combined organisational financial provisions required in the medium term.

9. We are therefore satisfied from the information provided in the application that the regulatory body has led the development of the budget and application.

Clarity and transparency of overall budget setting

10. The LSB is satisfied with the budget setting process outlined in the application and considers that it provides a reasonable level of information on the development and setting of the overall budget. This includes a clear breakdown of the expenditure of projected PCF income for 2020, the split of expenditure based on forecast costs, for regulatory permitted purpose activity, non-regulatory permitted purposes activity and other activities that are not regulatory or permitted purposes activity[8].

11. Total income from PCF is projected to increase to £15.4m, (less than 1% increase on 2019/2020) and income from non-PCF sources applied to permitted purposes is expected to be £590 000 (a 20% increase on 2019/20).

12. The level of PCF income to be applied to BSB activities will rise to £8.7m and the level of PCF income applied to BC representative permitted purposes will rise to £3.6m (each represent increases of 3.8% on 2019/20).

[7] https://www.barstandardsboard.org.uk/uploads/assets/4b599307-da48-4e4e-a8e2ff3bf83934bd/bsbstrategicplan2019-22.pdf

[8] For example, the BSB's share of the BC's joint overhead and support costs.

13. The application also clearly sets out the total funding the BC expects to receive (including from non-PCF sources such as other regulatory fees and charges and contributions from the Inns)[9].

14. The application is clear on the main budgetary risks, such as PCF collection levels and other sources of income that present financial risks and has explained the steps the BC has taken to mitigate these risks.

15. It also explains that shortfalls in funding or unplanned costs may, at the BC's discretion, be met by designated PCF reserves (for permitted purposes only), General reserves, cost reductions targeted at non-permitted purposes activity, cost reductions applied to permitted purpose activity (as agreed by the BSB) or other options to ensure the best use of available cash reserves.

Evidence that immediate and medium-term needs have been taken into account.

16. The application notes that the direct costs of the BSB are forecast to increase and explains that the main drivers of this increase are
    - a longstanding commitment to remunerate case presenters in cases before the Disciplinary Tribunals (previously provided pro bono),
    - the cost of managing the transition of the current centralised examination system to the new arrangements under Future Bar Training and increased staff costs,
    - a 3.5% inflationary increase and changing roles and responsibilities within the organisation and
    - a non-recurrent provision of £50,000 for the review of the BSB Handbook.

17. The BSB will provide detailed forecasts beyond 2021 once the review of the take up of the Future Bar Training course and the impact of the LSB's new Internal Governance Rules has been assessed. We will expect these to be set out in the BC's next PCF application for 2021/22.

18. The direct costs of the BC are also expected to increase which is driven by
    - an annual budgeted 3.5% increase in salary costs
    - a 1% increase in staff non-salary costs (increase in travel and events)
    - cost adjustment for pension uplift
    - staff training costs relating to training and events
    - non-staff costs relating to training and events which generate additional income.

19. The BC has provided a summary of the financial outlook for itself and the BSB beyond 2021 and indicative income and expenditure to 2024[10].

Contingency fund arrangements

20. The BC's policy is that the reserves should be the higher of 4 months operating costs or £3m. In addition, it maintains a permitted purposes reserve which is only used for permitted purposes. This is currently in deficit, although last year's increase in PCF partially addressed this and the current forecast is that it will be replenished by a surplus generated in 2020/21.

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[9] Table 9 of the application.

[10] Table 4 of the application.

21. The BC also maintains a separate Pension reserve and a Legal reserve (which is a designated permitted purpose reserve) to hold and provide visibility of costs of the BSB defending against a legal challenge following the cessation of third party insurance cover in 2019 on the grounds that it was considered to be uneconomic.

22. During the assessment of the PCF application, the LSB asked the BC to provide further explanation about the stated purpose of the Legal reserve. The BC explained that the Legal reserve was set up in March 2018 because the cost of the premiums for professional indemnity insurance for BSB regulatory work (typically, to defend appeals in the High Court and judicial reviews of individual disciplinary decisions) was becoming prohibitive compared to the actual pattern of costs incurred. Therefore, a restricted reserve was set up where the notional cost of the insurance premiums would be used to build up a Legal reserve exclusively for the BSB, to cover defence costs and damages awarded against the BSB. A proportion of this is released annually to the BSB to pay for this work as part of normal business, equivalent to the amounts the BSB had to meet historically because of the excess on the previous indemnity policy. This process was agreed by the BSB in early 2018 and subsequently approved by the joint Finance Committee[11]. The BC confirmed that use of the in-year allocation and / or reserve in respect of any individual case is entirely under BSB control and governance.

23. The BC was also asked to explain the arrangements regarding the BSB's access to the reserves. In their reply they stated that although the BSB has not had the need to access the permitted purposes reserves to date, in principle it has unfettered access to the permitted purpose reserve and that any major unbudgeted expenditure drawing on it would be approved by the BSB's own Planning, Resources and Performance Committee, its Board and then the joint Finance Committee. Any draw down on the Legal reserve is subject to the exclusive governance of the BSB because of the purpose of the reserve. Any decision to increase or decrease the level of this reserve would be subject to the approval of the joint Finance Committee.

24. The BC is currently reviewing its long-term reserves policy so that it can demonstrate to the Bar good stewardship and financial management. We will expect to the BC to report on the outcome of this review in the next PCF application.

Consultation on PCF

Summary

25. As it has done in previous years, the BSB sent a regulatory update on 4 December inviting comments from registered and unregistered barristers. In total 17,586 emails were sent. 94 unique visitors clicked on PCF consultation on the BSB website. The BC also sent a Bar Talk update on 12 December and a total 17,457 emails were sent. 37 unique visitors clicked on the PCF consultation on the BC's website.

26. The PCF level and budget proposal for 2020/21 were also disseminated to the legal press (such as the Law Society Gazette, Legal Futures, the Times, Legal Business and Specialist Bar Association newsletters and the New Law Journal).

27. The consultation ended on 18 December. There were no responses to the consultation.

[11] The BC has made clear that the Legal reserve cannot be used by the BC to mount a challenge to BSB policy or decisions.

28. Although we acknowledge the BC's and BSB's efforts to engage with its regulatory community on the PCF and budget proposal for 2020/21, a consultation that does not generate any responses is not a material consultation. We consider that the very short (14 -day) consultation period is likely to have contributed to the lack of responses. In future, we expect the BC and BSB to ensure meaningful engagement with its regulated community and to allow for an adequate consultation period.

Permitted purposes

Allocation to permitted purposes

29. The application notes that all PCF income allocated to the BSB is used for the regulatory permitted purposes.

30. The application provides a breakdown of the non-regulatory permitted purpose activities undertaken by the BC based on the staffing resource allocated to them[12]. The non-regulatory permitted purposes activities are grouped into five themes and are particularised in the application. A proportion of staffing resource is allocated to non-permitted purposes activities and is funded independently.

31. The BC has explained that it intends to fund some permitted purposes activity by other means such as commercial income or the Bar Representation Fee[13].

LSB targeted review

32. In our 2019/20 Business Plan[14] we set out our intention to conduct a review of the PCF approval process, including a targeted review of the regulators' approach to non-regulatory permitted purposes as set out in section 51 of the Act.

33. The targeted review is due to begin in 2020. We look forward to working with the BC and the BSB to enhance our understanding of their current approach.

Transparency of PCF information to fee paying members

Clarity of information provided

34. As part of its communication and engagement on the PCF consultation the BC and BSB
    - shared the PCF income bands and fees stating they would remain the same
    - set out its budgeted expenditure for 2020/21 providing the split between the BC and the BC and explained how rising regulatory costs will be accommodated without increasing the PCF levels
    - explained the increase to the BSB's budget and reasons for it
    - set out the non-PCF the BC and BSB are expecting to receive in 2020/21
    - set out the consolidated budget for 2020/21 and a comparison with 2019/2020

35. In response to the LSB's query, the BC has confirmed that following LSB approval, the BSB will inform its regulated community of the LSB decision using its regulatory update, as part of the Authorisation to Practice process and will use social media to

[12] Table 11 of the application.
[13] This is represented as a cross subsidy to members in Table 9 of the application.
[14] https://www.legalservicesboard.org.uk/news_publications/publications/pdf/2019/Final_business_plan_2019-20.pdf

communicate the outcome. The BC will separately send out the “BarTalk” update. We would strongly encourage the BC and BSB to make clear in all their communications, the proportion of PCF income allocated to the BSB.

Regulatory and Equality Impact assessment

36. The BC has explained in the application that the PCF is set according to income band in recognition of the wide gap in earnings across the Bar and the pressures faced by those at the publicly funded bar. In doing so, it has conducted an equality impact assessment and has taken further steps to address any perceived disadvantage to those returning to practice after taking parental leave (by offering the PCF at no cost during the leave period and reducing the level of PCF to the lowest income band on return to work) and reimbursing those who have had to give up practice due to ill health.

Decision

37. The LSB has approved the PCF application submitted by the BC for 2020/21 under section 51 of the Act.

Summary of expectations for next application

- Detailed forecasts on income and expenditure beyond 2021 to be provided in the BC’s next PCF application for 2021/22 (paragraph 17)
- BC is to report on its review of its long-term reserves policy in the next PCF application (paragraph 24)
- BC to ensure publication of its consultation on its website and engagement with regulated community allows more time and opportunity for responses to be received and for them to be considered before a PCF application is submitted to the LSB (paragraph 28)
- BC and BSB to make clear in all their communications, the proportion of PCF income allocated to the BSB (paragraph 35).

Matthew Hill, Chief Executive
Acting under delegated authority granted by the Board of the Legal Services Board
16 January 2020