23 February 2023

Approval of 2023/24 Practising Fee application made by the General Council of the Bar 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 General Council of the Bar ("GCB") to the LSB under section 51 of the Act. Section 51 of the Act relates to the control of Practising Fees charged by approved regulators.

2. Practising Fees are payable by a person under an approved regulator's regulatory arrangements, in circumstances where the payment of the fee is required for that person to be authorised by the approved regulator to carry on one or more reserved legal activities. An approved regulator may only apply amounts raised by Practising Fees for one or more of the permitted purposes which are set out in section 51(4) of the Act and the Practising Fee Rules 2021 (Rules)[1].

3. Practising Fees are payable under the regulatory arrangements of an approved regulator only if the LSB has approved the fee under section 51 of the Act. The GCB is an approved regulator, and the Bar Standards Board ("BSB") is the regulatory body to which the GCB has delegated its regulatory functions. The Bar Council ("BC") is the representative body within the GCB.

4. In making an application, an approved regulator must comply with the provisions of the Rules. The Rules provide a framework for the practising fee application and approval process. An approved regulator must also have regard to the LSB's Guidance on the Practising Fee Rules 2021 (Guidance)[2] which gives guidance on each of the Rules.

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

Summary and overview of Practising Fees application and decision

6. In the annual Regulatory Performance assessment[3] of the BSB which was published in January 2023, the BSB was assessed as not providing sufficient assurance on any of the five standards within the LSB's regulatory performance framework[4]. Where

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[1] https://legalservicesboard.org.uk/wp-content/uploads/2021/02/PCF-Final-Rules-2021-Accessible.pdf
[2] https://legalservicesboard.org.uk/wp-content/uploads/2021/01/PCF-Final-Guidance-for-publication-accessible.pdf
[3] Current regulatory performance assessments - The Legal Services Board
[4] https://legalservicesboard.org.uk/our-work/regulatory-performance/current-regulatory-performance-assessments

regulatory bodies are not meeting the outcomes within the five standards, we expect them to take action to improve their performance.

7. The BSB Handbook requires Barristers to renew their practising certificates by 31 March, which means that for renewal to occur as planned, the Practising Fees must be approved in advance of that date.

The BSB's Business Plan and regulatory performance action plan

8. As at the date of this decision, the BSB has not fully developed and costed its action plan to set out how it will improve its regulatory performance. This means that the BSB did not demonstrate or otherwise set out within the application whether the Practising Fees would provide it with sufficient resources to improve its performance.

9. Moreover, the BSB usually publishes its annual business plan in Spring, which is several months after the GCB submits the annual Practising Fees application. The LSB does not therefore have access to the BSB's Business Plan as part of its consideration of the proposed Practising Fees.

10. In view of the above documents being unfinalised as at the time of the application, the LSB made additional enquiries to the BSB to ascertain whether it believed the proposed Practising Fees would be sufficient to improve performance and execute its intended Business Plan. The LSB received assurances that the BSB has considered its forthcoming action plan and Business Plan as part of its assessment of the Practising Fees, and it considers it will be adequately resourced to execute their objectives. Further discussion around performance assessment and the BSB Business Plan is set out in paragraphs 21 to 31 below.

11. In view of these assurances, the LSB is prepared to approve the Practising Fees for 2023/24. However, we expect the BSB to reconsider when it produces its Business Plan in future, so that it is better aligned with the process for the approval of Practising Fees.

The proposed Practising Fees

12. The application provides that the Practising Fees to be charged to individuals will increase. The proposal is for an overall 5% increase in Practising Fees. This is spread across income bands. There is no increase proposed for the lowest earning barristers and the increase is limited to 5% in the other bands, except for band 7 which will see a 6% increase. The bands are set out in the table on the next page:

Income band	Range	Last years PCF fee	New PCF fee	Increase in fee
Band 1	£0 - £30,000	100	£100	£0
Band 2	£30,001 - £60,000	253	£266	£13
Band 3	£60,001-£90,000	509	£534	£25
Band 4	£90,001 - £150,000	926	£972	£46
Band 5	£150,001-£240,000	1,406	£1,476	£70
Band 6	£240,001-£350,000	1,906	£2,001	£95
Band 7	£350,001 - £500,000	2,017	£2,138	£121
Band 8	£500,001 - £750,000	2,575	£2,704	£129
Band 9	£750,001 - £1,000,000	2,725	£2,861	£136
Band 10	£1,000,001 - £1,500,000	3,090	£3,245	£155
Band 11	£1,500,001 and over	3,270	£3,434	£164

13. The GCB's projected total Practising Fees income for 2023/24 is £18.549m (a £1.35m increase on forecast Practising Fee income of £17.19M in 2022/23), based on the assumption of 16,862 individuals paying a Practising Fee[5].

14. Of the total amount of Practising Fees (£18.549m) to be collected, £12.45m (67%) will be allocated to the regulatory body and £5,2m (28%) will be retained by the approved regulator, while the remaining £0.89m (4.8%) will be used to fund the work of the Legal Ombudsman and the Legal Services Board. Paragraphs 12 and 18 of the application explain that the cost drivers are '*the BSB's plan to increase staff 'reward' (salary); the very tight labour market which is driving staff cost inflation; general inflation; and expenditure to improve cyber security*' which are expected to increase staff and non-staff expenditure by 10% across the GCB. The BSB has explained at paragraph 1 of annex 2 of the application that the increase to its staff costs is to address below market salary rates. The increases to both staff and non-staff costs can be broken down as follows:

   - The BC expects staff costs to increase by 12% and non-staff costs by 2%
   - The BSB expects staff costs to increase by 16% and savings to non-staff costs of 8%
   - Shared services (the cost of which is shared by the BC and the BSB) expects a 12% increase in staff costs and 8% increase in non-staff costs.

15. We are satisfied that the BC and BSB activities for 2023/24 which will be funded by the Practising Fees fall within the permitted purposes, in compliance with section 51(2) of the Act. We are satisfied that the BSB set its budget independently from the BC and that the GCB plans to discharge its regulatory functions in a way that is compatible with the regulatory objectives set out in section 28 of the Act.

[5] Not all fee payers will pay the full fee as some will be subject to discounts.

16. Further, the application enables the LSB to take assurance that the GCB has carefully and properly planned its financial position for the forthcoming year, and that the application provides transparency to the regulated community about the reserves and financial resilience of the GCB.

17. We note that the GCB has promoted the consultation to its regulated community. We refer to this further in paragraphs 40-43 below.

18. We consider that the application provides meaningful consideration of equality issues, which are particularly relevant to the regulatory objective of encouraging an independent, strong, diverse and effective profession.

19. We also consider that the GCB, in setting the level of Practising Fees for 2023/24, has given due consideration to the impact of the Practising Fees on the provision of legal services by their regulated community.

20. The LSB's decision is to approve in full the Practising Fees for 2023/4 that are to be charged to individuals and firms as set out in the application by the GCB.

LSB assessment

<u>BSB Regulatory Performance</u>

21. The LSB's regulatory performance framework sets out the outcomes that we expect all regulatory bodies to meet. Where regulatory bodies are not meeting the outcomes, we expect them to take action to improve their performance. Through our approval of a regulatory body's Practising Fees, we seek assurance that any commitments for action are adequately funded by the Practising Fees, as per paragraph 42 of the LSB Guidance on the Practising Fee Rules 2021.

22. In our 2022 annual assessment, we assessed the BSB as not providing sufficient assurance against the standards for well-led, Regulatory Approach, Authorisation, Supervision and Enforcement.

23. Paragraph 48 of the application set out that the BSB's Chair would shortly be writing to the LSB to set out how the BSB intends to respond to the latest Regulatory Performance Assessment. It explained the letter would set out 'holistic reforms of performance, culture and capability' with a focus on improving performance in delivering core regulatory operations, including accelerating investigations. The letter was received on 31 January 2023.

24. We asked the BSB to provide information to demonstrate that its commitments for action were adequately funded by the proposed Practising Fees. The BSB confirmed that ongoing discussions between the LSB and BSB meant that the BSB had anticipated many of the challenges outlined in the LSB's regulatory performance assessment. The BSB confirmed that its response to the outcome of the assessment was informing the BSB's business planning. The BSB confirmed that it was satisfied that this work could be done within the proposed budget.

25. The cover letter provided alongside the application, as well as responses to the consultation, have questioned the BSB's approach to addressing capacity issues by increasing staff pay. With that in mind we asked the BSB what consideration it had given to measures beyond remuneration, which might help the BSB to improve its regulatory performance.

26. The BSB confirmed that it is actively pursuing a range of measures to improve its performance including:

    - an independent review of the BSB's key operating systems
    - an intention to commission an independent review of its end-to-end enforcement process in 2023/24
    - the use of an external delivery expert to support key operational teams to identify opportunities to improve efficiency and customer care
    - a planned pilot in 2023/24 of a balanced scorecard of measures of operational performance.

27. We understand that further specific activities to improve regulatory performance will be included in the BSB's upcoming business plan. Alongside that, the BSB is expecting to provide the LSB with a standalone action plan setting out timescales and milestones for addressing its current regulatory performance. We anticipate that this action plan will be published on the LSB website following receipt.

<u>Allocation of Practising Fee to permitted purposes</u>

28. We are satisfied that the Practising Fees income is expected to be used for permitted purposes. However, the application lacked clarity around how the programme of activity funded by the Practising Fees was linked to business plans and strategic priorities.

29. The application notes in paragraphs 30 and 31 that annual expenditure is driven by BSB and BC objectives, as articulated in their respective strategic and business plans. We note that pages 13-18, 22-25 and 50 of the application provides information about how the BSB addresses strategic priorities. However, the application did not include information which explained how the BSB intends to include its planned programme of activity in its upcoming Business Plan.

30. We asked the BSB to share information about how the programme of activities funded by Practising Fees relates to BSB business plan priorities for the Practising Fee year.

31. The BSB explained that its business plan is being finalised in consideration of the LSB's annual assessment of the BSB and subsequent engagement between the two Boards. The BSB also confirmed where its budget had accounted for actions relating to performance, regulatory approach and culture and capacity as follows:

Area	Function
Performance	Supervision, Authorisation, Contact and Assessment, Enforcement and Legal Support
Regulatory approach	Regulatory Risk, Equality and Access to Justice, Policy and Research, Public Legal Education
Culture and capacity	People and Governance and Corporate Services

32. Pages 35-39 of the application describe the BC activities which will be funded by the Practising Fee. However, the application did not include information about how the Practising Fees spend links to the GCB's Business Plan or strategic priorities. We asked the GCB to share a narrative or table setting out how Practising Fees spend links to the GCB's strategic priorities. The GCB provided us with a link to its strategic plan for 2019-2024[6] and explained that the representative activities in the application seek to meet the aims and objectives of that plan. We note that the Practising Fees application for 2022/23 included a more detailed narrative of how its activities that are carried out for permitted purposes are linked to its strategic priorities, which increased transparency for the regulated profession. We encourage the GCB to include a meaningful narrative of how activities funded by Practising Fees income link to its strategic priorities in all future applications.

Reserves and financial resilience

33. Paragraph 82 of the application shows that the target range for the Permitted Purposes Reserve should be £3m-£6m. This is based on the estimated operating costs for a minimum period of 3 months and a maximum 6 months. Our analysis shows that since 2019/20 the policy for the level of the permitted purposes reserves has been above £3m. This is based on the estimated operating costs for a minimum period of 3 months and a maximum 6 months.

34. We asked the GCB to share its considerations about whether this figure is still appropriate given the substantial increase in the BSB budget during this period. The GCB confirmed that the target range for reserves is reviewed annually by the joint finance committee, and it takes an overview of financial requirements of both the BSB and BC. It confirmed that the target range remains sufficient and noted that the level of reserves and any need to replenish them are key factors in the annual setting of Practising Fees.

Consultation and engagement

35. The GCB submitted the annual Practising Fees application on 20 January 2023, having consulted on it between 1 December 2022 and 13 January 2023.

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

36. Paragraphs 117-129 of the application set out how the consultation was run and provides a summary of the consultation feedback. Paragraph 125 of the application states that the consultation 'feedback was unanimously negative'. The application includes feedback which shows that barristers who responded to the consultation think that the BSB is too expensive and there has been no appropriate explanation as to why the BSB needs to increase its staff costs. We note that out of nearly 17,000 barristers there were only 13 responses. This rate of return was not sufficient to indicate widespread opposition to the proposals (nor, for that matter, widespread support).

37. While conscious of the limited number of consultation responses, we asked the BSB to share its reflections on the consultation feedback that was received. We also asked the BSB to set out its consideration of how it might better communicate its resourcing needs to its regulated community. The BSB explained that it considered comments received through consultation about 'mission creep', reflected an out-of-date view of the role of the regulator. It explained that it needs to engage in significant and transformative work that cuts across all functions to meet the LSB's expectations as to regulatory performance.

38. The BSB further explained that it believes the views of the profession are driven by its performance in relation to reports about barristers and associated enforcement action and perceptions of regulatory 'scope creep'. It explained that it has plans to improve its performance in relation to reports and enforcement. It also explained that it understands the need to explain why additional work is required. However, it sees its additional work as reflective of the expectations of a modern regulator focused on delivery of the regulatory objectives included in the Act.

39. The BSB explained that it has been taking steps to reach out to its regulated community and has held roundtables to discuss how it can work with the profession to promote standards. It considers this approach has been effective in promoting a constructive dialogue and may be a model for continued engagement.

40. The application demonstrates that the BC and the BSB have taken reasonable steps to promote the consultation. However, there were only 13 responses to the consultation. We asked the GCB to share its considerations of alternative routes and response mechanisms to obtaining input from the profession to the Practising Fees consultation.

41. The GCB explained that it takes active steps to promote the consultation. It engages via direct email, social media, use of its website and through face-to-face engagement. The GCB asks that respondents email their response to the GCB. It does not consider there are any other obvious channels of communication which would be likely to result in a higher response rate.

42. We are aware that even if a consultation has been sufficiently promoted, consultees may decide not to respond. We note that other approved regulators

have tried a range of measures to engage with their key stakeholders. For example:

- Use of roundtable events or online seminars as another means to capture the views of the profession.
- The use of online questionnaires as a quick and easy way to provide a response.

43. The LSB encourages the GCB to consider whether alternative methods could facilitate an increase in the number of consultation responses.

Decision

44. The LSB has approved the Practising Fees application submitted by the GCB for 2023/24 under section 51 of the Act.

Summary of expectations for next application

- The BSB is to reconsider when it produces its Business Plan in future, so that it is better aligned with the process for approval of Practising Fees.
- The BC should consider including a meaningful narrative of how activities funded by Practising Fees income links to its strategic priorities.
- The GCB is to consider whether alternative methods could facilitate an increase in the number of consultation responses.

Matthew Hill, Chief Executive
Acting under delegated authority granted by the Board of the Legal Services Board
23 February 2023