

Changes to rules made under section 51 of the Legal Services Act 2007

LSB decision document on changes to the Practising Fee
Rules 2009

1 June 2016

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Introduction

1. The Legal Services Board (**LSB**) had previously made rules under section 51 to the Legal Services Act 2007 (**the Act**).
2. Section 51(5) of the Act states that a practising fee (otherwise known as a practising certificate fee – PCF) is payable under the regulatory arrangements of an approved regulator only if the LSB has approved the level of the fee. The Board, under section 51 of the Act, must also make rules (**the PCF Rules**) specifying the “permitted purposes”, as an approved regulator may only apply amounts raised by practising fees for one or more of the “permitted purposes”. Section 51(4) of the Act states a number of purposes which must be permitted purposes, such as, “the regulation, accreditation, education and training of authorised persons”.
3. Section 51(5) of the Act specifies that the PCF Rules must make provisions including:
 - the form and manner in which applications for approval must be made and the material which must accompany applications
 - a requirement that applicants have consulted such persons as may be prescribed by the rules
 - the procedures and criteria that will be applied by the Board when determining whether to approve the level of a fee.
4. A consultation was conducted for eight weeks between 10 February and 8 April 2016. The proposed changes to the PCF Rules were annexed to the consultation and shown as tracked changes so it was clear to the reader what constituted the proposed amendments.
5. The consultation made clear that the objective of the consultation was to consider the proposed amendments to the PCF Rules. We did not propose to alter the policy intent behind the rules.
6. This paper summarises the LSB’s decision and the next steps.

Respondents to the consultation

7. This section sets out a summary of the range of responses that we received to each question in the consultation paper, including some general comments that were made by respondents. It also sets out the final position that the LSB has reached as a result of the feedback received.
8. We received seven responses to the consultation which closed at 5 pm, Friday 8 April 2016. The individual respondents were:

- Bar Council (BC)
- Bar Standards Board (BSB)
- Costs Lawyer Standards Board (CLSB)
- Chartered Institute of Legal Executives (CILEx)
- Council of Licensing Conveyancers (CLC)
- Solicitors Regulation Authority (SRA)
- The Law Society (TLS)

9. We are grateful to all those who took the time to respond. Full copies of the responses have been published on the LSB's website under closed consultations.¹

Responses to specific questions in the consultation

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?

10. Two additions were proposed to the criteria for the Board and approved regulator to have regard to in Rule 10 of the PCF Rules

- Insertion of a new rule 10 (a), compatibility with the regulatory objectives
- Insertion of a new rule 10 (f), clarity and transparency of the allocation of all the approved regulators financial resources, whether or not those resources arise from permitted purposes, and the impact on the proposed practising certificate fee

11. In relation to proposed rule 10 a), a definition of regulatory objectives was added to the section A1 of the PCF Rules, Definitions.

Feedback from respondents

12. Five of the seven respondents commented on the proposed new rule 10 (a). Overall there was support for the proposal to specifically include reference to the regulatory objectives and the related change to the definition section.

13. In addition, some of the respondents (BC, TLS and SRA) suggested that Rule 10(a) should also make specific reference to either or both, the 'better regulation principles' and 'best regulatory practice'. Section 3(3) of the Act provides that the LSB must have regard to these when discharging its functions.

¹ Closed consultations: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm

LSB response

In considering a PCF application, the LSB is exercising its statutory functions and we therefore consider it appropriate to make specific reference to the regulatory objectives in the rules. As is the case whenever we are exercising our statutory functions we have regard to the better regulation principles and best regulatory practice but have concluded that this level of detail is not necessary in the rules.

14. The Law Society supported the proposal to include reference to the regulatory objectives. It also proposed that “compatibility with the regulatory objectives” should be given *“its ordinary meaning i.e. that the LSB’s assessment of this factor will not extend to compatibility with non-regulatory objectives of an approved regulator (which the LSB is unable to do in view of the limitations in Section 29(1) of the Act)”*. Section 29(1) of the Act specifies that nothing in the Act authorises the Board to exercise its functions in relation to a representative function of an approved regulator.

LSB Response

We have considered this issue. For the avoidance of doubt, we recognise that section 29(1) of the Act prevents us from exercising any functions in relation to the representative functions of an approved regulator and the proposed changes are not intended to do that. There are sufficient powers in the Act to request reasonable and proportionate information in order for the LSB to make the statutory decisions that it is required to make. We consider it reasonable and proportionate to seek clarification about a representative body’s decisions and actions where they have a direct impact on the practising fee that we are being asked to approve.

15. Six of the seven respondents commented on the proposed new rule 10 (f). The regulatory body responses broadly agreed with the LSB’s approach behind the new rule to provide greater transparency, clarity and accountability on the type of information used to assess a PCF application.
16. However, there was some concern from both the BC and TLS that the rule as currently drafted was either ‘not fit for purpose’ or, ‘not required’ and should therefore not be included in the PCF Rules.
17. The BC thought that the rule went beyond the LSB’s PCF obligations under the Act. Its view was that the LSB should concentrate only on activity falling within the permitted purposes and should not extend to activities that have no bearing on the permitted purposes. It sees the introduction of the new rule as an inefficient use of LSB resources, as the rule would mean that the LSB would need, “to consider extensive detail”, about non-PCF expenditure. The BC suggested that transparency and accountability could be better met through full, auditable financial reporting on all expenditure on an annual basis, both PCF and

otherwise. This would give a more accurate picture than a financial forecast provided in advance, which is likely to be subjective and subject to change.

18. TLS raised further issues over the drafting of Rule 10(f) and challenged the LSB's legal remit in requesting details of an approved regulator's financial resources arising for non-regulatory permitted purposes and/or arising from non-permitted activities and whether approval of the fee level could be refused based on clarity and transparency of such information.

LSB response

The LSB is aware that an approved regulator engages in activities that are not permitted purposes and are not funded by PCF; we would not be interested in these activities unless they affect the practising fee. For example, this could be the case where revenue generated from non-permitted purposes is used to subsidise permitted purposes, potentially reducing the PCF level.

Alternatively, there may be cases where revenue generated from permitted purposes subsidises a non-permitted purpose, rather than being off-set against the following year's PCF. Against that background we consider that it is both reasonable and within the scope of the Act, for the LSB to require clarity and transparency of such information both for the fee payers and to assist the LSB in its statutory decision making.

With regard to the BC's suggestion about placing reliance on auditable financial reporting on all expenditure, we agree that publishing such information increases transparency and accountability but in the context of a PCF application we are looking forward to future expenditure rather than past.

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

19. The consultation proposed two additional provisions to the evidence criteria inserted as 11(b) and 11(c) in section D of the proposed rules
- where there is a proposed increase to the practising fees, the budget should show anticipated income from all sources and its allocation to the permitted purposes for the current application and, where available, the next three years.
 - the proposed practising fees for the current application, and where there is a proposed increase in practising fees and where available, the estimates for the next three years.

Feedback from respondents

There was a general understanding that the contextual information provided by a three year forecast would be helpful in cases where there was the intention to

increase the PCF. The SRA for example said that this would help to highlight the issues underlying the increase.

20. TLS queried whether the requirement was necessary or permissible under the Act, using the same arguments as for their objections to 10(f). The CLSB said that the requirement was burdensome and the need was not backed up by evidence. The BC thought that three years was too short and prescriptive and suggested five years. The BSB said it did not understand the LSB rationale for an approval process being more onerous if a fee increase is proposed; it said that just as much, if not more scrutiny, should be applied if a practising fee is being reduced. CILEx asked for an adequate transition period to enable adjustments to their financial modelling.

LSB response

Again for the avoidance of doubt, we will only seek forecast information where there is a proposal to increase the practising fee. As we said at the time of the publication of the consultation, we believe in the importance of reducing regulatory costs in legal services. We hope therefore that in most years and for most approved regulators, they will not be required to provide such a forecast. However, an approved regulator may of course provide any additional information to support its application.

Where an increase is proposed we think that three years is a realistic expectation of what approved regulators could provide but we recognise that this may not always be available. Where necessary, we will talk to individual approved regulators on a case-by-case basis in the pre-application phase to ascertain and agree what they are able to supply with respect to future forecasting.

We acknowledge the BSB point about the need for scrutiny of all applications, whether the fee is increasing or reducing. All applications will be subject to an appropriate level of scrutiny but we remain of the view that it would be disproportionate to require forecasts in all cases.

Other general comments made by respondents

21. TLS said it would urge the LSB to undertake an Equality Impact Assessment (EIA) given the impact on profession and client base with varying demographics.

LSB response

The LSB do not consider that an EIA is appropriate or proportionate in this case. The proposals are not determining the level of fees, only the information that approved regulators should provide to assist with the LSB's assessment. There is no direct impact on the regulated community in so far

as the rules do not expect the approved regulators to require the providers they regulate to undertake new compliance.

22. The LSB raised a legal technical point with respect to section 51 of the Act and whether the current rules meet the requirement under section 51(7) of the Act for the LSB to set a time limit in the rules to make decisions on PCF applications.

LSB response

The LSB considers that the requirement for, “provision about the time limit” in section 51(7) of the Act is not an outright requirement to a set deadline. The current wording in the Rules states that a timetable including key decisions and submission dates, that must be observed by the approved regulator and the Board respectively, will be set out by the LSB. We consider that the current rule meets the requirement of section 51(7)(b) for there to be, “provision about the time limit for the determining of an application”.

PCF applications are made to the LSB from a variety of approved regulators ranging in size and resources. It would not be sensible, and indeed it would be unfair on smaller approved regulators, to apply a one size fits all timescale. Rule 9(a) is drafted with close regard to separate safeguards to ensure that PCF applications are processed by the LSB within a reasonable timeframe. There is no evidence over the last five years of any identifiable detriment or risk to the approved regulators that warrants a stricter interpretation of section 51(7)(b) of the Act (i.e. by having a concrete deadline). We are happy to agree to target specific timetables with individual approved regulators.

LSB decision

23. In the light of the feedback from respondents, we have amended the proposed new rules 10(f) so that it is clear that as follows:

“...Insofar as the criteria mentioned in Rule 9(c) are concerned, the Board and approved regulator should have regard to factors including the following:

10(f) for the purposes of enabling the LSB to assess the impact on the proposed practising fee, provide clarity and transparency on the allocation of all the approved regulator’s financial resources, whether or not those resources arise from permitted purposes”.

24. Some other minor typographical changes have also been made.

25. The final Practising Fee Rules 2016 are set out in Annex A.

Practising Fee Rules 2016

Version 2: 1 June 2016

The Legal Services Board has, on [Date 2016], made the following rules under the Legal Services Act 2007 (c.29), section 51(3) and (6):

A. DEFINITIONS

1. The words defined in these rules have the following meanings:

Act the Legal Services Act 2007 (c.29)

Applicable persons includes “relevant authorised persons” as defined in Section 51(8) of the Act but extends also to other persons over which the approved regulator has regulatory powers

approved regulator has the meaning given in Section 20(2) of the Act

Board the Legal Services Board

Consumer Panel the panel of persons established and maintained by the Board in accordance with Section 8 of the Act

legal services means services provided by a person which consist of or include “legal activities” as defined by Section 12(3) and 12(4) of the Act

permitted purposes the purposes which an approved regulator may apply amounts raised by practising fees, as set out in Rule 6 of these Rules

person includes a body of persons (corporate or unincorporated)

practising fees has the meaning given by Section 51(1) of the Act

regulatory functions has the meaning given by Section 27(1) of the Act

regulatory objectives has the meaning given by Section 1(1) of the Act

reserved legal services has the meaning given in Section 207(1) of the Act.

B. WHO DO THESE RULES APPLY TO?

2. These Rules are the rules that the Board has made in compliance with 51(3) and 51(6) of the Act relating to the control of practising fees charged by approved regulators.
3. Accordingly, these Rules apply to each approved regulator that proposes to charge practising fees as part of its regulatory arrangements.
4. In the event of any inconsistency between these Rules and the provisions of the Act, the provisions of the Act prevail.

C. THE PERMITTED PURPOSES

5. Monies raised through practising fees must not be applied for any purpose other than one or more of the permitted purposes.
6. The permitted purposes are:
 - a) the regulation, accreditation, education and training of applicable persons and those either holding themselves out as or wishing to become such persons, including:
 - i. the maintaining and raising of their professional standards; and
 - ii. the giving of practical support, and advice about practice management, in relation to practices carried on by such persons;
 - b) the payment of a levy imposed on the approved regulator under section 173 of the Act and/or the payment of a financial penalty imposed on the approved regulator under section 37 of the Act;

- c) the participation by the approved regulator in law reform and the legislative process;
- d) the provision by applicable persons, and those either holding themselves out as or wishing to become such persons, of legal services including reserved legal services, immigration advice or immigration services to the public free of charge;
- e) the promotion of the protection by law of human rights and fundamental freedoms;
- f) the promotion of relations between the approved regulator and relevant national or international bodies, governments or the legal professions of other jurisdictions;
- g) increasing public understanding of the citizen's legal rights and duties.

D. THE APPROVAL MECHANISM

- 7. Where an approved regulator proposes to charge practising fees as a part of its regulatory arrangements, the approved regulator must apply to the Board for approval of the level of that practising fee.
- 8. In making an application under Rule 7, an approved regulator must comply with the provisions of this Part of these Rules.
- 9. In respect of each approved regulator, the Board will set out from time to time:
 - a) a timetable including key decisions and submission dates that must be observed by the approved regulator and the Board respectively;
 - b) the persons that should be consulted by the approved regulator before submitting its application;
 - c) the criteria against which the Board will decide on applications put to it; and
 - d) the evidence required by the Board to satisfy it against the agreed criteria.

10. Insofar as the criteria mentioned in Rule 9 (c) are concerned, the Board and approved regulator should have regard to factors including the following:
- a) compatibility with the regulatory objectives
 - b) evidence which demonstrates that reasonable care was taken in settling the application in the context of the budget necessary for the immediate and medium term;
 - c) evidence which demonstrates that the revenue raised through the practising fee charge will be applied solely to purposes which are permitted purposes;
 - d) clarity and transparency over the revenue raised through practising fees to be applied for permitted purposes which are regulatory functions;
 - e) clarity and transparency over the revenue raised through practising fees to be applied for permitted purposes which are not regulatory functions;
 - f) for the purposes of enabling the LSB to assess the impact on the proposed practising fee, provide clarity and transparency on the allocation of all the approved regulator's financial resources, whether or not those resources arise from permitted purposes; and
 - g) evidence that persons paying practising fees will have explained to them how revenue raised through the charging of practising fees will be applied as between the approved regulator's performance of regulatory functions and any other functions also carried on by the approved regulator.
11. Insofar as the evidence mentioned in Rule 9 (d) is concerned, the Board and approved regulator should have regard to factors including the following:
- a) a description of how the application was developed and settled, including any consultation carried out, whether or not such consultation was required by the Board;
 - b) where there is a proposed increase in practising fees, the budget should show anticipated income from all sources and its allocation to the permitted purposes for the current application and, where available, the next three years;

- c) the proposed practising fees for the current application and, where there is a proposed increase in practising fees and where available, the estimates for the next three years;
 - d) an explanation of how the cost to each regulated person is to be broken down as between income to be allocated to the discharge of regulatory functions and income allocated to any other functions;
 - e) an explanation of contingency arrangements where unexpected regulatory needs arises in-year;
 - f) evidence of how the previous year's practising fee income was allocated only to permitted purposes; and
 - g) a regulatory and diversity impact assessment.
12. In considering an application submitted to it under this Part of these Rules, the Board reserves the right to consult any person it considers appropriate. In particular, it reserves the right to consult the Consumer Panel about the impact of the proposed fee on persons providing non-commercial legal services.
13. If the Board approves an application under this Part of these Rules, it must notify the approved regulator concerned.
14. If the Board does not approve an application under this Part of these Rules, it must:
- a) notify the approved regulator concerned;
 - b) give reasons for its decisions;
 - c) require the approved regulator to submit a revised application which addresses the Board's reasons for withholding approval previously; and
 - d) specify the circumstances (if any) in which the approved regulator may charge a limited practising fee under its regulatory arrangements as an interim measure pending consideration and approval of its full application.