

**RESPONSE OF CHANCERY BAR ASSOCIATION TO THE PRACTISING CERTIFICATE FEE (PCF)
CONSULTATION BY THE BAR COUNCIL**

Introduction

1.1 The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognised by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

1.2 Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000.

1.3 Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad.

1.4 This response is the official response of the Association to the Bar Council's consultation on the Practising Certificate Fee (PCF). It has been written by Steven Barrett and Mark West and has been approved by the Committee of the Association.

General Observations

2.1 The Association acknowledges that members will have their own individual views on the future of the PCF and the Bar Council proposals and that many members either already have, or will have, submitted those views in response to the present consultation. It is not therefore the purpose of this response to substitute its view for those of individual members of the Association, but to address some matters of general principle.

2.2 The Association as a body does consider that the debate over how to structure the PCF must not detract from matters of general concern to its members and in particular the inordinate increases in both the cost of the PCF to individual members and the total revenue generated (as demonstrated by the Charts 1 and 2 which are set out in the Consultation Paper). The explanations given for the near doubling of revenue in a 6 year period, which includes 5 years of a domestic and global recession, are currently unsatisfactory at best.

2.3 Moreover, the proposal on page 8 of the Consultation Paper to increase the PCF by a further 20% (and the near 10% increase that we understand to have been approved in the event by Council) is deeply concerning and unjustified. The thinly veiled proposal on page 9 of the Consultation Paper to levy a 'Chambers fee' in future years in addition to individual fees is of similar concern.

2.4 As has been noted in previous responses (such as <http://www.chba.org.uk/for-members/library/consultation-responses/response-to-jag2019s-fourth-consultation-papers-on-the-quality-assurance-scheme-for-advocates-crime>) there is an ongoing concern about the tendency to assert a 'need' for change in the absence of hard evidence of actual need or of a defined problem identified by evidence. The current justification for significant future increases in the PCF is said to be (on page 8) that "*The LSB has recently imposed upon the BSB a new 'Regulatory Standards Framework' that has had attendant consequences upon working methodology and, therefore, for resource requirements. Consequently, the BSB successfully bid for a further £380K of expenditure during 2012/13*". At a time of unprecedented hardship for members of the Bar, barristers might understandably regard such open-ended financial comments as suggestive of regulatory bodies cocooned in their own narrow world.

2.5 The preferential system of levying the PCF must be that which is both simplest to administer and which is the most cost effective. Experience suggests that the better course is either (subject to the points we make below) to leave the system as it is or to move (if it can be achieved cheaply) to a simpler system.

The PCF Levy

3.1 We would not support any move to an income-based system of PCF allocation across the profession and would oppose any attendant obligation to declare earnings to the Bar Council.

3.2 The Consultation Paper itself recognises that there are practical calculation difficulties and use over timing and that there would be likely to have to be a further consultation on the precise methodology to be employed in such a system. That the Paper itself recognises such difficulties does not engender confidence as to how such a system could be made to work simply or cost-effectively in practice. But the objection to an income-based system is one of principle over and above objections of a purely pragmatic nature.

3.3 The adoption of an income-based system would necessarily require the disclosure of fee income to the Bar Council, but that would mark a wholly unacceptable erosion of confidentiality as to income on the part of individual barristers and a corresponding acquisition of detailed personal information of all members of the profession on the part of the Bar Council and would be opposed by the Association and, we strongly suspect, by large parts of the practising Bar. That issue of principle applies regardless of whether what is required to be disclosed are actual figures for fee income or fee income within bands.

3.4 Furthermore, to assess the PCF on the basis of uncapped income is unacceptable and wrong in principle, in that it in essence amounts to an income tax. By contrast, a capped income based system depends entirely on the fairness of the cap, but none has been suggested in the Consultation Paper and it is not easy to see where and on what principled basis a cap should be imposed at a particular level. The better way to protect either lower paid members of the profession or very junior members at the outset of their careers is by

way of waiver system. Such a system already exists (so that there is no need to create a new one). For that existing system there is already existing data (so that it is relatively easy to predict the consequences) and it depends on the individual applicant being prepared to provide full financial details to justify a waiver.

3.5 In addition, any system which depends on accurate and prompt income declaration will have an inherent unreliability (and hence unfairness) built into it. That unreliability and unfairness does not exist under a scheme banded in terms of years of call where the data already exists to assess the contribution which the individual barrister is called upon to make in any given year.

3.6 What is envisaged is in fact another layer of complexity and expense in which apparently “all practitioners would be obligated to allow the Bar Council to validate declared earnings with either the Bar Mutual or respective employers”. It is all too easy to see that the costs of such an exercise will themselves drive up the PCF significantly and be marked by the extraordinarily-time consuming paper trail which is one of the least attractive facets of the current regulation of CPD obligations. It is difficult to see the rationale for an increase in the regulatory burden in this respect at the very time when its deficiencies have been recognised in the CPD context.

3.7 We are also concerned at the potential impact on the practising Bar of such sensitive information as to individual incomes across the whole of the profession being gathered together under the aegis of one single body. One thinks, for example, of the well-publicised losses of sensitive personal data by government departments in recent years and how that would impact on the Bar, both individually and collectively, were such universally applicable information held by a single body to be lost or obtained on a wider basis.

3.8 There is also a justifiable concern as to whether, once such sensitive information has been gathered by the regulator, it might be sought to use it thereafter for other purposes. That concern is nowhere addressed in the Consultation Paper.

Principles of PCF Levy

4.1 The Association recognises that increasing the costs of the PCF represents a disproportionate burden upon the young Bar and those whose incomes at the publicly-funded Bar have been significantly eroded, and that ever-rising regulatory expenditure will perform prove damaging for equality and diversity at the Bar.

4.2 It is apparent that those currently paying the most in PCF are by and large not the people most using the services for which the PCF pays. However, in principle a general subsidy from the perceived top of the profession towards those at the bottom is appropriate and should be maintained. There must in principle be some support for those starting out in the profession and care must be taken to ensure the system of collection of the PCF does not further damage access to the Bar. For the reasons set out above, we are concerned that any system which involves an element of self-declaration, or which is income-based, is a system which will inevitably lead to further rises in both overall cost and regulatory burden and as such will not serve the interests of either the very junior members of the profession or of equality and diversity.

4.3 In our view the essential structure of the present arrangements based on easily identifiable criteria, such as year of call should remain in place and should not therefore lead to an increase in costs or of the regulatory burden. We would suggest that the present system of a 5-rate system (QCs, juniors over 13 years' call, juniors of 8-12 years' call, juniors of 5-7 years' call and juniors of up to 4 years' call) coupled with waivers is one which does not impose any disproportionate fee on any barrister, as long as the spending tendencies of the regulators are reined in.

4.4 However, we recognise that a system of banding based on years of call alone can operate unfairly against those who have had career breaks where their actual experience of practice is not commensurate with their apparent seniority. The BSB online system now has years in practice built into it and that system could easily be substituted for years of call. It is true that there is a value to an individual's year of call in the eyes of clients and it might be

said that it is not clear why this value should not be paid for, but on balance we would favour this limited modification to the present arrangements.

4.5 As an alternative, a flat fee with a lower and higher band based could readily be substituted for the current call-based system. The lower band would accommodate those up to (say) 5 years in practice, and the higher would apply to QCs. The waiver system could easily be applied to this too, allowing for (say) a 50% reduction if income in the lower band were less than £20,000 and in the standard band less than £40,000.

The Employed Bar

5.1 There is no apparent justification for the current discount enjoyed by the employed Bar. The employed Bar falls broadly into two categories: in-house barristers and barristers in law firms.

5.2 With regard to those employed in law firms - the mechanism for transferring to regulation by the SRA is extremely straightforward. Previously barristers who refused to cross-qualify could not be partners. Despite both of these facts many barristers continued to pay for the PCF and to 'be' barristers. It seems highly unlikely that the motivation for paying for a practising certificate was the discount currently given to the employed Bar.

5.3 With regard to in-house barristers – there may or may not be a need for a practising certificate in order to perform their job. Wherever a company is currently paying the costs of the practising certificate for the barrister in question, it seems unlikely that the company is motivated by the discount currently given. The Association is aware that barristers moving in house will frequently negotiate for the PCF to be paid as part of their contract of employment.

5.4 The discount is therefore likely to be an historic anomaly and there seems no good reason for its continuance.

Summary

6.1 There are good reasons for either retaining the present banding arrangements, varied so that the banding was based on the number of years during which an individual had practised rather than on year of call, or for substituting a flat rate fee with lower and upper bands and waivers.

6.2 We would not support the introduction of an income based approach to PCF allocation. Nor would we support an obligation to declare earnings to the Bar Council.

6.3 We would not support the introduction of an element of income based approach to PCF allocation either. Nor would we support an obligation to declare earnings to the Bar Council in the case of an element in the calculation of the PCF.

6.4 We consider that self-employed and employed barristers should be treated the same for PCF purposes.