

Background for Board Members on the Practising Fee Rules 2009 review

Section 51

1. Section 51 of the Legal Services Act 2007 (the Act) specifies that income raised from practising certificate fees (PCF) can only be applied to permitted purposes. Under the Act the LSB must approve the level of fee before it is payable (section 51(5)), and the LSB must also make rules specifying the permitted purposes (section 51(3)).

Need for a review of the LSB's practising Fee Rules

2. In the summer of 2015, an issue arose in respect of the Law Society (TLS)/Solicitors Regulation Authority (SRA) PCF application for 2015/16, when in its draft application TLS proposed a different treatment of commercial income from previous years. It proposed to use income, including that arising from PCF funded permitted purposes (so called "derivative income"), for non-permitted activities, and in future years also to be allocated to non-permitted reserves.
3. 'Derivative income' can arise from activities undertaken by the regulatory and representative arms of an approved regulator. In the case of TLS, the mandatory PCF paid by solicitors and firms can be used by TLS to fund the costs of, for example, providing accreditation schemes and certain training programmes (i.e. non-regulatory permitted purposes). In the past, income generated from those PCF funded activities has been used to 'net off' the costs of the permitted purposes and so reducing the level of PCF to be collected. Under the approach proposed (but withdrawn) by TLS, monies raised by charging for these PCF funded activities could have been applied for other non-permitted activities, which could include paying for TLS overheads or its commercial activities.
4. As it would have not been possible for the LSB to properly consider the implications of the new approach within our usual three week period for making decisions on PCF applications, TLS removed the proposal from the 2015/16 PCF application. We gave a commitment to TLS that we would review the handling of the issue in time for the 2016/17 PCF application.
5. In addition, the PCF rules were in any case overdue for a review. They were made in 2009 and many matters arising from our scrutiny of applications have subsequently been the subject of comment in our decision letters. It seems sensible that we now review the rules in the light of five years' experience to test if they continue to meet the purpose for which they were intended and whether further clarification is required.

Approach to the review

6. The conclusions and recommendations from the review were based on the following:

- A review of the existing rules and guidance
- A review of each of the PCF decisions made over the last five years
- Meetings with the approved regulators (with the exception of the Institute of Chartered Accountants in England and Wales) to gain their feedback on the process
- Specific consideration of the derivative income issue

Main findings from the review

7. The main conclusions from the review were as follows:

- Overall, approved regulators considered the rules reflect the requirements of the Act, are clear about the permitted purposes and there is no need for a radical alteration at this time. If changes are needed, these should continue to be expressed at a high level rather than having prescription in the rules.
- The guidance that has been published is valued by those preparing applications. If clarity is needed on any issues, then this is best addressed through revisions to the supporting guidance rather than changes to the rules. The current guidance should be reviewed and republished.
- There is a perception that the LSB has a one-size fits all approach to assessing PCF applications. The view was expressed that for the smaller regulators (particularly where the PCF income is used for purely regulatory activities) could be subject to less intense scrutiny than the larger regulators.
- Transparency of costs is an important consideration for the LSB when making a decision. This has arisen in relation to a number of issues including the allocation of PCF income to permitted purposes, reserves, the allocation of the cost of shared services (where relevant) and the presentation of the LSB/OLC levy (where there have been instances where the presentation has suggested that the levy is higher than it is).
- Approved regulators' consultation exercises on proposed fee levels are seen as a burden that does not add much to the process of setting fee levels. There is nothing in either the rules or guidance to indicate the frequency of consultation and all the approved regulators perceive that it was the LSB's expectation that there should be a consultation every year which many of the approved regulators felt is disproportionate. In part this may arise from the fact that the approach and outcome of consultation exercises is something that we have specifically commented on in decision letters in previous years.