



Bar Council response to the Bar Standards Board's 'Modernising regulatory decision-making' consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to Bar Standards Board consultation paper entitled 'Modernising regulatory decision-making'.¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB.)
4. We are grateful to the BSB for having offered an opportunity to hear more about the proposals and ask questions via the stakeholder meeting of 18 April.

Question 1: Do you have any views on the proposals for creating a centralised assessment function in the form of a Centralised Assessment Team?

5. The move to a centralised assessment function makes sense to us, in that it allows the BSB to handle information according to what it relates to rather than how it is received. Confusion, duplication of work and inefficiency can thereby be avoided.

¹ Bar Standards Board, "[Modernising regulatory decision-making](#)" (2018)

6. In the consultation paper, the Centralised Assessment Team (CAT) is conceived of as a triage system that only decides whether and where to refer information within the BSB. While it will carry out its own risk assessment, it cannot decide to take any action itself—it must refer it to one of the relevant specialist teams to make a more detailed assessment, although it can decide not to take any action. We note that the draft amended regulations do not reflect any of these distinctions (and the consultation paper states that this is intentional). While the allocation of responsibility between BSB staff members may not need to be set out in the Handbook, we have concerns about the way it is drafted in terms of broad powers held by the Commissioner, which we discuss in our answer to question 4 below.

Question 2: Do you have any views on the proposal to move from the concepts and terminology of complaints, to the concept of “receiving information”?

7. We can see the force behind the BSB’s reasoning on this point. We recognise that the BSB is not necessarily designed or equipped to provide redress for individual complaints, in the way the Legal Ombudsman is, but rather is tasked with enforcing the Code of Conduct. To the extent that using ‘information’ rather than ‘complaints’ is more transparent and avoids creating expectations that cannot be met, this is sensible. However, we found persuasive the concern raised in the BSB stakeholder meeting of 18 April that a call to ‘provide information’ is potentially opaque or vague and may not encourage people to share information with the BSB. Alternative phrasing such as ‘report a concern’ might be clearer.

8. We welcome the assurance made by the BSB, in its consultation paper and at the stakeholder meeting, that it will continue to keep those who report concerns informed of the progress of any action the BSB is taking. Communication by a regulator helps build public confidence by reassuring them that concerns about the profession are taken seriously.

Question 3: Do you have any views on the proposals for, and future structure and functioning of, the Independent Decision-Making Body?

9. We disagree with the proposals to replace the Professional Conduct Committee (PCC) with an Independent Decision-Making Body. We note that these stem from a desire to keep up with the prevailing trends in regulatory best practice, forming part of a wider programme of reforms that has been underway since 2014. We are concerned that the BSB is already committed to the creation of an IDB and is at an advanced stage in its planning. We urge the BSB to keep an open mind as to its approach, based on the responses to this consultation.

10. It is worth stating at the outset that we consider the PCC to be working well and do not believe that it ought to be disbanded. The desire to keep up with regulatory best practice does not outweigh the risk of changing to an entirely different system nor does it justify changing a system that has been independently assessed to be working well. We note that the Capsticks independent review of BSB enforcement decision-making, which formed the evidence base for this consultation, cited the ‘excellent input’ of the PCC and the ‘quality results’ that it produces.² It also notes that the nature of barristers as a profession makes them particularly effective at enforcement decision-making,³ a factor which should be borne in mind when transposing regulatory practices from other sectors.

11. The PCC has been responsible for making decisions in the most serious, complex cases. Our primary concern is that the new structure could lead to a loss of professional knowledge and practice area insight that comes from the wide-ranging backgrounds of those who sit on the PCC. No concrete risk of any lack of independence on the part of the PCC has been pointed to in this consultation. There is reference to its size possibly creating a perception of lack of independence,⁴ but we find this speculative. Moreover, while the Legal Services Board is quoted as mooted separation of expert advice and decision-making,⁵ the BSB has not articulated what (if any) problems there are with the present PCC that have led it to adopt that view.

12. Notwithstanding the fact that we have overarching concerns about the creation of the IDB, we shall comment on each of the proposals set out on page 22 onwards in the consultation paper:

- a) *Remit of the IDB*: We agree that decision-making on authorisations should be kept separate from enforcement decisions until the BSB is assured that all IDB members are fully trained on the full breadth of IDB functions. The BSB should give thought as to how it can be assured of the quality of the decision-making and how the ongoing training needs of the panel members can be met.
- b) *Executive decision-making*: We note that the new setup does not envisage much difference in the level of Executive decision-making.
- c) *Expert advice for the Executive*: The consultation paper says very little about the proposed composition of the APEX panel members, but it seems to us that their role is crucial in terms of mitigating some of the risks surrounding loss of expertise and breadth of perspective that concern us. We were reassured from

² Neil Marshall, “A Review of the Bar Standards Board’s Enforcement Decision Making”, Executive Summary.

³ Mr Marshall states at para 4.12: “to put it bluntly, if a Committee populated in part by experienced and high quality barristers cannot get enforcement decisions right then who can?”

⁴ Consultation paper, *supra* note 1, at 20 (quoting the independent review).

⁵ *Ibid*, at 19.

attending the BSB stakeholder event on 18 April that the BSB intends to recruit new members for APEX and its composition will be broadened. We understand that it will not be as currently outlined on the BSB website. Lay members have been recruited to provide input in various areas of regulatory function and there are barristers who have expertise in competition law, equality and diversity law and regulatory law. However, we understand that barristers will be recruited in other areas such as criminal and family law. We consider that it is vital for APEX to provide high quality advice across as many of the key practice areas as possible. Our experience of working with the Bar Council Ethics Committee is that a combination of practice area specialism with perspectives from other practice areas can be crucial for ensuring a depth and breadth of understanding of some of the most complex conduct cases. In these cases, the right approach may be influenced by the legal and procedural factors specific to a particular practice area whilst needing to be judged in the broader professional context. We recognise that APEX may not provide an entirely exhaustive pool of experts but note that the BSB has given thought to sourcing other additional experts on an ad hoc basis to provide advice and we agree that this is a sensible proposal. We also agree that this is likely to be needed in only more marginal or complex cases.

- d) *Membership of the IDB*: We understand that the BSB intends to draw on a pool of 30 members – 20 lay and 10 barrister. We agree that the panel needs to be set at a manageable level to ensure the quality of training and rigorous standards going forward.
- e) *Composition of IDB panels*: We note that the consultation paper suggests that panels ought to be comprised generally of three members, two lay and one barrister. We are not convinced that three members will allow for sufficient dialogue and discussion to establish the right course of action. It is important for the panel to be able to have a meaningful discussion and benefit from a range of different views when coming to a final position. Similarly, overly small panels will lose the benefit of shared learning identified by the independent review.⁶ We consider that it may be more appropriate for there to be panels of five as a starting point, with panels of seven convened in cases of a serious or complex nature. We urge the BSB to develop guidelines to clarify when larger panels might be needed.
- f) *Presentation of evidence to IDB panels*: We understand from comments made at the BSB stakeholder event that the identity of the complainant will be disclosed to the IDB Panels and not more widely. Assuming that is the case, we are happy to support this change. A complainant's identity should not be made known

⁶ *Supra* note 2, at paras 4.18-19.

more widely as this could have ramifications for those who are considering whether to report sensitive information.

- g) *Provision of the full case file to the IDB members:* This sounds like a sensible change.
- h) *Frequency of meetings:* We do not have any comments.
- i) *Virtual meetings:* We can see that there would be benefits for those who are not based in London and that this may help to broaden participation.
- j) *Recording decisions of IDB panels:* We agree that it would be helpful to record the more detailed reasons to refer cases to disciplinary action.
- k) *Pilot meetings:* We are encouraged to hear that participants who are currently PCC members have spoken positively about their work in panels. We urge the BSB, in testing larger panels, to include consideration of making a five-person panel the norm. It should also be borne in mind that the PCC members who participated in the pilots would have brought with them experience drawn from sitting on the much bigger PCC, which may not be reflective of actual IDB panels in the future.

Question 4: Do you consider the revisions to the Standing Orders, the Enforcement Decision Regulations and the consequential changes to the BSB Handbook will be effective in supporting the change in our approach to regulatory decision-making?

13. The draft amendments to the Regulations succeed in streamlining the enforcement rules and making them more easily understandable. However, we are concerned about the drafting approach of giving sweeping powers to the Executive, via the Commissioner. The independent review of BSB decision-making points out that the permissible extent of staff decision-making depends on i) clear delineation of the categories of different complaints, and precise criteria for decision-making; ii) availability of expertise where needed (discussed above); iii) the absence of operational imperatives influencing decision-making; and iv) a high degree of quality assurance and audit of decisions.⁷ The regulatory arrangements should reflect these principles, and we believe that they do not as currently drafted in Annex 2.

14. Under the existing Standing Orders and Enforcement Regulations, the PCC is entrenched as a multi-member lay/barrister body, independent of the BSB executive, with powers of investigation and enforcement. It can and does delegate these to staff, but it retains ultimate responsibility and could revoke them. We recognise that staff

⁷ *Supra* note 2, paras 3.9-3.16.

currently make the majority of decisions, and it is not suggested in the consultation that the balance of staff and independent decision-making will change. However, the draft regulations in principle allow for *all* enforcement decision-making to be made by the executive. We feel that this goes too far in the opposite direction. Staff are only required to seek independent input in order to refer a case for disciplinary action (outside the enumerated grounds in rE19.4 where they can directly refer a case) or for a decision under the Determination by Consent procedure. However, there is no requirement in the draft regulations for them to choose either of those paths, and no indication of the circumstances in which they should. We trust that BSB policy documents will clarify the circumstances in which the Executive must refer decisions to the IDB (along the lines of the existing 'categorisation of complaints' guidance). Nevertheless, we believe that the rules themselves should mandate that serious or complex cases are to be decided by the IDB.

15. Moreover, the draft regulations confer all power on an office which will be held by an operational and strategic manager, the Director General. We recognise that it is a construct, and it is not likely that enforcement decisions will be made by the Director General (though the draft regulations do not preclude that). Nonetheless, the benefit of the existing regime is that the PCC is independent of the operational chain, and though it delegates powers in practice it retains ultimate responsibility for their exercise. We think the BSB should consider conferring enforcement powers on the Chair of the IDB, mirroring to some extent the PCC, or alternatively the office of Commissioner should not be held by the DG and instead should be independent of operational management.

16. The independent review also made clear the importance of credible quality assurance, and in particular highlighted the value of the existing Quality Review Sub-Committee.⁸ It is vital that quality assurance be done by persons who are not part of the operational chain, and so we are concerned by the notion that the Commissioner will have this responsibility. We encourage the BSB to go ahead with the external audit mechanism it is considering. At present, without that being fully fleshed out, we are sceptical that the rules as drafted create a scheme of sufficiently accountable regulation.

Question 5: Do you consider the changes in approach to our regulatory decision making could create any adverse impacts under the Equality Act 2010?

⁸ *Supra* note 2, para 4.4.

17. We agree that the BSB's proposals to pay IDB members, and the more flexible scheduling that may be enabled by bodies smaller than the PCC, could enable a greater diversity of people to commit to panel work.

18. We also take the BSB's point about why it is no longer anonymising information providers' names in case documents. We are grateful to the BSB for elaborating on the practical difficulties with doing so at the stakeholder meeting. Given that there is no concrete evidence about whether unconscious bias arises in relation to information providers (as opposed to the subject of the allegation), we agree with the BSB's intention to monitor decisions for any potential bias.

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