Bar Standards Board
Consultation Paper

New Handbook and Entity Regulation: Part 2 (Supervision and enforcement)

March 2012

This consultation closes on Monday 28 May

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INTRODUCTION AND STRUCTURE OF PAPER

1. In proposing a new entity regulation framework the BSB needs to develop a supervision and enforcement regime that will both help entities comply with their obligations and allow the BSB to take proportionate enforcement action where appropriate. The BSB has also taken this opportunity to review the supervision and enforcement arrangements which apply to individual barristers.

2. In setting out our approach to supervision and enforcement the BSB proposes to be guided by a series of overarching principles. Firstly, our energy and resources should be targeted at the greatest areas of risk. Secondly, we should have a number of tools at our disposal to ensure that our regulatory response is flexible and proportionate. Thirdly, wherever possible regulatory issues should be resolved through an enhanced use of supervision and monitoring, with only the most serious cases being dealt with by way of disciplinary action. Finally, as far as possible the BSB will strive for consistency between the supervision and enforcement mechanisms applicable to individual barristers and those proposed for entities.

3. Because some of the proposed changes affect both entities and individual barristers, it is important that the scope of the proposed changes is clearly understood from the outset. With respect to changes around supervision, it should be noted that the BSB is reviewing generally its approach to monitoring and supervision and will be consulting on this topic in the autumn. This paper sets out current thinking on the supervision of entities but would, in the light of any developments with broader BSB monitoring, be subject to refinement where appropriate. The underlying principle is that monitoring and supervision of entities and Chambers (and, in due course, individuals) will be in accordance with a consistent risk framework.

4. The BSB's new proposals around enforcement will be applicable to the entire regulated community, including individual barristers. This means that proposed changes to areas such as administrative sanctions, the Interim Suspension and Disqualification Rules, Determinations by Consent, fines and the Disciplinary Tribunal Rules will apply equally to entities and individual barristers.

5. The consultation paper discusses a considerable amount of material and proposes a number of changes to the BSB's current supervision and enforcement regime. To assist readers with digesting the consultation the various sections, and a brief outline of what is covered by each, is set out below:

    - Supervision (Monitoring Unit) – a brief overview of the current supervision and enforcement arrangements and a detailed examination of the BSB's approach to entity supervision and the expanded role of the Monitoring Unit (paragraphs 6-30);

    - Enforcement Policy – this section details the BSB's new enforcement policy and approach to disciplinary action, including factors which will be used in deciding when to take disciplinary action (paragraphs 31-33).

    - Disciplinary Action – this section sets out the factors which will be used in deciding which disciplinary route to use in a given case and proposes to expand the use of administrative sanctions and Determination by Consent so that Tribunals can concentrate on serious cases of professional misconduct (paragraphs 34-61).

- Interim Suspension and Disqualification Panels – this section examines the new proposals around the Interim Suspension (and Disqualification) Rules, including the proposal to broaden the triggers for referral to an Interim Panel and the powers available to the Panel (paragraphs 62-77).

- Non-authorised persons – this section covers the BSB's powers over non-authorised persons (i.e. lay managers and employees), including the power to disqualify them from working in BSB regulated entities (paragraphs 78-97).

- Divestiture – this section discusses the BSB's power to force an owner to divest their ownership interest in a BSB regulated ABS (paragraphs 98-102).

- Interventions – this section examines the BSB's powers around intervening into an entity, including limiting interventions to ABSs, the initial triggers for intervention, vesting of money, appointment of intervention agents and cost recovery (paragraphs 103-123).

- Fines – this section outlines the BSB's proposals as to the maximum levels of fines that should apply, including the proposal that the maximum level of fine applicable to individual barristers should be increased to £1,000,000 (paragraphs 124-133)

- Disciplinary Tribunal Regulations – this section discusses the proposed changes to how Disciplinary Tribunals are run. The proposed changes cover both entity specific changes and more general changes to the procedure, particularly around Directions Hearings (paragraphs 134-142).

- Appeals to the Visitors – this section covers the proposal that all entity appeals from Disciplinary Tribunals should be heard before the Visitors (paragraphs 143-145).

SUPERVISION (MONITORING UNIT)

Existing arrangements

6. Historically the BSB has been a reactive regulator and the level of proactive supervision and monitoring over individual barristers and chambers has been minimal. This means that most of the BSB's regulatory effort has been focused on reacting to past events and taking appropriate disciplinary action where necessary.

7. Alleged breaches of the Code are currently dealt with by the Professional Conduct Department (PCD) and the Professional Conduct Committee (PCC). The office of the Legal Ombudsmen deals with all service related complaints against barristers. On receipt of a complaint or intelligence the PCD will first check to see whether there is evidence of potential misconduct or other breach of the rules. If there is no evidence, the matter will be dismissed with no further action. If there is evidence, the PCD will investigate and refer the matter to the PCC for disposal. The PCC has a range of options available to it including dismissing the matter, imposing an administrative sanction or directing that a barrister be charged with professional misconduct and referred to a Disciplinary Tribunal.

8. In 2010 the BSB's Quality Assurance Committee conducted the first round of nationwide chambers monitoring. Chambers were required to complete a monitoring form answering questions relating to compliance with pupillage, money laundering, complaints handling and equality and diversity rules. There are plans to commence the second round of chambers monitoring later in the year.

Proposed approach

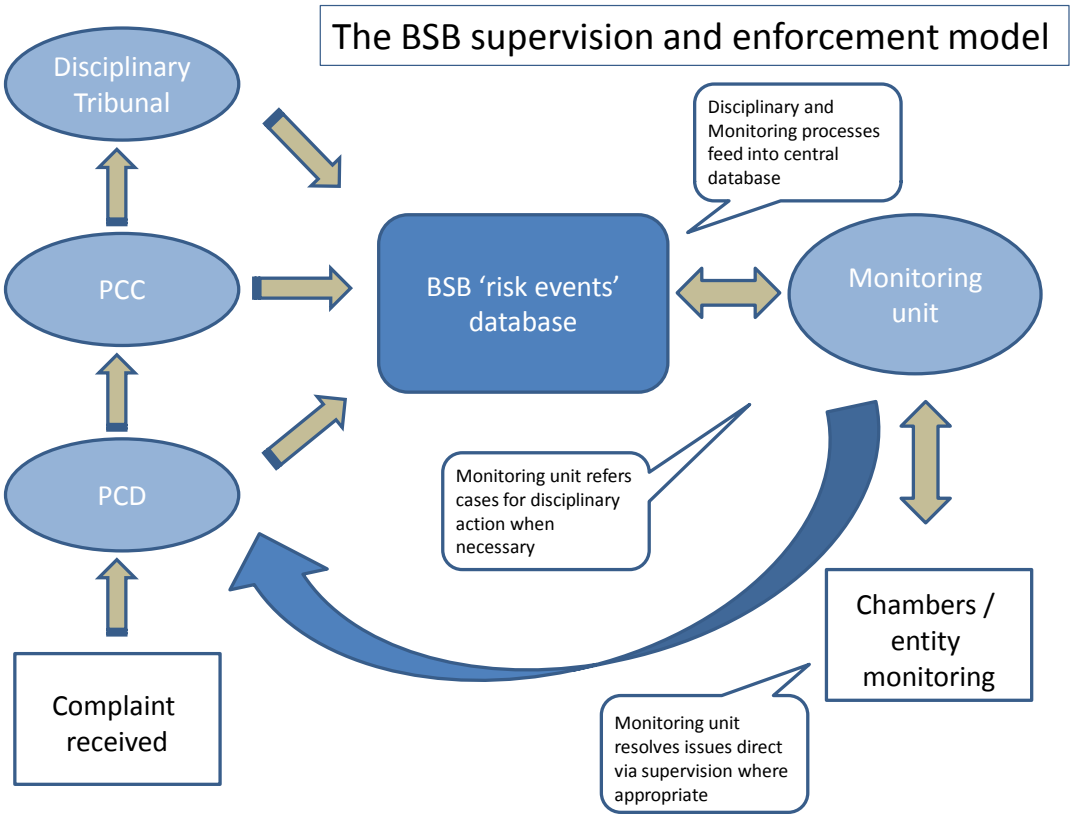
9. The BSB is currently reviewing its monitoring strategy in order to maximise compliance with the LSB's regulatory standards framework. The intention will be to set up a central Monitoring Unit which will be responsible for monitoring entities and chambers. There will be a targeted consultation on the development of the risk-based monitoring strategy later this year.

10. In relation to entities, the new risk-based monitoring strategy will see the Monitoring Unit taking a more active role in the identification and resolution of any regulatory issues that may emerge post authorisation. The Monitoring Unit will endeavour to resolve any regulatory issues through non-disciplinary measures by working constructively with the entity in question. The PCD and PCC will therefore only become involved if all reasonable supervisory measures have failed (or if there is a serious alleged breach of the Handbook that justifies immediate disciplinary action).

11. Particularly during the early days of entity regulation, some non-compliance may be due to the novelty of the regime and be better addressed by supervision towards compliance than by enforcement measures. In this way, the Monitoring Unit will build up knowledge of the areas that are causing particular difficulty for entities, and of where there is a risk of adverse impact on their clients, and can use this knowledge to focus monitoring resources appropriately.

12. In relation to specific complaints and other intelligence that suggest a possible breach of the Handbook, we propose that the PCD remains the initial collection point for both individual barristers and entities. The PCD will also continue to be responsible for undertaking an initial assessment of all information received and for investigating potential breaches of the Handbook with a view to disposal by the PCC. As a parallel work stream the Monitoring Unit will continue to work with entities and chambers to ensure compliance with the Handbook and help to resolve any regulatory issues that do not justify disciplinary action.

13. The below diagram sets out how the BSB envisages the relationship working:



14. All complaints and intelligence about potential breaches of the Handbook will go to the PCD for initial assessment (irrespective of whether they relate to an entity, chambers or an individual). If there is no evidence of a breach, or if the complaint is made out of time or can be more appropriately dealt with by someone else, the complaint will be dismissed. If there is evidence of a breach then the PCD will investigate in their normal way and gather evidence.

15. Unlike some other Approved Regulators, the BSB does not propose to run all new complaints and intelligence received through a mathematical risk framework. Nor does the BSB propose to treat complainants as "informants" and keep them at arm's length. Instead the BSB will continue to keep complainants at the centre of its procedures and keep them fully engaged and informed throughout.

16. At the end of any investigation the matter may be dismissed by the PCD for lack of evidence or referred to the PCC for disposal. The PCC will continue to have the full range of disposal options available to them. These include dismissing a matter, imposing an administrative sanction, referring the matter to a Determination by Consent (with the defendant's consent) or drafting charges of professional misconduct and referring the matter to a Disciplinary Tribunal for hearing.

17. The work of the Monitoring Unit will continue in parallel with the work of the PCD and PCC. Because the Monitoring Unit's work will be risk based, it will need access to any information that may affect the risk profile of an entity or chambers. The proposal is therefore that information about how a complaint or intelligence has been dealt with (be it dismissed, imposition of administrative sanction, referred to DBC, referred to Disciplinary Tribunal) will

be fed into the shared risk events database. The database will be a discrete part of the BSB's new core database.

18. The Monitoring Unit will be able to access information passed into the database and use this to constantly update their risk profile of the entity or chambers. The type of information passed into the database by the PCD will obviously have different weightings depending on the nature of the information. For example, information that a complaint has been received but immediately dismissed for lack of evidence will have less weight than information that an individual or entity has been convicted by a Disciplinary Tribunal of professional misconduct. The type of information, and the weight attached to it, will therefore directly affect the intensity of the supervision and monitoring undertaken by the Monitoring Unit. In straightforward terms, entities and chambers that are assessed as a greater risk will justify more intense supervision and monitoring.

Proactive supervision of entities

19. The above sets out how the BSB generally proposes to react to complaints and intelligence and the parallel the role of the Monitoring Unit. This section focuses on the likely application of proactive risk based supervision applicable to BSB regulated entities.

20. When working with entities and chambers to resolve regulatory issues, the options available to the Monitoring Unit will be varied and will include:

    a) Offering advice about areas of regulatory concerns and suggesting ways in which these areas might be addressed (this may include referring the entity or chambers to assistance offered by the Bar Council, Circuits or SBAs);

    b) Providing the entity or chambers with a timeframe in which to address non-compliance and demonstrate compliance;

    c) Working with the entity or chambers towards an agreed action plan to remedy any areas of concern;

    d) Recommending extra training on aspects of the Handbook (i.e. money laundering, complaints procedures, pupillage requirements etc).

21. Where possible the BSB is committed to resolving regulatory issues without bringing formal disciplinary proceedings. The clear aim will be to ensure future compliance, not to impose sanctions for past mistakes. If however the Monitoring Unit is satisfied that an entity or chambers has not complied with any of the above and further non-disciplinary measures are inappropriate, it will refer the matter to the PCD and suggest a BSB own motion complaint be raised.

22. Whether or not an own motion complaint is pursued will be at the absolute discretion of the PCD having assessed all of the available information.

23. The Monitoring Unit will have an important role in the proactive supervision of entities to ensure general compliance with the Handbook. As part of the authorisation process and

subsequently, each entity will be subject to a risk assessment. The BSB anticipates that the vast majority of entities it regulates will present a medium or low risk score and therefore will not require intensive supervision (see Part I of this consultation that explains the risk assessment process). However, there may be entities that produce a high risk score, or whose risk score increases over time, and therefore require closer supervision. Equally, the process of monitoring and feedback from complaints will, as evidence builds up over time, highlight particular areas of the activity of entities that tend to cause more frequent or more severe instances of detriment to clients. These will then warrant particular focus.

24. Before discussing the mechanics of the BSB's approach to proactive entity supervision specifically, it is worthwhile briefly examining the wider regulatory landscape and the BSB's position within it. An important aspect of the BSB's enforcement policy will be to ensure proportionate regulation.

25. The BSB will be acting as a specialist regulator of entities posing similar regulatory risks to those posed by the self-employed Bar, operating under rules that will exclude a number of sources of risk that exist in the regimes of other Approved Regulators (such as more complex ownership structures and handling client money). In general, entities regulated by the BSB are likely to be small to medium size enterprises. The BSB therefore does not consider that it would be appropriate, or proportionate, to operate an intensive supervision regime, unless specific risk factors have been identified at the point of authorisation or through monitoring that justify a more intensive approach in relation to a particular entity or on a thematic basis.

26. The appropriate level of supervision will be a balancing act that is determined by a number of factors. The current chambers monitoring scheme will be the starting point for the BSB's approach to entity supervision. In previous years the BSB has monitored chambers' compliance in specific areas including first tier complaints, pupillage and money laundering. It is anticipated that there will be another round of chambers monitoring undertaken in the middle of this year. The results of this monitoring exercise will help the BSB refine the various risk factors intended to be included in its new risk-based monitoring framework, which will apply to chambers and entities.

27. Within the first 12 months of being authorised, the BSB proposes that it will conduct a monitoring visit with every entity that produces a medium or high risk score. The BSB does not consider that it would be an appropriate use of its resources to conduct these initial monitoring visits for entities that produce a low risk score, although we may decide to undertake such visits for the purposes of information gathering. The initial visit will serve to reinforce the BSB's commitment to constructive dialogue and also ensure that the entity is complying with its obligations under the terms of its licence/authorisation.

28. For entities that produce a low or medium risk score, the BSB considers that the appropriate level of ongoing supervision would normally be to require no more than completion of a regular return (possibly annually but maybe every two years) and any other returns required in particular risk areas. The entity will be required to certify that it continues to comply with the Handbook and also answer specific questions on particular areas of regulatory concern. All returns would be analysed by the Monitoring Unit to ensure no regulatory issues arise. If regulatory issues do arise, or new intelligence is received, then appropriate action will be taken and the risk score will be reviewed.

QUESTION 1: Do you agree that this level of supervision is appropriate for low and medium risk entities?

29. Entities that produce a high risk score (at the authorisation stage or otherwise) will require something more intensive. The exact level of supervision will need to be proportionate and will of course depend on the facts of individual cases. There are a number of ways the entity and the BSB can work together to mitigate those risks which the BSB considers may not be adequately controlled, these include:

    a) Personal monitoring visits and/or telephone conversations on areas of concerns;

    b) Recommending additional training;

    c) Requiring more frequent monitoring returns (e.g. six monthly);

    d) An undertaking to work towards an agreed action plan on particular areas of concern (e.g. no computer system in place to ensure the proper conduct of litigation or poor CPD compliance);

QUESTION 2: Do you agree that this level of supervision is appropriate for high risk entities? Should the BSB do anything more by way of supervision of these entities?

30. Aside from the above, the BSB is also considering the possibility of carrying out short-notice spot inspections of randomly selected entities. All entities would potentially be subject to these spot inspections, irrespective of the risk assessment score. The BSB believes that conducting a reasonable number of short-notice inspections is a proportionate way to incentivise compliance with the Handbook and to identify any emerging problem areas which may be of more general concern. The BSB may also want to carry out thematic inspections if it has identified any cross-sector issues. Again, if areas come to light where the BSB is concerned that risks are not adequately controlled it will aim to identify in discussion with the entity ways these risks can be better mitigated.

QUESTION 3: Do you agree that the BSB should adopt short-notice inspections of randomly selected entities and thematic inspections?

ENFORCEMENT POLICY

31. This section applies to individual barristers as well as to entities. In the first instance, it is important that the BSB clearly identifies why enforcement action is necessary. The BSB considers that the primary reasons for taking enforcement action are to protect the public interest and to protect the interests of consumers, although this obviously meets other regulatory objectives indirectly. Aligned to this is the need for the BSB to offer a credible deterrence and to encourage compliance with the Handbook.

32. The hallmarks of the BSB's new enforcement policy, for all those whom the BSB regulates, will be:

a) Proportionality - The BSB recognises that proportionate enforcement is necessary to ensure the stated outcomes are achieved and the Handbook is complied with. This means that wherever possible, matters will be resolved through supervision and engagement without the need for formal enforcement proceedings. Such an approach relies heavily on a positive and open working relationship between the BSB and the regulated community (this reflects the constructive engagement ethos that underpins our approach to supervision).

b) Individual responsibility - Individual responsibility is at the heart of the BSB's regulatory regime. Therefore, it is more likely that enforcement action will be targeted at an individual rather than at an entity level. However, there will be cases that justify action targeted either at the entity alone or at the entity plus certain individuals. With respect to chambers, the BSB will have no power to bring charges against the Chambers itself (unless it sets up as a BSB regulated entity). Therefore the BSB will continue to enforce the Handbook by holding individuals within chambers (particularly the Head of Chambers or the senior management committee) responsible for compliance with the rules relating to the management of Chambers.

c) Flexibility - A range of enforcement tools will be available to the BSB including written advice or rebukes, the expanded use of administrative sanctions, Determination by Consent, referral to a Disciplinary Tribunal and a power to intervene (applicable to ABSs only).

d) Disciplinary charges - Although charges will be brought with specific reference to breaches of core duties and/or rules, the enforcement policy will nevertheless take into account the outcomes that each section of the Handbook is trying to achieve. This means that before deciding whether or not enforcement action is required, consideration will be given to whether or not one of more of the outcomes has been adversely affected (other criteria mentioned below will also be considered). A consequence of adopting this approach is that no formal disciplinary action may be taken even where a particular breach of the Handbook has been identified, provided that breach was relatively minor, did not have a negative impact on one or more of the outcomes and appropriate steps have been taken to prevent a recurrence.

33. If all supervisory options have been exhausted, or if supervision is not appropriate in the particular circumstances, the BSB will consider taking disciplinary action against the relevant individual(s) and/or the entity. In deciding whether or not to take disciplinary action for a particular breach of the Handbook, the BSB proposes to include the following criteria in its new enforcement policy:

    a) Whether one or more of the outcomes has been negatively affected;
    b) The seriousness of the act or omission;
    c) The number of clients affected and the seriousness of the adverse impact (or potential adverse impact) on those clients (particularly if the clients are vulnerable);

d) Evidence of insufficient care being taken over compliance or of recklessness, deliberate breaches, or dishonest behaviour;
e) The period of time over which the act or omission took place;
f) Whether the breach is accepted by the defendant and what has been done to correct the breach and to provide any appropriate redress;
g) The extent to which the act is a one off or part of series of similar matters;
h) The impact on clients of the BSB's taking action compared with the impact of not taking action;
i) Impact on public confidence in the profession and the administration of justice;
j) Whether enforcement action is necessary to deter others;
k) The impact of the act or omission taking into account the BSB's regulatory priorities as stated from time to time.

QUESTION 4: Do you agree that the above should be included in the BSB's enforcement policy; are there any other factors that should be included?

DISCIPLINARY ACTION

34. The proposals in this section again apply both to individual barristers and entities. Where disciplinary action is deemed necessary, the BSB will have a number of options available to it. Depending on the seriousness of the breach, the disposal options available to the PCC will include:

    a) Impose an administrative sanction;
    b) Resolve via the Determination by Consent procedure; or
    c) Referral to a three or five person Disciplinary Tribunal.

Administrative sanctions

35. Presently there are only limited sections within the Code that are capable of being dealt with administratively by the BSB (see rule 901.1). Every other breach falling outside rule 901.1 is construed as professional misconduct (see rule 901.7) and is therefore not capable of being disposed of administratively. Unlike other Approved Regulators, the BSB does not currently have the power to impose internal disciplinary findings (other than through the Determination by Consent procedure).

36. The BSB now proposes to move away from limited use of administrative sanctions and instead apply them, where appropriate, to the entire Handbook. The ability to impose administrative sanctions would apply equally to all entities, authorised individuals, non-authorised managers and individual barristers.

37. The new proposal fundamentally alters the position under the current Code and will mean that every breach of the Handbook is potentially capable of being dealt administratively. Once disciplinary action has been determined to be appropriate in respect of a breach of the Handbook, applying the factors in paragraph 33 above, the BSB will consider whether, in all the circumstances, a proportionate outcome in the public interest would be the

imposition of an administrative warning or fine. If so, the BSB will proceed to deal with the breach administratively, applying a civil standard of proof.

38. An alleged breach of the Handbook will be elevated to an allegation of professional misconduct if certain aggravating factors are identified by the PCC. Relevant factors that may justify an alleged breach being treated as an allegation of professional misconduct include:

    a) The seriousness of the allegation and its impact having regard to all of the factors set out in paragraph 33 above;
    b) Whether the barrister has a poor disciplinary record;
    c) Whether the appropriate sentence is likely to be a fine above the administrative limits, disbarment, suspension, disqualification or revocation of licence or authorisation;
    d) Whether the breach involves non compliance with previous orders or directions of the BSB;
    e) Whether there is a substantial dispute of fact; and/or
    f) For any other good reason.

39. Having identified that an allegation is to be treated as one of professional misconduct, the PCC will, as it does now, apply an evidential test and a regulatory objectives test before deciding whether or not to prosecute.

40. The BSB considered the possibility of carving out various provisions of the Handbook where breaches would <u>always</u> constitute professional misconduct. Obvious examples of such behaviour would be misleading the court, breaching client confidentiality, committing fraud etc. On balance it was agreed that this approach should not be adopted because too much will turn on the facts of the case and the seriousness and impact of the breach. The BSB considers that it would be better to start from a position where a breach of any given rule could potentially be dealt with administratively and then go on to apply the above criteria. Plainly, it would be exceptional for certain of the rules in the Handbook to be breached in a way that did not amount to professional misconduct, but, nevertheless, approaching the matter in this way will encourage a proportionate approach. The BSB is confident that the above approach will ensure that allegations of serious breaches of the Handbook will always be construed as allegations of professional misconduct and be dealt with accordingly.

41. The power to impose administrative sanctions will rest exclusively with the PCC who, in accordance with existing arrangements, will be able to delegate the power to senior PCD staff in appropriate cases. This means that, following investigation, it will be possible for a member of the PCD staff to determine whether or not there has been a breach of the Handbook that is apt for administrative disposal.

42. In deciding whether or not to impose an administrative sanction, the civil standard of proof will be applied. The BSB considers that the civil standard is appropriate given the less serious nature of the breaches being considered, as compared with an allegation of professional misconduct before a Disciplinary Tribunal. The SRA, likewise, applies a civil

standard in relation to administrative sanctions, whilst a quasi-criminal standard applies to allegations of professional misconduct in the SDT.

43. Currently the BSB can impose a fixed financial penalty of up to £300 (or such other amount as agreed by the BSB from time to time). The BSB considers that the existing fixed level of fine is too low and too rigid. Instead the BSB proposes to move to a new maximum level of up to £3,000 for an individual or up to £5,000 for an entity. When deciding what level of fine is most appropriate the BSB will have regard to the various factors set out in the fines policy (detailed at paragraph 133 below). The BSB will also continue to be able to issue warnings.

QUESTION 5: Do you agree that the BSB should adopt this new approach to enforcement with greater use of administrative sanctions?

QUESTION 6: Do you agree with the new maximum level of fines proposed?

QUESTION 7: Do you agree with the application of the civil standard to administrative sanctions?

44. As is currently the case, the BSB's decision to impose an administrative sanction can be appealed to an independent Appeal Panel that is administered by COIC (there is no further right of appeal beyond the COIC Panel).

45. In the absence of any appeal, non compliance with an administrative sanction (i.e. failing to pay the fine) is likely to be treated as professional misconduct which would result in the matter being referred to a full Disciplinary Tribunal for disposal.

46. Because administrative sanctions will only be appropriate for lower level breaches of the Handbook that, based on the above criteria, do not constitute professional misconduct, the BSB proposes that administrative sanctions will be formally recorded but will not be made public. Any administrative sanction imposed will however be taken into account in future risk assessments and in decisions as to whether to deal with a subsequent matter by way of supervision or by enforcement.. If findings were to be published, they would appear on a certificate of good standing and would need to be disclosed in any future application for silk, admission to an overseas jurisdiction or on application to the judiciary.

47. The primary objective in dealing with matters administratively is to secure future compliance. Dealing with minor issues without publicity is more likely to encourage co-operation by the barristers concerned. This will be in the public interest as it will achieve better compliance with less use of the BSB's resources and therefore at lower cost. The BSB considers that public disclosure would have disproportionately serious consequences for barristers with little or no corresponding benefit to the public.

QUESTION 8: Do you agree that administrative warnings and fines should be recorded but not be published?

<u>Determination by consent</u>

48. In appropriate cases, and with the consent of the defendant, the BSB currently has the power to dispose of complaints that disclose a prima facie case of professional misconduct

without the need to refer the matter to a Disciplinary Tribunal, by way of the Determination by Consent process. The PCC oversees the process and hands down decisions having considered the evidence on the papers.

49. The proposal is that the Determination by Consent process (currently found at schedule 1 of Annex J) should be expanded to include entities and all individuals working within the entity. Cases will only be appropriate for determination by consent if the individual submits to the jurisdiction of the PCC and if the PCC considers that:

    a) Where relevant, there is a realistic prospect of a finding of professional misconduct being made or there is a realistic prospect of the disqualification condition being satisfied in respect of the complaint;
    b) There are no substantial disputes of fact which can only fairly be resolved by oral evidence being taken;
    c) There are no exceptional circumstances which would warrant no further action being taken on the complaint or the complaint being dismissed;
    d) Having regard to the regulatory objectives, it is in the public interest to resolve the complaint under the Determination by Consent procedure; and
    e) The potential professional misconduct or disqualification condition, if proved, would not lead to a sentence outside that available to the PCC.

50. If a finding is made, the PCC currently has the power to impose a variety of sanctions, including:

    a) Fine up to £15,000;
    b) Issuing advice as to future conduct;
    c) Reprimand and/or a warning;
    d) Ordered to complete CPD;
    e) Ordered to take and pass a test in professional conduct and ethics.

51. Importantly the PCC has no power to disbar or suspend under this procedure. The proposal is that the PCC will retain all of the existing powers (although the level of available fine would be much higher– see fines section) with additional powers to impose conditions on a practising certificate, licence or authorisation and to disqualify someone from working in another BSB regulated entity (see below). This will, for example, allow the imposition of conditions designed to prevent a repetition of the misconduct and to promote future compliance.

52. There are no appeals from PCC decisions under the determination by consent procedure. However, if the defendant is dissatisfied with the PCC's final decision they may elect to have the matter referred to a full Disciplinary Tribunal. In those circumstances the finding of the PCC is set aside and the matter considered afresh.

QUESTION 9: Do you agree that the Determination by Consent procedure should be extended to include entities and to allow the PCC to impose conditions on a practising certificate, licence or authorisation and to disqualify individuals?

<u>Disciplinary Tribunals</u>

53. The PCC will continue to refer the most serious breaches to three or five person Disciplinary Panels for disposal. Subject to specific changes discussed below, the process of bringing disciplinary charges or a disqualification application to a Disciplinary Tribunal will be broadly similar for individual barristers, entities and those who work in entities.

54. In determining that a matter is apt for disposal at a Disciplinary Tribunal the PCC must be satisfied of the following:

    a) The imposition of an administrative sanction is not appropriate in all the circumstances;
    b) The PCC considers that there is a realistic prospect of a finding of professional misconduct being made or of the disqualification condition being satisfied; and
    c) The PCC considers that the regulatory objectives would be best served by pursuing the disciplinary proceedings.

55. In deciding whether a three or five person Disciplinary Tribunal is most appropriate the PCC will consider the sentence which is likely to be imposed if a finding is made. If the PCC considers that likely sentence would be one of disbarment or suspension for more than three months (in the case of a barrister defendant), disqualification (in case of non-BSB authorised individual defendant and non-authorised manager/employee defendant) or revocation of an entity's licence or authorisation, then the matter will be referred to a five person Disciplinary Tribunal. This can also be done if the nature of the case is such that it would be beneficial to have a broader range of experience on the Tribunal.

56. As set out in Part 1 of this consultation, unlike other Approved Regulators the BSB's proposed policy is that the stated outcomes in the Handbook will not themselves be enforceable. Rather specific charges heard before Disciplinary Tribunals will be framed by reference to breaches of one or more of the core duties and/or rules.

57. Hearings before Disciplinary Tribunals will proceed in accordance with the existing rules and the rules of natural justice.

58. Following a finding of professional misconduct or were the disqualification condition has been satisfied, a five person Disciplinary Tribunal will have the following powers:

    a) Disbar or suspend a barrister;
    b) Disqualify a barrister, non-BSB authorised person or non-authorised manager/employee from working in another BSB regulated entity (this power will be enforced by making it a breach of the Handbook for a BSB regulated person to employ a disqualified individual);
    c) Revoke an entity's licence or authorisation;
    d) Place conditions on an entity's licence or authorisation (for example, a prohibition on undertaking certain kinds of activity);
    e) Impose fines up to the prescribed maximum (see fines section below);
    f) Issue a warning, rebuke or advice.

59. The BSB considered giving the Disciplinary Tribunal an additional power to impose administrative sanctions in circumstance where a charge or professional misconduct had not been proved, but the Tribunal felt there had a been a breach of the Handbook that nevertheless justified an administrative sanction. On balance the BSB's proposal is that such a power should not be included and Disciplinary Tribunals should be restricted to ruling on matters of professional misconduct only.

60. Following a finding of professional misconduct, a three person Disciplinary Panel will have the same powers as above except it will not be permitted to disbar a barrister or suspend him from practice for more than three months, disqualify a defendant or remove an entity's licence or authorisation. If, at the conclusion of the hearing, a three person Disciplinary Tribunal considers that a case merits a sentence that is beyond their powers, they may refer the case to a five person Disciplinary Panel for sentencing.

QUESTION 10: Do you agree with the proposed approach to Disciplinary Tribunals? Do you think there is still benefit in retaining five person Panels or should the BSB move to three person Panels?

61. Both the PCC (via Determination by Consent) and the Disciplinary Tribunal will have the option of imposing conditions on an authorisation or licence. We believe that it would be in the public interest for such conditions to be published by the BSB for inspection by an entity's clients.

QUESTION 11: Do you agree that conditions on authorisations or licences should be published by the BSB?

INTERIM SUSPENSION (AND DISQUALIFICATION) RULES

62. The BSB currently has powers to interim suspend a barrister from practice pending disposal of a matter before a Disciplinary Tribunal. The BSB proposes to widen these powers so that, in appropriate circumstances, it may impose interim suspension and/or disqualification orders against barristers (self-employed or otherwise), an entity, non-BSB authorised individuals and non-authorised managers/employees.

63. The BSB also proposes to introduce a power that will permit the PCC to impose an immediate interim suspension or disqualification in the most serious cases. An immediate interim suspension or disqualification may only be imposed if the PCC is satisfied that such a course of action is justified having considered the risk to the public if such interim suspension or disqualification is not implemented.

64. The BSB recognises that the ability to impose immediate interim suspensions or disqualifications pending hearing is a significant power that could have wide ranging consequences on individuals and entities. Nevertheless, the BSB also recognises that there are potentially circumstances where the power is required in order to protect the public and satisfy the regulatory objectives.

65. In broad terms the proposal would mean that, as well as being able to interim suspend a barrister's practising certificate, the BSB will also have the power to interim disqualify a authorised non-BSB person (e.g. a solicitor) or non-authorised manager/employee from

being employed by another BSB regulated entity, pending disposal of a matter before a Disciplinary Tribunal. The BSB would also have the power to interim suspend an entity's licence or authorisation.

66. The BSB's power to suspend a practising certificate applies exclusively to barristers. For example, this means that while the BSB can disqualify a solicitor from working in other BSB regulated entities, it has no power to suspend a solicitor's practising certificate generally. It will therefore be up to the other Approved Regulators to take any necessary action against their own authorised persons once notified by the BSB.

67. Currently, under Annex N of the Code, a barrister may be referred to an Interim Panel by the PCC if they have been:

    a) Convicted of, or charged with, an indictable criminal offence; or
    b) Convicted by another Approved Regulator of misconduct, for which they have been sentenced to a suspension or termination of the right to practise.

68. Where a conviction (either for an indictable offence or by another Approved Regulator) has caused referral to the Panel, the Panel may decide to impose a term of interim suspension from practice, or an interim condition on authorisation to practice (for example, an interim condition on a practising certificate prohibiting acceptance of public access instructions), for up to six months pending the hearing of a Disciplinary Tribunal. No interim suspension shall be imposed unless the Panel considers that it is likely a Disciplinary Tribunal would impose a sentence of disbarment or suspension for more than 12 months, and it considers it in the public interest to do so. In lieu of suspension, the Panel may also accept a written undertaking from the barrister on such terms as it thinks fit.

69. Where a criminal charge has caused referral to the Panel, the Panel may decide to direct the barrister to notify his professional and lay clients of the offence with which he is charged. The Panel may also direct that the barrister's practice be subject to any conditions they think fit. In lieu of making the above directions, the Panel may also accept a written undertaking from the barrister on such terms as it thinks fit. Importantly the Panel has no powers to suspend where the referral has been triggered by a charge.

70. The BSB proposes to amend the rules to expand the triggers for referral, so that it may refer a matter to an Interim Panel if the defendant meets one or more of the following criteria:
    a) the defendant has been convicted of, or charged with, a criminal offence other than a minor criminal offence; or
    b) the defendant has been convicted by another Approved Regulator, for which they have been sentenced to a period of suspension or termination of the right to practise; or
    c) the defendant is a BSB licensed body and has been intervened into by the Bar Standards Board; or
    d) the defendant is a barrister only entity or a legal disciplinary practice and the grounds for intervention have been met in respect of that BSB authorised body; and

e) the referral is necessary to protect the interests of clients (or former or potential clients); and

f) the PCC decides having regard to the regulatory objectives that the public interest would be best served by pursuing an interim suspension or an interim disqualification order.

71. If an individual or entity is referred to an Interim Panel, the PCC will also consider if an immediate interim suspension or disqualification is justified. The PCC may only impose an immediate interim suspension or disqualification if they are satisfied that such a course of action is justified having considered the risk to the public if such interim suspension or disqualification is not implemented. Such an order would take effect immediately and would remain in force until such time as the Interim Panel has disposed of the matter.

72. The BSB considered time limiting immediate interim suspension orders to no more than four weeks. On balance it was felt that setting a time limit would be unnecessarily restrictive, and leaving the order in place until such time as the Interim Panel could be convened was more appropriate.

73. The BSB proposes that, irrespective of what initially causes the referral, at the conclusion of the hearing the Interim Panel shall have the following powers:

a) Decide not to impose any period of interim suspension, disqualification or condition;

b) Decide to impose an interim suspension, disqualification or condition pending disposal of the case by a Disciplinary Tribunal - provided that no interim suspension or disqualification shall be imposed unless:

i. the Interim Panel considers that it is likely a Disciplinary Tribunal would impose a sentence of disbarment or suspension (with respect to barristers), or a sentence of disqualification (with respect to non-BSB authorised persons or non authorised managers and employees), or a sentence of suspension or revocation of an entity's licence/authorisation; and
ii. it considers it to be necessary in the public interest to do so.

c) In lieu of imposing a period of suspension, disqualification or condition, accept an undertaking from the individual or entity on any terms the Interim Panel thinks fit.

d) Require the individual or entity to inform lay and professional clients about any conviction, charges or other matters the Interim Panel thinks fit;

74. The old rules imposed a six month time limit on any order made by an Interim Panel. The BSB is considering whether to maintain this time limit or have a default position where any order would remain in force until such time as the Disciplinary Tribunal has been convened

to consider the matter (or the order has been overturned on appeal or for any other reason provided for in the Rules).

75. Currently Interim Suspension Panels are comprised of a barrister QC who Chairs, three other barristers of at least 10 years' Call and one lay person. The BSB proposes that the Interim Panel should be reduced to three people – chaired by a barrister QC with two other members, at least one of which must be a lay person.

76. Interim Suspension Panels will continue to be appointed and administered by COIC and proceedings shall be governed by the rules of natural justice. Appeals from decisions of Interim Panels will be heard by an independent Appeals Panel that is also administered by COIC.

77. The above amendments go further than the existing rules and widen both the triggers for referral and the powers available to an Interim Panel. Whilst the BSB considers that these powers will be used sparingly, it nevertheless thinks that the powers are necessary in order to protect the public and the other regulatory objectives.

QUESTION 12. Do you agree with the amendments being proposed by the BSB to the powers and procedure relating to the Interim Panel?

QUESTION 13. Do you have any views on whether time limits should be imposed on interim suspension or immediate interim suspension?

POWERS OVER NON-AUTHORISED PERSONS AND THE PROPOSED POWER OF DISQUALIFICATION

Introduction and legislative framework

78. In order to understand the BSB's proposals in respect of powers over non-authorised persons it is first necessary to explain what powers the BSB will have as an Approved Regulator and as a licensing authority.

79. Under 176 of the LSA 2007 an Approved Regulator will acquire a regulatory hold over any non-authorised persons who are managers or employees of a BSB authorised person. Such persons will have a duty under the LSA 2007 to comply with the BSB's rules. This will apply, equally, to those who are managers or employees in entities that are authorised or licensed by the BSB and to the employees of self-employed barristers who are authorised by the BSB.

80. Section 90 of the LSA 2007 obliges non-authorised persons who are employees or managers of an ABS not to cause the ABS or authorised persons within it to breach their duties.

81. Section 99 of The Legal Services Act 2007 will give the BSB a statutory power to disqualify a person from being a manager or employee of an ABS or acting as Head of Legal Practice or Head of Finance in an ABS if they breach the duties that the LSA 2007 places on them or cause or contribute to breaches of the body's licence/authorisation and the BSB is

satisfied that it is undesirable for the person to be a manager, employee, HOLP or HOFA, as the case may be.

BSB's proposals

82. The BSB believes its powers over non-authorised persons should be consistent, regardless of the type of business structure within which the person works. It is not sufficient for the BSB to rely on these statutory provisions alone, since these would leave anomalous gaps. For example, there would be no power to disqualify a non-authorised person who worked in an LDP, BoE or chambers, as opposed to in an ABS. This is inconsistent and illogical and moreover the SRA does (under s43 Solicitors Act 1974) have such a power in relation to anyone working for a solicitor or for any recognised body the SRA regulates, as well as (under s99 LSA 207) in relation to those working within an ABS. Equally, where clerks were employed by the Head of Chambers they would come under a duty under s176 to comply with the BSB's rules so far as they applied to them, but where they were employed through a management company (which is not an authorised person) they would not.

83. The BSB is therefore proposing rules which would achieve consistency as between non-authorised persons working in different structures. Once approved, these amendments to the BSB's rules become part of the BSB's regulatory arrangements under s21 LSA 2007 and the duty in s176 extends to them. Given that there would be some exceptional cases (for example employees of an unauthorised management company) that would not be directly covered by that statutory duty, and in order to promote and underline the importance of compliance in all cases, there would in addition be a requirement that employers impose equivalent duties to those prescribed in ss90 and 176 LSA 2007 by way of the employment contract.

84. However, the BSB is also determined, as further explained below, to take a proportionate approach to the regulation of non-authorised persons. The BSB has considered and rejected the option of following the approach taken by the SRA, of imposing the entirety of its Handbook on all non-authorised persons, whether managers or employees.

85. The BSB proposes that all entities, together with all authorised persons and non-authorised managers working in entities, will be subject to a full range of disciplinary sanctions (including disbarment or disqualification or revocation, imposition of practising conditions, warnings, fines and rebukes). The BSB has decided that where a person has the status of manager they should, even though a non-authorised person, still be subject to all of the obligations which the BSB's Handbook places on managers. We deal with this in the parallel consultation on the Code of Conduct. It follows that they should also be subject to the full range of the BSB's regulatory powers, in the same way as other managers who are authorised persons.

86. The BSB believes, however, that such an intrusive approach is not justified in relation to non-authorised persons who are employees. Historically, the BSB has not directly regulated the employees of barristers but has relied on their employers to manage them appropriately and impose sanctions where appropriate. That approach, on the whole, has worked. The proposal, therefore, with respect to non-authorised employees is that they will only be subject to a power of disqualification. The BSB does not consider that it would be proportionate regulation, or a good use of its limited resources, to micromanage the conduct of non-authorised employees. It will be the employer's responsibility to ensure that non-authorised employees observe the rules and to take disciplinary action as necessary. The BSB's power to disqualify will be reserved for cases where it is necessary in the public

interest to prevent a person from being able to continue to work for BSB authorised persons. Such cases should be exceptional.

87. To reinforce the statutory obligations under the LSA 2007, the BSB proposes to introduce a l requirement that all non-authorised employees are appointed under a contract of employment that obliges them to do nothing which causes or substantially contributes to a breach of the Handbook by an authorised person, or which causes an authorised person to breach a condition attached to their authorisation or licence. The contract will make it clear that a significant breach of this duty will be gross misconduct and may lead to disqualification by the BSB.

88. Information leading to a decision to disqualify will come from a variety of sources. Because all authorised persons and managers are under an obligation to report serious misconduct, one important source of information will be self-reporting by the entity. Any information which discloses serious misconduct on behalf of a non-authorised employee will be investigated by the PCD and referred to the PCC in the ordinary way. In appropriate cases the PCC will then refer matters to a Disciplinary Tribunal for disposal.

89. Where referral involves a non-authorised employee, the Disciplinary Tribunal will not be asked to consider a charge that alleges a specific breach of the Handbook. Rather the BSB will make an application for disqualification on the basis that a) the employee has breached their duty to do nothing which causes or substantially contributes to a breach of the Handbook by an authorised person or which causes an authorised person to breach a condition attached to their authorisation or licence; and b) it is undesirable for the employee to be employed by or manage a BSB authorised person or entity. This formula applies to all non-authorised employees, whatever their employer, the criteria which s99 LSA 2007 establishes for the disqualification procedure in respect of employees of ABSs.

90. Disqualification will also be available in respect of barristers and non-BSB authorised individuals and non-authorised managers who are brought before a Disciplinary Tribunal on a charge of professional misconduct. In their case, the criteria for applying for disqualification will be a) that they have breached the duties imposed on them by s 90 and/or s176 LSA 2007, as the case may be, or if they are Head of Legal Practice or Head of Finance the specific duties imposed by ss91 and 92; and b) it is undesirable for them to perform any such role in respect of a BSB authorised body (for BSB-authorised persons the equivalent is suspension or disbarment). For example, in respect of barristers, disqualification will, where this is appropriate, be used to prevent them acting as a manager or employee of an entity, in addition to suspending or disbarring them.

91. The person sought to be disqualified will have an opportunity to put their case, to be represented and to call evidence at an oral hearing. In determining whether the criterion of a breach of a relevant duty is established, the Disciplinary Tribunal will apply the criminal standard of proof. If a breach is found proved to that standard, the Disciplinary Tribunal must then go on to consider whether it is undesirable for that person to be allowed to act in any of the relevant capacities in future. This is a matter for discretion, to be exercised in the public interest. In reaching a decision the following factors (which are not exhaustive) may be taken into account:

    a) The nature and extent of the breach and whether it caused significant harm or loss;
    b) If the breach was deliberate, calculated, repetitive or prolonged;
    c) If the breach negatively affected any of the regulatory objectives;
    d) Whether the breach has jeopardised the public confidence in the profession;
    e) Any remorse or any remedial steps taken by the individual;

92. If the Disciplinary Tribunal reaches a decision to disqualify, it will publish the findings and place the non-authorised employee , authorised person or non-authorised manager, (as the case may be) on a published list of those subject to suspension or disqualification orders or conditions on their authorisation to practice. The BSB will provide details of the disqualification to the LSB and all other Approved Regulators.

93. If dissatisfied with the decision of the Disciplinary Tribunal, an appeal may be lodged with the Visitors. Unless the Disciplinary Tribunal rules otherwise, the decision to disqualify will take immediate effect and the individual will remain disqualified pending appeal.

94. If a non-authorised individual accepts their breach and further accepts that they should be disqualified, the BSB will be able to impose the disqualification by consent without the need to refer the matter to a Disciplinary Tribunal. In the case of BSB-authorised persons, such cases will be treated as analogous to suspension or disbarment and therefore will be referred to the Disciplinary Tribunal, rather than dealt with under the determination by consent procedure.

95. A disqualified individual may apply to the PCC to review the disqualification, but only after 12 months have lapsed since the start of the disqualification. As above, any such application will initially be considered on the papers by the PCC with a right of appeal to an independent Appeal Panel administered by COIC. In determining the application the overriding consideration must be whether the disqualification is necessary to protect the public. There may be cases where the PCC would impose conditions on the reinstatement. The individual could apply to review those conditions after 12 months have lapsed from their imposition.

96. The BSB recognises that there may be exceptional cases where a disqualification places an entity in a difficult position regarding employment law. For example, a non-authorised employee who had not yet been dismissed by the entity might be disqualified by the BSB, which would require their employment to be terminated by the employer.

97. The BSB considers that the likelihood of legal challenge by an employee would be extremely rare because disqualification will be reserved for the most serious cases of misconduct. Such behaviour is almost always going to constitute gross misconduct under the employment contract, which would justify dismissal. Likewise, the drafters of partnership deeds or other documentation establishing the rights *inter se* of those forming the entity should be sure to cater appropriately for one of their number being disqualified and therefore unable to continue in their position in the entity.

QUESTION 14: Do you agree with the BSB proposed approach to the regulation of non-authorised employees and to disqualification?

DIVESTITURE

98. Pursuant to Part 5 of Schedule 13 of the LSA 2007 the BSB may make an application to the High Court to have an ownership interest of a non-authorised person divested. Any such application will be made by the BSB on the recommendation of the PCC. The “divestiture” provisions enable the court to order the sale of shares held by a person who holds an interest in an ABS, where that ABS is a company with shares. This may be done in the following circumstances:

    a) where an investor has taken steps to obtain an interest without the regulator’s approval;

b) where an investor holds a restricted interest in breach of conditions imposed by the regulator; and
c) where an investor holds an interest to which the regulator has objected.

99. The court may also order the sale of shares where a non-authorised person's shareholding exceeds any ceiling imposed by licensing rules made under Part 4 of the Schedule.

100. Where the conditions for divestiture are satisfied, the regulator may issue a restriction notice imposing certain restrictions on the shares. The restrictions which may be imposed are:

a) any transfer of the shares or agreement to transfer them is void (including transfer of the right to receive unissued shares),
b) the shares' voting rights cannot be exercised,
c) no further shares can be issued to the investor, or
d) the investor cannot be paid any sums due on the shares (dividends etc), unless the company goes into liquidation.

101. Divestiture may not always be possible and there is an alternative mechanism for enforcement in a case where a person holds a restricted interest in breach of any conditions imposed on the holding of that interest. The regulator may apply to the High Court for an order enforcing the conditions.

102. The power to divest an ownership interest only applies to non-authorised individuals. However, there will be circumstances where the entity will need to be able to require authorised individuals to divest themselves of an ownership interest or else lose its authorisation or licence. If, for example, a manager has to stand down from their position as manager of the entity by virtue of being suspended, disbarred or disqualified from acting as such, then, given that the BSB's rules do not permit non-manager ownership, that manager will also need to divest him or herself of ownership or the entity will no longer meet the conditions of BSB authorisation or licence. It will therefore be important that the entity's constitution, partnership deed or governing documentation make appropriate provision for this possibility.

INTERVENTIONS

Introduction

103. In broad terms, intervention is the process by which the regulator is able to take control of client money and client files in the public interest. Schedule 14 to the LSA 2007 provides a statutory power of intervention in relation to licensed bodies (ABSs), which the BSB will acquire if it becomes a licensing authority. The grounds for intervention under the LSA 2007 can be broadly summarised as:

a) Failure to comply with one or more terms of the licence;
b) The appointment of a receiver or another defined insolvency event;
c) Suspected dishonesty by a manager or employee;
d) Undue delay in dealing with a matter;
e) It is necessary to exercise the power for the benefit of clients.

104. The power to intervene in a solicitor's practice has existed since 1943. The power is closely linked to, and was introduced at the same time as, the Law Society's

Compensation Fund. Together these two elements of the solicitors' statutory scheme are primarily directed at the protection of client money.

105. Currently the Bar's regulatory scheme does not include an intervention power and there is not, as far as the BSB is aware, any evidence to suggest that such a power is necessary in relation to individual barristers. The BSB will however need to consider interventions in relation to the entities it regulates.

Does the BSB need an intervention power in relation to entities?

106. If the BSB becomes a licensing authority for ABSs under the LSA 2007 it will in any event acquire the "off the shelf" intervention power contained in Schedule 14 to the LSA 2007. The provisions contained in that Schedule are similar to the existing powers of the Law Society (SRA) under the Solicitors Act 1974. In effect, the BSB will acquire this statutory power in respect of ABSs by virtue of becoming a licensing authority, regardless of whether there is an objective need for such a power.

107. This statutory power of intervention would not, however, be available to the BSB when regulating LDPs or BoEs, and primary legislation would be needed in order to obtain such a power. The BSB has carefully considered whether such a power of intervention would be necessary in relation to these entities and has provisionally concluded that it would not.

108. The need to take control of client money does not arise, given the prohibition proposed for BSB regulated entities. The BSB therefore needs to consider whether LDPs or BoEs represent a significantly greater risk than established chambers or individual barristers. It could be argued that entities present the following risks that are not present, or at least are less prominent, with individual barristers' practices:

a) It would be possible for the entity to enter corporate insolvency. If one self employed barrister within a set of chambers enters into an IVA or is made bankrupt this is of less concern than if an entity becomes insolvent.

b) Suspected dishonesty could be more widespread throughout the entity because of its corporate nature.

c) As a consequence of the foregoing the entity itself is not able to resolve issues in the way a set of chambers could where the issue is limited to one member. Therefore there are likely to be regulatory issues that the BSB would not be able to address without a form of intervention power. In other words in a corporate entity the whole thing may collapse and there will be no one to take control in the interests of clients.

109. Having carefully considered the issues the BSB considers that some of these concerns might not be valid. This is because:

a) In a corporate insolvency, an insolvency practitioner is likely to be appointed who will wind down the business in an orderly manner and realise its assets. The practitioner may seek to carry on the practice or dispose of it – the BSB would then have to consider whether it would agree to this and if so what qualifications and/or obligations the insolvency practitioner should have. If it does not agree, it could withdraw the authorisation (which may ensure the co-operation of the insolvency practitioner without the need for an intervention power);

b) Within any LDP or BoE there will be individual barristers who will (or may be required to) have an individual obligation to assist in resolving the difficulties. It would be truly exceptional if all BSB regulated individuals in the entity were either incapable of doing so or were dishonest;

c) The risk of an entire practice failing has existed with sole practitioner barristers and there is no evidence that this risk has required an intervention power;

d) The BSB will in any case retain a number of other tools for mitigating risks, such as monitoring the entities, imposing conditions on their authorisations and revoking authorisations where necessary. These controls are likely to be sufficient in the vast majority of cases.

110. The BSB has therefore provisionally concluded that it is not necessary to seek a statutory power of intervention in relation to LDPs and BoEs. However, the following additional safeguards might be considered if necessary:

a) Imposing an additional requirement on BSB regulated individuals within entities that they will take all reasonable steps to inform clients and distribute files if the organisation itself is unable to do so;

b) A protocol as to how administrators or receivers shall react in relation to BSB entities;

c) Consideration of whether in an extreme scenario it may be possible to apply for a court supervised receivership in the public interest.

QUESTION 15: Do you agree with the BSB assessment of the regulatory risks and the provisional view not to have statutory intervention powers over LDPs and BoEs? Are there any other safeguards that could sensibly be adopted?

<u>Interventions and ABSs</u>

111. Although the BSB does not anticipate obtaining intervention powers over LDPs and BoEs, it will acquire the "off the shelf" intervention power contained in Schedule 14 to the LSA 2007 in relation to licensed bodies. Some of the provisions are not apt for a BSB scheme as they are directed at the more elaborate protections required in relation to client money.

112. The BSB will therefore develop a policy paper that sets out how it proposes to use the intervention power over ABSs. We suggest that the policy paper would need to include the following points:

a) Given client funds are not an issue, it would make clear that the primary aim of the intervention power is for the BSB to take control of documents, mail and other forms of communication;

b) The BSB would seek to recover its own costs from the monies held by the entity and vested in the BSB upon intervention; and

c) It will emphasise that the BSB would not normally expect to use the provisions relating to the vesting of monies in order to take control of those monies to which others are beneficially entitled. However, in the event that this did occur (for example in relation to client monies that were wrongly held in breach of the

Handbook) then the BSB would, as far as practicable, seek to establish those entitlements and distribute the statutory trust accordingly. In such circumstances, which should arise rarely, if ever, the BSB would appoint an agent to undertake that work (see further below).

113. Any decision to intervene will be authorised by the Office Holders of the PCC (made up of the Chair, two barrister vice-chairs and two non-barrister vice-chairs) on recommendation from BSB staff. In urgent cases the Chair of the PCC may authorise an intervention. Schedule 14 of the LSA 2007 provides that applications may be made to the High Court in order to challenge a notice to intervene.

QUESTION 16: Are there any other considerations that should be included in the policy paper on interventions in ABSs?

Vesting of money in BSB

114. Paragraph 3 of Schedule 14 to the LSA 2007 provides that the sums of money to which the paragraph applies, and the right to recover or receive them, vest in the licensing authority if the licensing authority decides that they should do so. The paragraph applies to all sums held by or on behalf of the licensed body in connection with its activities as a licensed body.

115. A similar provision is set out at paragraph 6 of Schedule 1 to the Solicitors Act 1974. This allows both office and client monies to vest in the SRA following an intervention into a solicitors practice. Following an intervention, the SRA identifies those persons who may have a beneficial interest in the statutory trust monies. Once a distribution has been made to the relevant beneficiaries, the SRA may use any residual funds to offset any costs, charges or other expenses incurred in establishing the beneficial entitlements and after this to the Solicitors' Compensation Fund (see the SRA Intervention Powers (Statutory Trust) Rules 2009).

116. Because BSB entities will be prohibited from holding client funds it does not immediately seem necessary to have a power such that upon intervention, client monies vest in the BSB. However, the relevant entity may be holding office monies, or may, in breach of the Handbook, be holding client money. The BSB may wish to use office monies to offset the costs associated with the intervention and would in any event need to take control of any client money wrongly held. We therefore think it will be useful to have provision for this, much as we would expect it to be rare for the BSB to need to make use of this provision.

QUESTION 17: Do you agree that the BSB should retain the full powers of office and client monies?

Intervention agents

117. The BSB does not consider that it will need an elaborate set of arrangements in relation to intervention agents. This is for two reasons. First, interventions are not likely to occur frequently, indeed they should be rare, since the main cause for interventions in other regimes is the need to protect client money. Second, if they do occur, the primary task will be to re-allocate existing files rather than account for money.

118. In so far as the work of the entity is done on a referral basis, it is likely that the instructing solicitors will deal with this. At all events, even in a situation where an ABS is

working directly for lay clients, the redistribution of that work should not in general require appointment of an agent (if it did, that would be an argument for a general power of intervention, not limited to ABSs, contrary to the BSB's present view). The ABS and any authorised persons within it would have a continuing duty, by virtue of their obligation to act in the client's best interests, to facilitate clients in distributing their work to the alternate lawyer of their choice as quickly as practicable, especially if a Court hearing or other deadline is imminent. However clients can also reasonably be expected to act to protect their own interests by promptly finding alternate representation, if provided with appropriate support, explanations and information by the BSB.

119. The additional administrative functions (such as identifying files, contacting solicitors or clients, fielding telephone calls etc) could be dealt with in-house or outsourced under contract. Because the BSB anticipates that interventions in ABSs will be rare, the BSB's preference is to outsource this work on an ad hoc basis.

QUESTION 18: Do you agree that the best option would be for the BSB to appoint intervention agents on an ad hoc basis?

Funding

120. There is inevitably an element of artificiality about this discussion. If the BSB thought there was a case for intervention powers for all entities or across the board, we would say so. That is not the view we take, but statute prescribes that, whether we think it is needed or not, we will acquire such a power in relation to ABSs alone. There is then the question of who should fund the capability to exercise that power, should it ever be needed. The BSB's proposal is that, although intervention powers apply exclusively to ABSs, funding for interventions should be obtained via a percentage of the annual fee paid by all entities. The BSB regards this as the least undesirable of the available alternatives. The alternative funding options would be to recover the costs:

a) Exclusively from ABSs on a polluter pays basis. The obvious risk with this option is that there may be low ABS uptake, making the imposition of the cost on only those entities disproportionate. Moreover the possibility of this exposure might distort choices of structure, which would be a case of the tail wagging the dog; or

b) From the entire profession. The justification for adopting this option would be that there is a risk to the barrister brand should a BSB licensed ABS have to be intervened into and it is reasonable to expect the entire profession to cover the cost.

121. Whilst it is proposed that up front funding for intervention costs should be shared amongst all entities, rather than either of the alternatives canvassed above, those costs would wherever possible be recovered from the entity intervened into under paragraph 17 of Schedule 14 LSA 2007, which provides that costs incurred under the Schedule are to be paid by the licensed body and may be recovered from the licensed body as a debt owing to the licensing authority.

QUESTION 19: Do you agree with the BSB's funding proposals? If not, what alternative funding method do you favour?

Impact on the authorisation to practice of individuals following intervention

122. The statutory scheme in respect of solicitors provides that where an intervention occurs on the grounds of suspected dishonesty or where the solicitor has been committed to prison in civil or criminal proceedings, the exercise of the power of intervention operates immediately to suspend any practising certificate of that solicitor for the time being, unless the Panel resolving the resolution specifically direct otherwise (see section 15 Solicitors Act 1974).The BSB proposes to make intervention a ground for referral to an Interim Suspension and Disqualification Panel. As part of this process the Chair of the PCC may decide to immediately suspend or disqualify an individual.

QUESTION 20: Do you agree that intervention should be a ground for referral to an Interim Panel?

Individual barristers

123. As above, the BSB considers that it will not be necessary to extend the intervention scheme to individual barristers. We are not aware of any evidence to suggest that an intervention power has been previously needed, and the BSB does not consider that the regulatory objectives will be adversely affected if the current position continues.

QUESTION 21: Do you agree that intervention powers are not necessary for individual barristers?

FINES

Introduction

124. Following a disciplinary finding, one sentencing option available will be to impose a fine against the entity and/or individual within the entity. The BSB therefore needs to consider the maximum level of fines available. It also needs to consider whether the maximum level of fines will be uniform across all types of entity and whether or not the existing level of fines applicable to individual barristers should be amended.

125. Pursuant to s95(1) of the LSA 2007 a licensing authority may, in accordance with its licensing rules, impose on a licensed body (or a manager or employee of a licensed body) a penalty of such amount as it considers appropriate. Subsections (2) and (3) confirm that the fine must not exceed the maximum as prescribed by the LSB.

126. The prescribed maximums set by the LSB are £250,000,000 with respect to the licensed body and £50,000,000 for a manager or employee within a licensed body. The LSB will expect the BSB to provide for these maxima in its rules. The maximum fine currently available after a Disciplinary Tribunal or Determination by Consent against an individual barrister is £15,000.

Fines and entity regulation

127. The factors referred to at paragraphs 33 and 38 above remain relevant in determining the appropriate maximum levels to be imposed, namely that the BSB will be a

specialist entity regulator regulating small and medium sized enterprises that do not handle client money. The level of fines it imposes must be proportionate having regard to this.

128. The two basic options available to the BSB are as follows:

a) Adopt the statutory limits set by the LSB for licensed bodies (ABSs), but impose a lower limit for BoEs, LDPs and individual barristers. The proposed lower limit is £1,000,000; or

b) Adopt the ABS upper limits for all BSB regulated entities and individual barristers.

129. On balance the BSB believes that option one is preferable. This option ensures compliance with the LSB's approach to ABSs, whilst at the same time recognising that the BSB will regulate lower risk entities that are very unlikely to require extremely high level of fines. The approach is also consistent with that adopted by the Council for Licensed Conveyancers, which uses the legislative maximums for ABSs but impose a lower £1,000,000 maximum for recognised bodies and for individual licensed conveyancers.

130. In preferring option one the BSB acknowledges that the proposals lead to inconsistencies between the maximum levels of fines that are available for ABSs as compared to LDPs, BoEs and individual barristers. Because the ABS maximums are determined by the LSA 2007 and the LSB, it is not open to the BSB to adopt lower maximums. The decision to adopt a £1,000,000 limit for non-ABS fines, although somewhat arbitrary in itself, more fairly reflects the nature of the risks posed by the BSB's regulated community.

131. The proposal would mean that the BSB will have the power to impose fines on ABSs of up to £250,000,000 and up to £50,000,000 for an individual within the ABS. For LDPs, BoEs and individual barristers the maximum fine available will be £1,000,000. Before imposing any fine, the BSB or a Disciplinary Tribunal will be obliged to consider the factors set out in the BSB's Fines Policy (outlined below), and also refer to any appropriate sentencing guidance to ensure like cases are dealt with consistently.

132. With respect to individual barristers the BSB recognises that this proposal represents a very significant increase in the level of fine that may be imposed (£15,000 up to £1,000,000). In recommending the proposed increase the BSB has in mind the desirability of being able to impose fines of a comparable amount to those available to other Approved Regulators in comparable circumstances. But it wishes to stress that historic sentencing guidance will still be relevant, and no fine may be imposed without proper regard to the fines policy. The BSB believes that this will ensure the level of fines imposed on an individual barrister will remain appropriate to the circumstances, despite the very high maximum that is nevertheless available.

QUESTION 22: Do you agree with the above proposals?

<u>Fines Policy</u>

133. The fines policy will form part of the wider sentencing guidelines already issued by the BSB. In deciding the appropriate level of fine to be imposed, the BSB and Disciplinary Tribunal will take into account all relevant circumstances, including that any financial penalty should:

a) be proportionate to:
    (i) the misconduct;
    (ii) the harm done;
    (iii) the means of the person directed to pay;
b) be of an amount that:
    (i) is likely to deter repetition of the misconduct;
    (ii) will remove any financial gain or other benefit obtained as a direct or indirect consequence of the misconduct;
c) take into account:
    (i) the intent, recklessness or neglect that led to the misconduct;
    (ii) any mitigating or aggravating circumstances;
    (iii) any indicative guidance published by the BSB from time to time.

QUESTION 23: Do you agree with the factors to be included in the fines policy paper? Are there any additional factors that should be included?

CHANGES TO THE DISCIPLINARY TRIBUNAL REGULATIONS (DTRS)

<u>Proposed entity changes to the DTRs</u>

134. The BSB's clear policy position is that, as far as possible, the procedures for disciplinary cases brought against entities, and individuals within entities, should mirror those applicable to individual barristers. This means that the DTRs, currently found in Annex K of the Code, will need to be amended.

135. Disciplinary Tribunals are independently administered and run by the Council of the Inns of Court (COIC). In principle COIC has no objections to expanding their functions to include disciplinary cases involving entities.

136. The entity specific amendments that are proposed are relatively straightforward and in effect simply widen the category of "defendant" so that it includes the entity and individuals within the entity. Aside from a couple of specific points that are discussed below, the amendments will mean that the process of bringing a disciplinary case against an entity will essentially be the same as that involving an individual barrister.

QUESTION 24: Do you agree that disciplinary cases involving entities should follow the same procedure as individual barristers? Is there anything unique to an entity that means other options would be more appropriate?

137. The BSB recognises that disciplinary cases involving entities may present slightly different factual scenarios than cases involving individual barristers (particularly around management of the entity). Because of this the BSB proposes to widen the rules around the

possible composition of the Disciplinary Tribunal. Expanding the possible composition of the Tribunal will ensure that cases are presided over by people with the appropriate experience and knowledge.

138. Sentencing powers will also be slightly amended with respect to entities. Where a finding of professional misconduct has been made, Disciplinary Tribunals will have additional sentencing powers. Aside from all of the ordinary sentencing options, the Tribunal will have additional powers to revoke or suspend an entity's licence, place restrictions or conditions on the entity's licence, fine the entity or an individual within the entity up to the prescribed maximum (see section on level of fines for details), and to disqualify a manager or employee from working in a BSB regulated entity.

Other general changes to the DTRs

139. As well as entity specific amendments, the BSB is also proposing other more substantive changes to the DTRs (particularly around the rules relating to Directions Hearings). The BSB regularly reviews the operation of it rules and regulations and having carefully considered the DTRs we have concluded that some sections should be modified to make the disciplinary process more efficient.

140. The major area of change proposed by the BSB relates to Directions Hearings. Currently it takes an unnecessarily long time to obtain directions, often in the region of three months and, in hard fought cases, substantially longer than that, because of the wording of the regulations. It is therefore proposed that the current system, allowing parties to negotiate directions, should be replaced with a system of automatic directions to take effect 21 days after service of charges. Provision has been made for a Directions Judge to consider an application, to vary or add new directions, on the papers, with an oral hearing taking place only in the event that the Directions Judge considers it necessary. Such a system should allow the majority of cases to move swiftly through the directions stage and then to a substantive hearing in a reasonable period of time.

141. A perusal of equivalent provisions within the disciplinary rules of other regulators has revealed that some have included standard directions and time-scales for complying with them in the rules themselves. Further directions may also be made during the course of case review telephone conferences or on paper by the Chairman of the panel due to hear the case. The BSB would not therefore be out of line with other regulators in its proposals.

142. Some of the other proposed amendments of substance include the following:

a) Power to allow evidence to be given by telephone and Skype in addition to video-link;

b) In cases involving disciplinary proceedings brought for criminal convictions, the fact that the defendant has been convicted of a criminal offence may be proved by producing a copy of the certificate of conviction relating to the offence and the

findings of fact upon which that conviction was based shall be admissible as conclusive proof of those facts,

c) Setting out in the rules the extent of the BSB's duty in respect of disclosure of relevant documents as this can be the subject of protracted argument leading to lengthy delays;

d) Amending the appeal provisions so the BSB may appeal to the Visitors (with the consent of the PCC) where the Disciplinary Tribunal has dismissed all charges or applications (current rules allow the BSB to appeal against dismissed charges in cases where at least one charge has been proved).

QUESTION 25: Do you agree that the proposed changes would be beneficial? Are there any additional changes you would suggest?

DISCIPLINARY APPEALS

143. Appeals arising out of decisions of the Disciplinary Tribunal are currently heard by the Visitors, pursuant to Rule 25 of the DTRs. The Visitors are High Court Judges exercising their powers as Visitors to the Inns of Court. Annex M of Code sets out the procedures for appeals before the Visitors, which are administered by the Judicial Office on behalf of the Lord Chief Justice.

144. The BSB's proposal is that appeals arising from disciplinary proceedings involving entities, and individuals within entities, should also be heard before the Visitors. We propose expansion of the term 'defendant' to encompass entities as well as individual barristers. Our understanding is that the Visitors' jurisdiction would permit this.

QUESTION 26: Do you agree that entity appeals should be heard before the Visitors?

145. It should also be noted that there is a proposal to abolish the Visitors' jurisdiction and transfer it to the High Court. It is hoped that (subject to the Parliamentary timetable) a legislative vehicle will be available to transfer the jurisdiction to the High Court in advance of the BSB beginning to regulate entities. Under our proposals and our understanding of the current Visitors' jurisdiction, this would mean that all appeals from BSB Disciplinary Tribunals (either from an individual barrister or an entity) would be dealt with in the High Court.