

Independent Observer's Report June 2013 – October 2013

Status:

1. For noting.

Executive Summary:

2. This is the Independent Observer's report for June 2013 – October 2013.

Recommendations

3. It is recommended that GRA considers the report, noting the recommendations and management responses (Annex 2) and endorsing the updated role profile (Annex 1).

Background

4. The Independent Observer took up post in May 11. This is her third year in post and this report covers the period June 2013 to October 2013. The Independent Observer will prepare a second report covering November 2013 – May 2014 and then an annual report summarising her observations and recommendations for the whole year which will form part of GRA's annual report to the June 2014 Board.

Financial implications

5. The implementation of some of the recommendations will have resource implications.

Equality Impact Assessment

6. No equality issues arise from the provision and receipt of this report. Paragraphs 86-90 specifically address equality and diversity matters.

Risk implications

7. PCD has identified the unexpected absence of their Data Analysis and Reports Officer as an issue of concern and the reliance on pro bono prosecutor arrangements as being under strain and these are being escalated accordingly. GRA has itself already discussed the risk of widespread QASA non-compliance and possible resource implications for enforcement.

Regulatory objectives

8. The role of the IO is to provide independent assurance that the BSB's enforcement system is operating in line with its aims and objectives and ultimately the BSB's regulatory objectives.

Annexes

9. Annex 1 – Independent Observer's report June 2013 – October 2013.

Lead responsibility: Isobel Leaviss

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

Independent Observer

Interim Report

June 2013 – October 2013

Introduction

1. My role as the Bar Standard Board's (BSB's) Independent Observer is to provide assurance to the Governance, Risk & Audit Committee and ultimately the Board that the BSB's enforcement system is operating in line with its aims and objectives (**Annex 1**).
2. This report summarises my observations from June 2013 to October 2013.

Executive Summary

3. As agreed with GRA, during the period June 2013 to October 2013, I focused on
 - cases for which court transcripts were obtained to assess whether there were patterns of avoidable delays and if so what action might be taken to minimise them in future
 - actions taken in the light of the COIC Disciplinary Tribunal and Hearings Review Group recommendations, focusing specifically on those recommendations which have been implemented and which pertain most directly to the BSB
 - samples of case files (inactive cases, cases outside KPIs, staff decisions)
4. In the course of my work, I continued to observe good administrative standards in the handling of cases; evidence on files of decision makers referring to relevant policies, procedures and guidance to inform their decision making; a demonstrable commitment to fairness when responding to challenges from complainants and/or barristers and constructive handling of procedural challenges.
5. Over the last six months, I have observed steps to improve internal knowledge management to assist case officers, the Professional Conduct Committee (PCC) and prosecutors in the efficient and consistent handling and prosecution of cases. The PCD should continue to build on these foundations.
6. The PCD has successfully completed the roll-out of a new database which should increase efficiency and will offer more immediate and flexible management reporting. The new database flags cases which are approaching or exceeding the expected service standard (no. days) for a particular stage and case officers can use this information to help prioritise actions across their caseload in order to improve turnaround times and performance against KPIs.
7. The unanticipated absence of the PCD's Reports and Data Analysis Officer (a key resource) since mid September is an issue of concern which PCD are seeking to address. The BSB must put appropriate cover arrangements in place very quickly to ensure that PCD have the reports they need for day-to-day management purposes and to ensure effective preparation for the Handbook roll out (such as database tools for risk assessments and reports to review administrative sanction decisions). This issue has (appropriately) been escalated to the most senior levels (paras 56-57).

8. My review of cases involving transcript requests has not revealed any significant systemic issues but **I recommend that the PCD considers my suggestions which are designed to help expedite transcript requests (paras 31-40) [13/14 H1R1 Low priority].**
9. Unfortunately, I have found it difficult to make an assessment of overall progress against the 82 Browne Report recommendations. In light of my enquiries and our discussions, the BSB's Director has initiated a review of progress against each of the 82 recommendations with a view to summarising this in a report for discussion with the October COIC/BTAS/BSB Project Board and as appropriate, to update the BSB Board.
10. There has been a lack of communication to the profession and wider public to explain what is being done to rectify the issues identified by the COIC Tribunal Review Report led by Desmond Browne QC. **I recommend that upon completing its review of progress in implementing the Browne Report recommendations, the BSB ensures that there is appropriate feedback to the profession and the wider public (paras 40-51). [13/14 H1R2 High]**
11. The PCD made a frank assessment of the results of the latest User Feedback Survey in a report to the July Board (available on the BSB website). They highlighted a widening gap between the views of barristers (in general four out of five come away with a positive perception) and complainants (two out of five).
12. My observation is that it must be difficult for any party to a complaint to separate their levels of satisfaction with the process from their ultimate (dis)satisfaction with its outcome. Four out of ten external complaints are closed without investigation and only one in five are referred for disciplinary action.
13. Notwithstanding this, the PCD takes various steps to try and communicate their policies and decisions in a way that contributes to a greater understanding of the thinking behind them and is committed to doing more. The PCD made thoughtful recommendations and devised a practical action plan in response to the latest User Feedback Survey. I support these and **recommend that the PCD considers my suggestions to further improve communication with complaint parties (paras 58-66). [13/14 H1R3 Low priority]**
14. I welcome the establishment of the new 'Dismissal Review Sub-Standing Committee' (DRSC) to review a quarterly sample of cases that have been dismissed by staff in order to assess whether due process has been followed. The results to date are encouraging and could underpin further delegation of decision making to staff, enabling PCC to focus on the most complex and/or serious cases.
15. I am disappointed that there has still not been any meaningful 'outreach' by the BSB to promote wider understanding amongst the public of its enforcement role or to inform the profession of the outcomes of complaints and 'lessons' for practitioners.

16. I am aware that the Board discussed the BSB's stakeholder engagement and communications strategy in July and that action plans are in draft. I am also aware that the BSB is organising a 'roadshow' to educate the profession about the roll out of the new Handbook. **I recommend that the BSB uses the Handbook rollout as an opportunity to provide feedback to the profession about its enforcement caseload, the outcomes of complaints and 'lessons' for practitioners (paras 67-72) [13/14 H1R4 Low priority]. I recommend that the BSB gives early priority to engaging with intermediary consumer groups to promote understanding of its enforcement role and, where appropriate, improve signposting to assist legal consumers (paras 67-72) [13/14 H1R5 Medium priority].**
17. The Investigations and Hearings Team is experiencing high staff turnover for a relatively small team within a department which has historically relied heavily on longstanding members with a detailed knowledge of past complaints and issues. The permanent appointment of the new Investigations and Hearings Manager is a welcome development, particularly given the challenge of maintaining a co-ordinated and consistent approach across the teams' increasingly complex caseload. She is already proactively working on developing communication within the teams and sub-teams, particularly on issues of a technical nature.
18. I have been observing tribunal hearings and in general, my observation has been that BSB prosecutors (instructed by the PCD case officer) appear well prepared, present the BSB's case and evidence clearly and thoroughly, assist the panel with appropriate reference to the Code of Conduct, Disciplinary Tribunal Regulations and Sentencing Guidance and respond effectively to panel enquiries. During July, I was slightly concerned that I was beginning to detect a pattern of insufficient attention to detail in the preparation and presentation of BSB prosecutions for apparently 'straightforward' (my description) own motion cases. I provided feedback to the Head of PCD and the Investigations and Hearings Manager has followed up with the team. During September, I did not identify any further such examples. In fact, I observed examples of careful attention to detail. I will continue to dedicate time to tribunals.
19. As previously reported, the PCD faces increasing numbers of wide ranging procedural challenges, complex and highly contested cases. These are often BMIF funded and can be protracted. The reliance on pro bono prosecutors appears to be under greater strain than ever – not least given the recent resignation of around a dozen from the BSB panel in protest over QASA. An impact assessment is underway and this issue is rightly receiving attention at the most senior levels.
20. The PCD (and as far as I can see, particularly the senior management team), continues to face other 'additional' demands beyond the day-to-day handling of cases including preparing for the imminent roll out of the new Handbook and the broader transition to a more risk based approach to supervision and enforcement as well as other dimensions of the organisation-wide change programme. Resources are stretched.

21. The latest performance report (annual report to end-March 2013) indicated that overall timeliness of day-to-day handling had not been suffering despite all these pressures. Headline data for Q1 13/14 appears broadly in line with previous quarters. However, detailed analysis and commentary is not available (cf para 7).
22. I have been unable to review so-called 'inactive' cases (cases without diary activity for the past 30 days) or samples of cases outside the KPIs because the reports identifying such cases are not available (cf para 7).
23. I have revisited previous recommendations and summarise their implementation status in **Annex 3**.
24. I previously made observations about the lack of clarity about the avenues available to complainants and/or barristers seeking to challenge regulatory decisions and/or complain about the way the BSB has handled a case and/or complain about the way the BSB has addressed concerns about its service. I made various suggestions. I have elevated these to formal recommendations (see below H1R6 and H1R7)
25. In summary, **I recommend that**
 - upon completing its review of progress in implementing the Browne Report recommendations, the BSB ensures that there is appropriate feedback to the profession and the wider public (paras 40-51). [13/14 H1R2 High priority]**
 - the BSB improves the accessibility [High priority] and clarity [Medium priority] of its service complaint policy on its website (para 92). [12/13 H1R7].**
 - the BSB gives early priority to engaging with intermediary consumer groups to promote understanding of its enforcement role and, where appropriate, improve signposting to assist legal consumers (paras 67-72). [13/14 H1R5 Medium priority]**
 - the PCD considers my suggestions to help expedite transcript requests (paras 31-40). [13/14 H1R1 Low priority]**
 - the PCD considers my suggestions to further improve communication with complaint parties (paras 58-66). [13/14 H1R3 Low priority]**
 - the BSB uses the Handbook rollout as an opportunity to provide feedback to the profession about its enforcement caseload, the outcomes of complaints and 'lessons' for practitioners (paras 67-72). [13/14 H1R4 Low priority]**
 - the PCD clarifies, on its website, the avenues for complainants and/or barristers seeking to challenge enforcement decisions (para 92) [12/13 H1R6 Low priority]**
26. BSB management have reviewed this report and these recommendations and their responses are summarised at **Annex 2**.

Summary of activities

27. Since June, I have observed one Professional Conduct Committee meeting, eight Disciplinary Tribunals, one Review Hearing and two days of JR proceedings.
28. I have reviewed samples of files involving transcript requests.
29. I have had two meetings with the BSB's Director and colleagues to discuss the BSB's response to the Browne Report and its oversight of the COIC Change Programme. I met meeting with the Communications Manager to understand more about the BSB's communication strategy and plans, the PCC Chair to discuss implementation of past recommendations and the new Investigations and Hearings Manager to explain my role.

Cases involving transcript requests

30. As discussed with GRA, I had previously formed an impression that cases involving requests for transcripts typically featured significant and avoidable delays.
31. Since the beginning of 2011, the database indicates that 102 complaint cases had diary references to 'transcripts'. Of these, most (88) were external complaints. Roughly two thirds were at the investigations or hearings stage, with only a third referencing transcripts during the assessment or pre-investigation stage. Of the 83 cases to which the 2012/13 KPIs applied, the vast majority (69 or 83%) had exceeded the service standard for the relevant stage (i.e. were 'delayed' in some way).
32. For some complaints (more likely to be external than internal complaints), it is relevant to review a court transcript to help identify the behaviour complained about and/or to assess whether it constituted a breach of the Code. At the assessment stage, the BSB puts the initial onus on the complainant to provide (or obtain) a copy of a transcript as part of the evidence supporting their complaint. In some cases (typically at the investigations stage), the PCD may ask the barrister or may itself request a transcript. Case Examiners sometimes request transcripts and the PCC may refer a case back with a request for a transcript to inform its decision-making.
33. Typically, the case officer will start by asking one of the parties to the complaint to provide/obtain a transcript. In some cases, a case officer may make a direct request. The process varies depending on the court and nature of the hearing. Typically, a request is made to the court for the tapes to be released to a nominated transcription service (i.e. a commercial provider) who then transcribes the hearing and charges a fee according to length and required turnaround time (ranging from £'0s for a short judgement to £'000s for multi-day proceedings). In some circumstances, various permissions (for example from parties to family proceedings) are required before tapes/transcripts can be released. It is usual for the Judge to have to approve the final written transcript for transcripts of judgements. There is scope for delays at each and every stage.

34. My observation (albeit based on a small sample), is that the most significant delays typically occur at the first stage i.e. it can take considerable time and several chasers from the BSB for the court to release the tapes to the transcribers. I am told by PCD administrators that some courts are simply more or less responsive than others. Some are known to be almost impossible to contact by phone. Once the tapes are with the transcribers, turnaround is usually prompt (at least for the cases I reviewed). There is evidence on file of systematic chasing up of requests by the PCD (usually the by the administrative team) and I have observed that as far as possible, the case officer pursues other aspects of the case rather than putting the whole case 'on hold'. Where possible, the PCD obtains the 'unapproved' transcript pending a Judge's approval.
35. PCD are conscious of the financial costs of obtaining transcripts. I saw one example of an Experienced Member requesting various additional documents, including a transcript. On being reminded of the costs of transcripts, the CE delayed obtaining the transcript until he had received and reviewed all the other materials requested. This took time and the file ended up being reviewed three times by a Committee member. Had the transcript been obtained at the first opportunity (in the end at a cost of c.£200), a decision might have been made within 3-4 months of the original complaint, rather than over a year. This observation is made with the power of hindsight. And is only one example. In another case, I noted that the Assessment Team case officer was required to source three quotes for a particular transcript in order to ensure value-for-money. This took time.
36. It seems unclear who has what authority to order transcripts and this is being clarified. Spending against the budget is monitored centrally. Whilst the PCD should be cost conscious and focus its requests for relevant parts of transcripts as far as possible, it should also enable staff to authorise and process matters quickly and not deter case officers from requesting transcripts at the earliest opportunity where this evidence is likely to be central to a case. My *instinct* is that if anything, PCD could afford to be more proactive about requesting transcripts at an earlier stage and that this might assist in reducing overall turnaround times and might ultimately prove more cost effective overall.
37. Having reviewed a small sample of cases, my observation is that whilst there are often delays, for the most part they fall beyond the PCD's direct control. Nevertheless, **I recommend that the PCD considers the following suggestions to help expedite requests for transcripts [13/14 H1R1 Low priority]**. Firstly, I suggest that the PCD increases the frequency of chasers, chases more by telephone as well as by email to instil urgency and escalates cases involving significant delays (e.g. two or three weeks following an unanswered request, a letter could be written to the Court by a Manager or the Head of PCD i.e. a more formal request from the regulator).
38. Secondly, I suggest that PCD look at the feasibility of logging transcript requests on the database in a way that enables better analysis, including tracking of turnaround times (e.g. showing Court and/or transcribers) to help identify and tackle any bottlenecks.

Browne Report

39. As suggested by GRA, I have looked into the progress made to address the shortcomings identified by the COIC Disciplinary Tribunal and Hearings Review Group, chaired by Desmond Browne QC ('the Browne Report').
40. The Browne report was published in July 2012 and highlighted a range of 'systemic failures in the administration of the Tribunals Service'. The report made 82 recommendations and set out a draft action plan with priorities and some timescales.
41. The BSB published a comprehensive formal response in November 2012 welcoming the report, emphasising that the BSB retains 'statutory responsibility for ensuring that the Bar's disciplinary arrangements are robust' and cautioning that the draft action plan and initial timetable were over ambitious given the proposed resourcing levels (my wording).
42. Whilst the BSB has made various public statements since to explain its actions in relation to historic cases affected by past anomalies in the appointments procedures, I have not seen any commentary on progress to implement the Browne recommendations.
43. The steps being taken to implement the Browne Report recommendations have been brought together under the auspices of the 'COIC Tribunal Service Change Programme 2012-13' (together with other changes deemed necessary), and are subject to regular scrutiny by a dedicated joint COIC/BTAS/BSB Project Board which meets monthly. The BSB is represented on this Board by the BSB's Director.
44. As I understand it, this Project Board foreshadows the contractual arrangement which will be established once the existing 'Memorandum of Understanding' between the BSB and COIC is replaced by a legally binding instrument covering disciplinary arrangements i.e. an 'Agreement for the provision of services in relation to the Bar Tribunal and Adjudication Service' between COIC and the BSB. The BSB's newly appointed Contract Management Officer will report to the BSB's Director, independently of PCD.
45. I reviewed the COIC Tribunal Service Change Programme Project Board papers for the July meeting. The papers included actions arising from the June meeting, the latest version of the BSB Service Agreement (since agreed and to be signed on 23rd October), an options paper for website hosting, a monthly activity report for the sentencing guidance project, a draft disclosure policy, a draft business continuity and disaster recovery policy, a programme risk register and a change programme activity report.
46. Whilst these papers provided evidence of structured programme and project management, it has proved difficult for me to assess overall progress against the original 82 recommendations. For example, whilst the change programme activity report did cross reference initiatives with the Browne report recommendations by number, it did not include all of them. Nor did it show status vis-à-vis initial or current target timelines.

47. I have observed progress against some of the recommendations. For example, I have visited the new dedicated Tribunals Service website which has been established (recommendation 51) and which makes clear reference to a Statement of Purpose (recommendation 2) and I have observed that Clerks do not advise Tribunals on the Code of Conduct (recommendation 55). However, I have not, for example, been able to readily identify the 'set of publicly available principles' under which the new Tribunal Service should operate (recommendation 3) or assess how many of the recommendations relating to TAB (recommendations 12-19) have been addressed.
48. I recently met again with the Vanessa Davies (the BSB's Director) to explain that I was finding it difficult to make an assessment of progress against the 82 Browne Report recommendations. Vanessa reported that the Project Board were satisfied with overall progress and received reports from the Change Manager on an exceptions basis. Whilst the BSB does have residual concerns about ongoing resourcing levels (as reflected in the risk register), Vanessa explained that additional resources had been found by COIC to keep the change programme broadly on track. The finalisation and signing of the COIC/BSB service agreement had taken longer than hoped (although I note that the Browne Report draft Action Plan indicated a target of November this year which should be met), but work has already begun to devise the detailed operational performance indicators which the agreement required to be in place within three months of signing but which should in practice be agreed almost immediately.
49. In light of our discussions, the BSB's Director has initiated a review of progress against each of the 82 recommendations with a view to summarising this for discussion with the October COIC/BTAS/BSB Project Board and as appropriate, to update the BSB Board.
50. There has not been any communication to the profession and the public to explain what has been done to rectify the issues identified by the COIC Tribunal Review Report by Desmond Browne QC. **I recommend that upon completing its review of progress in implementing the Browne Report recommendations, the BSB ensures that there is appropriate feedback to the profession and the wider public. [13/14 H1R2 High priority].**

General observations

51. In my review of case files, I continued to observe good administrative standards by PCD case officers. Files are complete, arranged chronologically and the audit trails for decisions are clear. There are clear records of pertinent conversations during the process – for example telephone conversations with the parties to a complaint or when matters are discussed with a line manager or with a Committee member. In the one case I queried because I could not immediately determine the audit trail for a decision involving advice from a Committee member, the case officer immediately clarified the position with reference to her emails (slightly out of synch on the database) and will check that the paper file more logically evidences the trail (file currently with solicitors).

52. During the last six months, I have observed steps to improve internal knowledge management in order to assist case officers, PCC and prosecutors in the handling and prosecution of cases. These improvements follow the appointment of a dedicated PCD Knowledge Manager. They include regular, informative newsletters for PCD, PCC and prosecutors to help ensure they keep abreast of developments and a new 'intranet' site to centralise and organise a range of resources making them much more readily accessible. The PCD should continue to build on these foundations and ensure that all policies, guidance and other useful departmental reference documents are readily available.
53. The Knowledge Manager has posted a series of anonymised case studies on the BSB's external website and has also posted a number of Appeal Judgements. I welcome these initiatives to increase transparency and promote understanding of the complaints handling process. However, I suggest that this content needs to be further developed so that it is more user-friendly for barristers, complainants and potential complainants. For example, PCD could provide a summary of the issues at stake for each of the appeals listed so that users can readily identify which might be relevant to them. For example, the illustrative case studies could be introduced so that their purpose and context is clear and each one could be expanded with additional commentary to spell out more clearly the principles that they are seeking to demonstrate.
54. The roll-out of the new enforcement database has been smooth. It is early days, but I personally find it more user-friendly and my observation is that it has been broadly welcomed by the department and appears to be operating well. In the past, queries and reporting were channelled through one person who had the technical knowledge required to download and manipulate data. The new database tool itself offers more flexible and sophisticated query and reporting capability to all users. My understanding is that 'frequently used' reports will be developed and made available to all users and then individual users will have the ability to run their own queries as and when they need particular information.
55. The unanticipated absence of the PCD's Reports and Data Analysis Officer (a key resource) is an issue of concern which PCD are seeking to address. He had started but not completed the development of frequently used reports which I understand involves writing code (i.e. requires technical input as well as departmental knowledge). The quarterly performance reports (to end-June) are therefore not available and I have not had access to the reports I need for reviewing so-called 'dormant' cases (cases without diary activity for the past 30 days) or cases falling outside the KPIs.
56. The BSB must put appropriate cover arrangements in place very quickly to ensure that PCD have the reports they need for day-to-day management purposes and to ensure effective preparation for the Handbook roll out (such as database tools for risk assessments and reports to enable the review of administrative find decisions). This issue has (appropriately) been escalated to the most senior levels.

Responding to user feedback

57. GRA members may have seen the PCD 2012 User Feedback Survey of Complainants and Barristers which was presented to the Board in July and has been published on the BSB's website. The report summarised survey results from questionnaires sent to 277 complainants and 439 barristers whose cases were closed between January and December 2012. The response rates were 39% and 37% respectively.
58. The survey addressed a comprehensive range of topics including accessibility, staff performance, timeliness and efficiency, transparency and openness and quality of service. The report explained how the survey design had taken account of previous survey findings and recommendations and that noted that whilst response rates were good, it is planned to perform future surveys online in order to further increase take-up.
59. PCD made a frank and thoughtful assessment of the results. They highlighted the key findings – both positive and disappointing – and drew attention to an apparently widening gap between the views of barristers and complainants. In general four out of five barristers come away with a positive perception of the BSB and its complaints handling service whereas for complainants the figure is closer to two out of five. Many cite concerns about transparency and openness and difficulties understanding the reasons for decisions. One observation I would make is that however carefully designed the survey might be, it must be difficult for any party to a complaint to separate their levels of satisfaction with the process from their ultimate satisfaction or dissatisfaction with its outcome. Four out of ten external complaints are closed without investigation and only one in five are ultimately referred to disciplinary action.
60. PCD already take various steps to explain the complaints handling process and to try and ensure that the manner in which they communicate their policies and decisions contributes to a greater understanding of the thinking behind them. Efforts are made at the outset and conclusion of each case to clarify the BSB's role, remit and powers and to explain the process and reasons for the decisions. Leaflets presenting a high level summary of the process are sent out following the acknowledgement of a complaint. Additional information and resources are signposted on the website and the PCD have a dedicated Information telephone Line. The use of 'standard' or template letters is useful for efficiency and consistency of explanations. My observation is that these are appropriately tailored to the particular circumstances in order to demonstrate care and concern and an understanding of the specifics of each complaint. In the course of my work, I have not found any evidence that complaints are not taken seriously.
61. Notwithstanding this, PCD are committed to doing more and made thoughtful recommendations and devised a practical action plan in response to the latest User Feedback Survey. I support these measures and **recommend that the PCD considers my suggestions to further improve communication with complaint parties. [13/14 H1R3 Low priority]**

62. I suggest that when writing to complaint parties, case officers could be encouraged to recap the steps taken in relation to the case (i.e. progress to date), spell out what the current stage involves (including providing a realistic time estimate) and summarise the subsequent steps (i.e. the remainder of the process). This would give the parties a clearer sense of progress and greater clarity about the overall process. Leaflets summarising the process are sent at the outset but many parties do not recall receiving them. Most parties receive written correspondence from the BSB with intervals of several weeks. It might be helpful to provide more of a running commentary.
63. I suggest that the PCD consider avoiding using the term 'dismissed' or 'dismissal' when communicating with complainants. This language may be perceived as dismissive. It may create the perception that the BSB has concluded that a matter is not worthy of consideration or suggest disregard or indifference. I note that in their external communications (at least via their websites and publications) both LeO and the SRA avoid these terms and instead use phrases such as 'no regulatory action required' or 'case closed'.
64. Where appropriate, decision letters could make more reference to policies that are being applied to a case (particularly once these are more readily accessible on the website). This would highlight the framework within which decisions are made and could help demonstrate that the BSB is giving matters appropriate consideration. I think this will become increasingly important as the PCD adopts a more risk based approach.
65. Finally, my observation is that PCD rely heavily on formal written communication (letters and emails), particularly during the investigations and hearings stage. I suggest that more could be done to facilitate the process and instil a sense of urgency amongst all the parties to complaints with more telephone calls (for example, to remind parties of upcoming deadlines, to chase responses etc.). This could also respond to one complainant's suggestion for the BSB to be 'more people friendly'.

Providing information and feedback to the profession and wider public

66. The key policies, guidelines and decision making criteria which govern the way staff work are all available on the BSB's website but most are buried in Section 7 Annex 4 of the Committee Information Pack. Their accessibility should be improved for those who wish to delve into the details. The new PCD intranet is now making PCD policies and guidance more accessible internally. I understand that work is well in hand to review all PCD policies and guidance in preparation for the Handbook roll out and that this project will website address accessibility for external parties. I will keep this under review.
67. I have yet to see any meaningful 'outreach' by the BSB to promote wider understanding amongst the public (particularly legal consumers) of its enforcement role or to inform the profession of the outcomes of complaints, wider implications and 'lessons' for practitioners.

68. The importance of doing so has long been recognised (e.g. recommendations 6, 7, 8, 11, 52 of the 2007 Strategic Review of Complaints and Disciplinary Processes by Robert Behrens all refer), has been the subject of my previous reports and has been reemphasised by the PCD in its analysis of the most recent user feedback survey. The BSB's mission is to 'promote high standards of practice and safeguard clients' and one of its strategic aims for 2013-16 is to 'promote greater public and professional understanding of what we do and why'.
69. The BSB's Communications Manager has provided me with copies of the BSB's 'top line' stakeholder engagement and communications strategy (discussed by the Board in July) and the Supervision and Enforcement Communications Plan (due to be discussed by the Board in September). I have also seen an example of the Chair's monthly email update to the profession which is being developed into an e-newsletter format.
70. Over the next few months, the BSB will be educating the profession on the new BSB Handbook (which incorporates a revised Code of Conduct) including through daytime workshops and evening roadshows across all circuits. This is an ideal opportunity to promote greater professional (and public) understanding of the BSB's role in relation to complaints and disciplinary matters. **I recommend that the BSB uses the Handbook rollout as an opportunity to provide feedback to the profession about its current caseload, the outcomes of complaints and 'lessons' for practitioners. [13/14 H1R4 Low priority]**
71. The BSB has recently tasked a stakeholder consultant to meet with around a dozen consumer groups (such as Victim Support, Legal Action Group, LSB Consumer Panel) to initiate more concerted stakeholder engagement. **I recommend that the BSB gives early priority to ensuring that these 'intermediary' groups for legal consumers are effectively briefed on the BSB's enforcement role and works with them to improve 'signposting' to assist potential complainants [13/14 H1R5 Medium priority].** I understand that work of this nature is agreed in principle.

Disciplinary tribunals

72. I have been observing tribunal hearings and in general, my observation has been that for the most part, BSB prosecutors (instructed by the PCD case officer) appear well prepared, present the BSB's case and evidence clearly and thoroughly, assist the panel with appropriate reference to the Code of Conduct, Disciplinary Tribunal Regulations and Sentencing Guidance and respond effectively to panel enquiries.
73. However, during July, I was slightly concerned that I was beginning to detect a pattern of insufficient attention to detail in the preparation and presentation of BSB prosecutions for apparently 'straightforward' (my description) own motion chases.

74. In two or three cases, the panel had to piece together the chronology of a case, cross reference different documents within the bundle and seek clarification of basic facts. Whilst on no occasion did this appear to affect the overall outcome (although in one case it may have resulted in a lower fine), my observation was that with greater or more precise assistance, the tribunal panel might have arrived at its decision more directly and efficiently.
75. I provided feedback to the Head of PCD and the new Investigations and Hearings Manager has followed this up with the team. Guidance on preparing for tribunal hearings exists but not all case officers were aware of it. The guidance has been reviewed and updated and will be discussed at a team meeting and recirculated. During September, I did not observe any further such examples. In fact, I observed examples of careful attention to detail – such as to prove service of documents to enable a panel to proceed in a barrister’s absence.
76. As previously reported, the PCD faces increasing numbers of wide ranging procedural challenges, complex and highly contested cases. These are often BMIF funded. The reliance on pro bono prosecutors appears to be under greater strain than ever – not least given the recent resignation of around a dozen or more from the BSB panel in protest over QASA. An impact assessment is underway and this issue is rightly receiving attention at the most senior levels.
77. As a lay observer, I question why cost orders are not made by the BSB. Cost orders could act as a deterrent to barristers tempted to ‘bury their heads in the sand’ and motivate them to respond to warnings or fines and thus resolve cases at an earlier stage (and potentially avoid the need for a tribunal). It could also incentivise parties at tribunal hearings to ensure that they make the most efficient and effective use of tribunal hearings; for example by ensuring submissions are made well in advance and are carefully prioritised and focused.
- 78. Professional Conduct Committee**
79. Since June, I have dedicated considerable time to observing tribunals. This, combined with the reduced frequency of PCC meetings and the fact that PCC does not meet during August and cancelled its early September meeting means that I have only observed one PCC meeting in the course of preparing this report.
80. I welcome the fact that the new ‘Dismissal Review Sub-Standing Committee’ (DRSC) has been established. This is a three person sub-committee of the PCC comprising lay and barrister members. It has clear Terms of Reference to review a quarterly sample of cases that have been dismissed by staff in order to assess whether due process has been followed.

81. GRA are aware that PCD staff have greater decision making authority than in the past and as we have discussed, one way to reduce overall turnaround times would be to further increase delegated authorities and focus Committee involvement on the most complex, serious and/or high risk cases. I note that in its 'Developing Regulatory Standards' assessment of the BSB published in May, the LSB noted that 'since January 2013, BSB executive staff have been given greater powers to make decisions on enforcement activity. This is welcomed and we consider that further extension (with appropriate oversight) should help deliver more timely enforcement investigations.'
82. The new DRSC has been operating for two quarters and has so far confirmed that all the cases that it has reviewed had been properly dismissed. I have observed that these results and some qualitative feedback about the use of 'template letters' have been disseminated to staff and PCC members in the new departmental newsletter. I understand that in future, the results of DRSC reviews will be summarised in the PCD performance reports available on the website.
83. The latest Performance Report indicates that the PCD, in consultation with the PCC, are considering extending staff decision-making authorities. Given appropriate oversight and/or review (for example, this new DRSC) I would support this in the interests of improving overall efficiency and to enable PCC to focus on the most complex and/or serious cases.

Equality and Diversity

84. As GRA is aware, an independent review of the enforcement system by the equality and diversity consultants Inclusive Employers has recently been carried out.
85. This review was commissioned in light of various findings from previous internal reports. In particular, firstly that BME barristers are over-represented in the complaints process in relation to the outcomes of external complaints. BME barristers are more likely to have a complaint referred to disciplinary action, white barristers are more likely to have a complaint dismissed without referral to disciplinary action, and BME barristers are more likely to be subject to a disciplinary action outcome of upheld; even when controlling for differences in the subjects of the complaints. Secondly that BME barristers are over-represented in the complaints process in relation to internal complaints. And thirdly (to a lesser extent) that male barristers were subject to a larger proportion of internal complaints than their proportion of the Bar.
86. The review by Inclusive Employers has involved specialist review of some 100 files and interviewing members of staff and the Committee (and myself). The final report is due to be presented to the end-September Board. The report 'does not identify apparent failings within the procedures which would explain the data which is the focus of this report' and makes many positive observations. It concludes with a number of recommendations designed to further strengthen and improve current practice including regarding training and anonymising of barristers' cases for Committee consideration.

87. I welcome and support all the recommendations, including those relating to my role; namely to include a 'watching brief' on equality and diversity within my job description (already actioned and endorsed by GRA in June – see Annex 1), for me to make equality and diversity observations within each of my reports (actioned starting with this report), to observe the Equality and Diversity Committee and to provide me with relevant training.
88. I can assure GRA that in the course of my ongoing work, I have been mindful of equality and diversity considerations (including the latest research findings) and have not seen anything to suggest general, systemic or inherent bias in the nature or application of policies and procedures nor any specific causes for concern in relation to the handling of any of the individual cases that I have examined. As I have reported previously, I have continued to see examples of sensitive handling of complaints alleging discrimination, appropriate steps taken to seek and take account of specialist equality and diversity advice where relevant and consistent efforts to ascertain whether parties require any reasonable adjustments to be made in the handling of their cases in view of any disabilities they may have. I look forward to receiving training to enable me to make a more informed assessment.

Previous Recommendations

89. In preparing this report, I have reviewed the status of all my previous recommendations and discussed them with PCD. The latest status for each is summarised in **Annex 3**.
90. You will recall that in my last report, I reviewed the 'comeback' process for complainants seeking review of a dismissal decision. I noted that there were two ongoing cases. I have revisited these and both are still ongoing. One case had been re-opened because upon review by an Office Holder, it had been decided that some aspects of the original complaint had been overlooked. The case was then adjourned pending the outcome of litigation. Litigation is ongoing and the case remains adjourned. The second case appears to be experiencing delays due to protracted efforts to obtain the relevant section of transcript. The case officer has explained that she is also awaiting input from the complainant. Both are being pursued in parallel.
91. I previously made observations about the lack of clarity about the options available for those wishing to challenge enforcement decisions and/or complain about the way the BSB has handled a case (so-called service complaints). A BSB-wide review of service complaint handling was ongoing so I made some suggestions but did not make any recommendations. The avenues remain unclear and what information there is in relation to service complaints is inaccessible. Parties to complaints are provided with some information during the course of the complaint handling process but **I recommend that the PCD clarifies, on the BSB website, the options for complainants and/or barristers seeking to challenge enforcement decisions [12/13 H1R6 Low priority]. I also recommend that the BSB improves the accessibility and clarity of its service complaint policy on its website. [12/13 H1R7 High priority].**

Focus for next report

92. I propose to focus on the following during the period November 2013 – May 2013.

Observing tribunal hearings

Consistency of staff decision making

Samples of cases e.g. outside KPIs, 'dormant' cases

Observing PCC meetings and attending PCC Awayday

Handbook roll out (January onwards)

Conclusion

93. I would like to thank PCD, Committee members and other BSB staff for responding so thoroughly, promptly and patiently to my enquiries.

94. As always, I welcome GRA Committee feedback on this report.

Isobel Leaviss
Independent Observer
October 2013

Annex 1: Independent Observer Role Profile

Key responsibilities include:

- Establishing whether in respect of the BSB's [complaints and disciplinary enforcement](#) system
 - Cases are handled in a timely manner in line with service standards;
 - Investigations of complaints are carried out, in accordance with policies and procedures, thoroughly and fairly [and with appropriate consideration of equality and diversity issues](#);
 - Decisions of the Professional Conduct Committee and staff are made consistently and in accordance with agreed criteria;
 - The reasons for decisions are explained fully and clearly to the parties;
 - Cases are transferred effectively, efficiently and correctly between the BSB and the Legal Ombudsman
 - The arrangements made for holding disciplinary hearings are handled effectively by the BSB;
 - The handling of the BSB of the prosecution of disciplinary cases and appeals and the BSB's treatment of all parties is fair, effective and in accordance with laid down procedures; and
 - In all other respects, complaints are being dealt with in accordance with the aims, objectives and service standards set for the complaints and disciplinary system
- Developing an appropriate quality assurance programme; agreeing it with the Governance, Risk and Audit Committee (GRA); and working in accordance with the agreed plan.
- At the request of the (GRA) or the Bar Standards Board, conduct enquiries into identified issues of concern and report on such enquiries.
- To prepare and submit to the (GRA) six monthly reports containing
 - A summary of activities
 - Evidence based rational, robust observations and conclusions
 - Recommendations to address any [systemic](#) weaknesses identified or areas for improvement
 - An annual general assessment of performance in relation to the relevant aspects of the [complaints and disciplinary enforcement](#) system for publication on the BSB's website.

The Independent Observer does not act as an independent adjudicator and is not tasked with reviewing the merits of individual decisions but rather the application of policies and procedures.

The Independent Observer has no powers [with which](#) to review [the progress or outcome of](#) individual complaints and cannot respond to individual parties about complaints.

Aims and Objectives of the BSB's complaints and disciplinary system

Aims

To

- Act in the public interest
- Protect the public and consumers of legal services
- Maintain high standards of behaviour and performance of the Bar
- Provide appropriate and fair systems for dealing with complaints and disciplinary action;
- Promote public and professional confidence in the complaints and disciplinary process; and
- Ensure complaints are dealt with fairly, expeditiously and consistently

Objectives

To

- Deal with complaints made against barristers promptly, thoroughly and fairly;
- Ensure proportionate action is taken in relation to barristers who breach the Code of Conduct; and
- Be open, fair, transparent and accessible

Annex 2: Summary of new recommendations and management responses

Ref	Priority	Recommendation	Management Response
13/14 H1R2	High	upon completing its review of progress in implementing the Browne Report recommendations, the BSB ensures that there is appropriate feedback to the profession and the wider public (paras 40-51).	Recommendation accepted
12/13 H1R7	High	the BSB improves the accessibility and clarity of its service complaint policy on its website.	Recommendation accepted
13/14 H1R5	Medium	the BSB gives early priority to engaging with intermediary consumer groups to promote understanding of its enforcement role and, where appropriate, improve signposting to assist legal consumers (paras 67-72).	Recommendation accepted
12/13 H1R6	Low	the PCD clarifies, on the BSB website, the options for complainants and/or barristers seeking to challenge enforcement decisions	Recommendation accepted – no cost implications
13/14 H1R1	Low	the PCD considers my suggestions to help expedite transcript requests (paras 31-40).	Recommendation accepted
13/14 H1R4	Low	the BSB uses the Handbook rollout as an opportunity to provide feedback to the profession about its enforcement caseload, the outcomes of complaints and 'lessons' for practitioners (paras 67-72).	Recommendation accepted
13/14 H1R3	Low	the PCD considers my suggestions to further improve communication with complaint parties (paras 58-66).	Recommendation accepted

Annex 3: Summary of recommendations made since May 2011 and status as at Oct 2012

Ref	Priority	Recommendation	Status
11/12 Q1R4	High	The BSB agrees an action plan for establishing performance indicators and targets for the complaints and disciplinary processes.	Implemented.
11/12 Q1R4	High	The BSB provides an up-to-date user-friendly summary of headline quarterly and annual performance information for complaints and professional conduct proceedings on its website	Implemented.
11/12 Q1R8	High	The BSB works with the Legal Ombudsman (LeO), which is responsible for 'service' complaints, to ensure that the BSB receives prompt notifications regarding the outcome of referred cases and the prompt and full transfer of all relevant case papers.	Implemented.
11/12 Q1R9	High	The BSB systematically compares its list of 'referred cases' from LeO with LeO and addresses any discrepancies.	Implemented.
11/12 Q1R11	High	The BSB continues to monitor case officer workloads, resourcing levels and particularly staff absences in order to make arrangements to minimise avoidable delays in complaint handling	Implemented.
11/12 Q2R5	High	The BSB regularly reviews all 'inactive' cases to highlight potential issues and ensure that all cases are being actively progressed.	Implemented.
11/12 Q1R4	Medium	The BSB publishes its most recent performance reports	Implemented.
11/12 Q1R3	Medium	The BSB expands the information on complaints handling on its website to include more detail about the steps that it take in dealing with complaints, examples of what constitutes misconduct, the standard of proof required and guidance/examples of the type of supporting documents or other evidence that a complainant needs to submit in order to substantiate their complaint	Implemented.
11/12 Q1R1	Medium	The BSB updates the pdf version of the Code of Conduct on its website to reflect all approved amendments and adds a link to the Code in the Complaints section of the website	Implemented.
11/12 Q1R6	Medium	The BSB considers providing more regular feedback to the industry and the wider public regarding complaint volumes, the nature of misconduct findings and wider lessons	Closed. But see 13/14 H1 R4 and R5
11/12 Q1R10	Medium	The BSB spells out its role and approach to complaint handling upfront when first acknowledging complaints, particularly LeO referrals and spells out the reasons for its approach at each stage, next steps and likely timescales	Implemented.

Ref	Priority	Recommendation	Status
11/12 Q2R9	Medium	That in cases where the Professional Conduct Committee decision differed from the Case Examiner's recommendation to dismiss, the rationale for the Committee decision is summarised by the Chair and formally recorded to provide a clear audit trail.	Implemented.
11/12 Q2R8	Medium	That a summary of any advice given to barristers whose behaviour has given cause for concern should be disclosed to the complainant as a matter of course	Implemented.
11/12 Q2R3	Medium	That a specific box be introduced to the complaint form explicitly prompting complainants to list evidence to substantiate their complaint and that the guidance accompanying the form explain the importance of evidence and provide examples	Implemented.
11/12 Q2R1	Medium	That the review of BSB letter templates should be completed and that the specific comments I have made in relation to a number of letters are considered	Implemented.
11/12 Q2R7	Medium	That prior to adjourning consideration of complaints, the BSB should actively consider what, if any, contemporaneous enquiries should be made in order to capture evidence before memories fade/documents become difficult or impossible to obtain and that guidance to this effect should be incorporated into departmental guidance.	Implemented. PG09 now refers.
11/12 Q2R6	Medium	That time taken for Case Examiners to accept a case, as well as actually deal with a case, should be monitored so that as far as possible delays can be addressed and minimised	Implemented.
11/12 Q2R4	Medium	That in line with existing guidance, case officers should be reminded to indicate specific issues about which information, clarification and/or evidence is needed (rather than a general invitation for comments) in order to focus (and potentially expedite) the investigation process.	Implemented.
11/12 Q2R2	Medium	The BSB consider developing a simple 'checklist' for all letters in order to help embed best practice	Implemented.
11/12 Q3R1	Medium	The BSB formalise and publish its policy for commenting publically on complaints and disciplinary proceedings	Implemented.
11/12 Q3R2	Medium	The BSB remind staff that in the event of a 'comeback' (i.e. new evidence from the complainant or other grounds for re-opening a case file), the complaints database should be updated immediately to help trigger prompt follow-up	Implemented.
11/12 Q3R7	Medium	The BSB identifies additional resources to more systematically keep Committee members and its prosecutors updated about developments on significant cases, rulings and judgements in order to inform decision making and, in the interests of transparency, considers what aspects of this could be made publically available.	Implemented.

Ref	Priority	Recommendation	Status
12/13 R1	Medium	The BSB publishes a summary of the appointment process for its prosecutors, including spelling out the criteria for deciding to approve a barrister for addition to the panel; that the BSB formalises appointments to the panel with an appointment letter and that the BSB assigns an experienced 'mentor' to each of its new prosecutors	See para 77 re prosecutor arrangements.
12/13 R2	Medium	The PCD captures lessons from 'dismissal reports' centrally, agrees an appropriate action plan and monitors implementation	Implemented.
12/13 H2R3	Medium	the PCD extends its recently finalised Disclosure Policy to include Committee minutes and publishes it.	Implemented.
12/13 R3	Low	The instructing letter for prosecutors prompts them to given active consideration to preparing a case chronology to assist the Tribunal.	Implemented.
11/12 Q1R7	Low	The BSB flag and explain material changes to the Complaints Committee Information and Guidance Pack when circulating updates.	Implemented.
11/12 Q1R5	Low	The BSB convey more of the experience of the Professional Conduct Department staff and Committee members on its website.	Implemented.
11/12 Q1R2	Low	The BSB records the nature of enquiries made on the Complaints Information Line.	Implemented.
11/12 Q3R3	Low	The BSB considers renaming the 'sponsor' role in order to avoid any possible misimpression that the member advising on individual cases 'vouches' for either the complaint or the barrister.	Implemented. Renamed 'case examiner'
11/12 Q3R4	Low	The guidance on preparing Case Examiner Reports be more fully spelt out to explain the type of analysis required, including explicit cross reference to the current policy document on decision making.	Implemented.
11/12 Q3R5	Low	The guidance for Committee members be clarified so that its meaning is clearer in relation to referral of matters not previously presented to the barrister.	Implemented.
11/12 Q3R6	Low	Prior to communicating Committee decisions to the parties involved, a review of the case chronology be undertaken so that, as appropriate, the reason(s) for lengthy timelines (and in particular avoidable delays) can be acknowledged, and if necessary apologised for.	Implemented
12/13 H2R1	Low	following the organisation-wide review of the 'Unacceptable Behaviour by Members of the Public – Guidance to Staff', the BSB publishes an external facing statement or version of this policy.	Accepted cf 13/14 H1R7
12/13 H2R2	Low	when the Committee discusses 'lessons' from cases, the Chair draws out any conclusions or actions for the minutes so that they can be recorded and more systematically followed up as appropriate.	Implemented