

Section 69 Order to modify the functions of the Bar Council

A consultation paper under section 70 of the Legal Services Act 2007 on a recommendation and a proposed draft statutory order to the Lord Chancellor, to be made under section 69 of the Legal Services Act 2007 to modify the powers of the General Council of the Bar

This consultation will close on **Tuesday 22 November 2016 at 5pm**

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Introduction

1. The powers and functions of the legal services approved regulators are set out in a number of different sources, reflecting the different historical development of each of them. The Legal Services Act 2007 (**the Act**) did not significantly amend any of these powers and functions, but it does contain a provision which allows for the functions of approved regulators to be modified through secondary legislation.
2. Under section 69 of the Act, the Legal Services Board (**LSB**) has the power to make a recommendation to the Lord Chancellor that an order is made to modify, or make other provision relating to, the functions of an approved regulator.¹ This can include modifying provisions made by or under any enactment, instrument or document.² A recommendation can only be made by the LSB under section 69 of the Act with the consent of that approved regulator.³
3. Any order made by the Lord Chancellor under section 69 of the Act must be made by statutory instrument⁴ through the affirmative procedure,⁵ i.e. approved by both the House of Commons and the House of Lords to become law.⁶
4. Section 70 of the Act sets out the procedural requirements relating to a recommendation under section 69. Section 70(2) requires the LSB to publish a draft of the proposed recommendation and a draft of the proposed order and invite representations on the proposals, before making a recommendation to the Lord Chancellor. The LSB must state the period in which representations must be made.
5. The General Council of the Bar (**Bar Council**) is an approved regulator under the Act, which has historically regulated the conduct of individual barristers. In view of the Act's requirement for separation of representative and regulatory functions, the Bar Council established and delegated its regulatory functions to the Bar Standards Board (**BSB**). References in this paper to the Bar Council should therefore be read in the context of the BSB exercising those functions.

¹ Section 69 (1) of the Act.

² Section 69 (6) of the Act.

³ Section 70 (1) of the Act.

⁴ Section 204 (1) of the Act.

⁵ Section 206 (4)(h) of the Act.

⁶ Section 206 (5) of the Act.

6. This consultation invites representations on the proposed policy discussed below, along with a proposed draft recommendation and draft order that, if given effect, would modify the functions of the Bar Council by placing certain powers on a statutory footing. The modifications relate to the powers of the Bar Council when acting as either an approved regulator or a licensing authority (if designated as such) as follows:
- i) *appeals*: the power to make regulations or rules allowing for appeals to the General Regulatory Chamber of the First-tier Tribunal (**FTT**) against decisions made by the Bar Council (including arrangements enabling the FTT to suspend decisions where an appeal has been brought but not yet determined by the FTT)
 - ii) *intervention*: to apply (with some amendments) provisions of Schedule 14 to the Act (a licensing authority's powers of intervention) to the Bar Council as an approved regulator of individual barristers and entities⁷
 - iii) *information gathering*: to allow for the gathering of documents and other information from individual barristers and entities for the purpose of assessing compliance with rules or regulations or any code issued by the Bar Council in its capacity as an approved regulator, with the ability to seek enforcement through the High Court
 - iv) *disciplinary arrangements*: to allow for disciplinary arrangements to apply to all persons regulated by the Bar Council⁸ that, among other things, may include:
 - the revocation or suspension of authorisation,
 - the imposition of conditions on authorisation
 - financial penalties
 - disbarment or disqualification from specified activities
 - v) *practice rules on engaging disqualified individuals*: the power to require barristers and entities to check the BSB's list of disqualified persons before engaging someone to carry out specified activities, and to seek permission to use a person in activities from which they are disqualified
 - vi) *compensation arrangements*: to make compensation arrangements that would apply to individual barristers and entities, and to administer those arrangements.

⁷ Bodies that are not alternative business structures for the purposes of part 5 of the Act.

⁸ Section 21 (3) of the Act.

7. The proposed draft recommendation and draft order that would modify the functions of the Bar Council can be found at **Annex A**. Representations are invited on the draft recommendation and order. Comments are also welcomed from respondents on the proposed policy discussed in this consultation.
8. As the LSB is proposing to recommend to the Lord Chancellor that she makes an order, the Ministry of Justice requires that the BSB drafts a regulatory triage assessment in support of its proposals.⁹ This can be found at **Annex B**. Respondents are also invited to comment on the regulatory triage assessment.
9. Any representations on the proposals should be made by 5pm on Tuesday 22 November 2016. Further details on how to make representations can be found on page 18.

Background to the proposed changes

Legal basis for regulation

10. The Bar Council is an approved regulator under the Act. In order to meet the requirements for separation of regulatory and representative functions, the Bar Council has established a regulation board, the BSB.¹⁰ While the proposed order makes modifications to the functions of the Bar Council, in the remainder of this paper reference to the BSB is made when describing the exercise of regulatory functions.
11. Historically the Bar Council regulated the conduct of individual barristers. Under the Act, the BSB now authorises individual barristers to carry on reserved legal activities. In September 2013, the Bar Council amended its constitution (which determines and constrains the powers and functions that can be delegated to the BSB) to allow the BSB to make regulatory arrangements for the authorisation and regulation of non-barristers, including entities.
12. The BSB applied to the LSB in June 2014 to extend its remit to include the regulation of entities.¹¹ The application comprised of a number of changes to the BSB Handbook to make it applicable to entities and those working in them. In reaching a decision on whether to approve the change to the regulatory arrangements, the LSB had to be satisfied that the BSB had the power to make

⁹ A regulatory triage assessment is a mini version of a full Impact Assessment. It is used to assess policy measures on business or charity cost impact. Costs must be under £1m gross in order to use a regulatory triage assessment.

¹⁰ Internal governance rules:

http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/Internal_Governance_Rules_Version%203_Final.pdf

¹¹http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2014/20140626_1_BSB_Change_Of_Regulatory_Arrangements_Under_Schedule_4_Entity_Regulation_Application.pdf

the proposed changes. We undertook extensive work with the BSB to understand the source of its powers to regulate entities, in addition to individual barristers.

13. The LSB and BSB concluded that there is presently no statutory basis for the regulation of entities (or individual barristers) by the BSB.¹² We agreed that the amendment to the Bar Council constitution provided it with a basis for entering into a contract with entities (as it already did with individual barristers), with those entities and their management agreeing to be regulated by the BSB and to adhere to its rules as part of the authorisation process.¹³
14. As stated in our decision notice on the BSB's 2014 application,¹⁴ while we consider that this contractual basis for regulation may be appropriate for arrangements where the interests of the approved regulator and the regulated person are aligned (for example, in relation to education and training arrangements), it may not be as appropriate in other areas, such as interventions and other enforcement action. Although remedies may exist under the contract, enforcing them may not be straightforward. This is particularly a risk where there is a need to take action in a contentious situation where parties may not necessarily cooperate. Therefore, we consider that grounding enforcement powers in statute is vital for consumer protection. This is equally the case for entities and for individual barristers.
15. The 2014 application was granted by the LSB in the knowledge that the statutory basis of the BSB's powers would be considered more fully in the context of this draft order. We do not consider a contractual mechanism to be a sustainable long term position and we agreed with the BSB that the interests of consumers would be better protected if its arrangements for regulation, in particular enforcement powers, were underpinned by legislation. The BSB, LSB and Ministry of Justice, have concluded that the BSB can use section 69 of the Act to modify, through secondary legislation, specified regulatory functions, including in relation to entities.
16. The principal objective of the proposals set out in the draft order on which we are now consulting is to provide a statutory basis for those regulatory activities discussed above at paragraph 6. In addition, it allows for a consistent regulatory regime for the regulation by the BSB of non-alternative business structures (or entities) and alternative business structures (**ABS**) firms if the BSB is designated as a licensing authority.

¹² The LSB and BSB jointly sourced an opinion from Nigel Giffen QC which supported the LSB's view that section 20 (6) of the Act is not itself a source of vires but is concerned with where the power to authorise lies, in terms of the scheme of regulation laid down by the Act.

¹³ Bar Council powers come from the agreement of its members and those it authorises to be bound by the constitution (and hence regulatory arrangements)

¹⁴ http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/20141201_BSB_DN_For_Website.pdf

17. In April 2015 the BSB made an application to the LSB seeking designation as a licensing authority under Part 1 of Schedule 10 to the Act, in respect of those reserved activities for which it is an approved regulator.¹⁵ The LSB decided to grant that application on 29 March 2016 and on 17 May 2016 made a recommendation to the Lord Chancellor that an order be made that the Bar Council be designated as a licensing authority.¹⁶ Our recommendation was accepted on 14 July 2016 and the designation order will be laid in Parliament in due course.¹⁷ If it is designated, the Act will confer powers on the BSB (as the regulatory arm of the Bar Council) in relation to the regulation of ABS firms. The draft order (at **Annex A**) seeks to ensure that the BSB would have comparable regulatory tools at its disposal when acting as an approved regulator.

Draft section 69 order

18. The BSB's policy intentions, on which it undertook a consultation in July 2015,¹⁸ are set out in this paper. This consultation seeks representations on the BSB's proposals and also on the proposed recommendation and the proposed draft section 69 order (at **Annex A**) that is intended to give effect to those policy intentions by placing certain powers on a statutory footing. **It should be noted that the proposals in this consultation in relation to appellate and disciplinary arrangements are wider in effect than those on which the BSB consulted.** In light of this, we are inviting comments on the proposed policy that is set out in this document, along with the proposed draft order and draft recommendation.

19. The LSB supports these proposals. Protecting and promoting the interests of consumers and the public interest, and promoting and maintaining adherence to the professional principles are three of the regulatory objectives in the Act. The proposed Section 69 order will help enable the BSB to address those objectives.

Appellate body for regulatory decisions (Article 3 of the draft order)

20. The BSB's consultation proposed an order empowering it to make rules allowing for appeals against specified "authorisation-type" decisions relating to entities to be heard by the FTT. The order is intended to allow the BSB to replace the existing route of appeal (after initial review by the BSB's Qualifications

¹⁵ The exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities, and the administration of oaths.

¹⁶ http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/BSB_Licensing_Authority_Application.htm

¹⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539861/letter.pdf

¹⁸ https://www.barstandardsboard.org.uk/media/1665744/consultation_-_amendment_to_bar_standards_board_powers_-_may_2015_-_final.pdf

Committee) to the High Court.¹⁹ Relevant appeals to be heard by the FTT were identified as:

- *an entity appeal* – against a decision to refuse authorisation, to impose a condition or a modification on the terms of authorisation, to refuse to grant a modification of authorisation if requested by the entity or to impose a suspension (other than as a result of disciplinary proceedings)
- *an entity or an individual appeal* – against a decision that the individual is unsuitable to act as the entity’s head of legal practice or head of finance and administration.

What the order seeks to do

21. In practice, the order would have a broader scope than that proposed in the BSB’s consultation. This is because it would not (as was previously anticipated) state on its face which appeals would be heard by the FTT. Instead it would give the BSB the ability to specify that detail in its regulations or rules (which are subject to approval by the LSB). This approach would still be able to give effect to the policy consulted on by the BSB, but would also provide greater flexibility to make further changes in the longer-term. It would also facilitate plans in the BSB’s licensing authority application that appeals on decisions relating to licensing of ABS firms are heard by the FTT (although a separate order under section 80 will establish the FTT as the relevant appellate body).^{20,21}
22. Article 3 would therefore give the BSB the power (but would not require it) to make regulations or rules allowing appeals to the FTT against decisions that it makes as an approved regulator or licensing authority. It would also permit the FTT to suspend a decision when an appeal has been brought but not yet determined by it.
23. The effect of this is that the BSB could specify in its regulations and rules the type of decision that could be the subject of an appeal to the FTT. This would encompass the decisions on which the BSB originally consulted, but could be extended to any other regulatory decision that it makes.
24. The power that would become available under the order would allow the BSB to replace the existing route of appeal to the High Court against BSB regulatory

¹⁹ Section 24 of the Crime and Courts Act 2013 enables the BSB to make rules to give the High Court jurisdiction to consider appeals. This was done as a temporary measure (although the draft order would not repeal it) at the start of entity regulation in April 2015 until such time as an order could be put in place.

²⁰ Reviews in the first instance are proposed to be heard by the BSB Qualifications Committee, as is the case for entities.

²¹ The LSB recommended to the Lord Chancellor on 17 May 2016 that such an order be made; http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2016/20160519_LSB_Recommends_New_ABS_Licensing_Authority.html

decisions, including those associated with authorisation of entities (including its approval of specific roles within those bodies).²²

Rationale

25. The proposed order facilitates the BSB's intent, as set out in its applications, for entity regulation and for designation as a licensing authority, and its subsequent consultation on amendment to its powers, to have the FTT hear appeals against its decisions related to authorisation and licensing. For this to be effective, the BSB needs a statutory power to make appropriate rules or regulations. HM Courts & Tribunals Service has agreed to the proposed arrangements.
26. While the BSB would have flexibility to decide the appropriate route for an appeal in its regulations or rules, its intention is still for the appeals identified in its consultation, as discussed above, to go to the FTT. Should the BSB wish to allow other decisions to be referred to the FTT, this would mean a change to regulatory arrangements that would require a consultation by the BSB and could only take effect if approved by the LSB. Our consideration of any proposed change to the regulatory arrangements would include consideration of whether it was consistent with the terms of the order.
27. Although the current proposed order is broader in effect than the BSB's original consultation, this approach would give the BSB the flexibility to manage its appeal arrangements. Not listing the specific decisions that can be appealed on the face of the order means that the BSB can, subject to the checks and balances described in paragraph 26, amend its regulatory arrangements if necessary without the need for further secondary legislation. This is a more proportionate approach. However, for the avoidance of doubt, it is the BSB's intention that the appeal route from the Bar Tribunals and Adjudication Service (i.e. disciplinary decisions) continues to be to the High Court.
28. The LSB has previously indicated that in our view that the FTT appears to be the most appropriate body to hear appeals against decisions by licensing authorities.²³ While not specified in it, this is in keeping with our guidance to licensing authorities on the content of licensing rules.²⁴

²² Introduced by the April 2015 amendment to the Practice Direction for the Civil Procedure Rules

²³ http://www.legalservicesboard.org.uk/news_publications/latest_news/pdf/abs_appeals_sdt_consultation.pdf

²⁴ http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/abs_guidance_on_licensing_rules_guidance.pdf and http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/supplementary_guidance_on_licensing_rules.pdf

Powers of intervention (Article 4 of the draft order)

What the order seeks to do

29. Article 4 would give the BSB, when acting as an approved regulator, statutory powers of intervention based on (with some amendments) those set out in Schedule 14 to the Act (that otherwise relate to licensing authorities and ABS firms) over barristers, entities, their employees and the managers of entities. This means that in specified circumstances the BSB could exercise certain powers to secure money and documents. Those circumstances include where one or more of a prescriptive list of intervention conditions is satisfied (such as the BSB being satisfied that the terms of authorisation have not been complied with) or an authorisation has expired. Where this is the case, among other things, the BSB could:

- apply to the High Court for an order to prevent (without the court's leave) the use of money held on behalf of a barrister or entity
- recover or receive particular sums of money held by or on behalf of a barrister or entity
- apply to the High Court for an order requiring information about money held on behalf of a barrister or entity
- require a barrister or entity to produce or release particular documents, and apply to the High Court for an order relating to those documents
- apply to the High Court for an order that specific communications to the barrister or entity communications are redirected to the BSB or any person appointed by it
- apply to the High Court for an order to recover its intervention costs, including from individual barristers and entities, any partner or former partner of an individual barrister, former partners in an entity, or those who are or have been a manager of entities.

Rationale

30. The BSB has identified a number of non-statutory tools that it could have at its disposal in the absence of a statutory power.²⁵ However, in terms of regulatory effectiveness and efficiency, it is important that an approved regulator has the ability to take prompt appropriate action when issues arise. This is especially so in circumstances where the interests of possible parties involved may not be

²⁵http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2014/20140626_1_BSB_Change_Of_Regulatory_Arrangements_Under_Schedule_4_Entity_Regulation_Application.pdf

aligned, in order to avoid the regulatory objectives being frustrated. The order is needed to give the BSB these powers when acting as an approved regulator.

31. The order would deliver parity with powers that the BSB will have for ABS firm regulation if it becomes a licensing authority. It is fitting for an approved regulator to have consistent powers at its disposal in dealing with those it regulates, regardless of the business model involved.

Information gathering (Article 5 of the draft order)

What the order seeks to do

32. Article 5 would permit the BSB to make rules requiring barristers and entities it authorises to produce documents and provide information so that it can assess compliance with its rules, regulations or codes. These statutory powers would be similar to those available to licensing authorities when dealing with ABS firms under sections 93 and 94 of the Act. In summary, among other things, these rules may:

- allow the BSB to specify a time and place that a barrister or entity must attend in order to explain any documents produced or information provided
- allow the BSB (or person it has appointed) to take copies of or extracts from documents produced
- allow the BSB to pay a barrister or entity reasonable costs incurred in complying with a requirement imposed by virtue of the rules
- specify the manner and form in which such documents or information must be made available.

33. A notice that may be issued to barrister or entity under these rules would have to specify the period within which such documents are to be produced or information is to be provided. It may also specify how they are to be produced or require them to be provided to a person specified by the BSB. In the event of a barrister or entity failing or refusing to comply with a requirement imposed by virtue of rules made in accordance with Article 5, the BSB would be able to seek an order from the High Court requiring compliance.

Rationale

34. The BSB can (and does) already make rules in accordance with the powers and functions delegated to it under the Bar Council's constitution. As with intervention powers, this would provide a statutory basis for powers that would enable the BSB to carry out its role more effectively and efficiently, through the ability to take proportionate and consistent regulatory action.

Disciplinary arrangements (Articles 6 and 7 of the draft order)

35. The BSB's consultation proposed an order giving it an express statutory power to discipline non-barristers (including entities and their owners and managers), in keeping with the extension of its regulatory remit to entities. The proposed order is broader. In addition to the powers originally consulted on, the order will put the BSB's existing arrangements for regulating barristers on a statutory basis, replacing the existing contractual arrangements described in paragraph 13 above. This is because during the drafting process it became apparent that for the order to be effective it needs to apply to all those regulated by the BSB. This reflects that the power available to the BSB in Article 7 (disqualification) is determined by the scope of Article 6 (sanctions), with both falling under the description of disciplinary arrangements. In order for Article 7 to apply to individual barristers (and their employees), they must be included in Article 6.

What the order seeks to do

36. Article 6 would give the BSB a statutory power to make disciplinary arrangements, including rules, which would enable it to apply sanctions to barristers and entities, and to their managers and employees. These arrangements may, among other things, provide for:

- an individual's or entity's authorisation to be revoked or suspended
- conditions to be imposed on an individual or entity's authorisation
- ordering the disbarment of a barrister by the relevant Inn of Court
- fines to be imposed of up to £250 million in the case of entities, and up to £50 million for individuals
- an order that an individual must complete specified continuing development activities
- a warning, reprimand or advice to be given in relation to future conduct.

37. Article 7 would similarly enable the BSB to make disciplinary arrangements that allow it to disqualify individuals (barristers and their employees, and entity managers and employees) from certain activities. These activities are:

- acting as an entity's head of legal practice or head of finance and administration
- being a manager of, or being employed or remunerated by an entity that is regulated by the BSB

- employment or remuneration by a manager or employee of an entity, in connection with that entity's business of carrying on a legal activity
- employment or remuneration by a barrister in relation to their practice of a legal activity²⁶
- carrying out work in the name of, or under the direction or supervision of, a barrister or entity in relation to their practice of a legal activity
- employment or remuneration by a body in which one or more barristers or entities have a material interest, in so far as the employment or remuneration relates to the barrister's or entity's practice of a legal activity.

38. Individuals could be disqualified from those activities if (either intentionally or through neglect) they have:

- breached obligations that the BSB has placed on them
- caused or substantially contributed to a barrister or entity, or their managers or employees, breaching obligations the BSB has placed on them

and the BSB considers it undesirable for them to continue carrying the activities out.

39. The BSB would be required to keep a list of those it has disqualified and the activities that they are disqualified from.

Rationale

40. Again, it is important for an approved regulator to have a statutory basis for the powers needed to perform its functions, including taking action to address risks and harms associated with non-compliance. The ability to impose increased levels of fines allows for 'future-proofing' of regulatory arrangements. This is both in terms of being able to adapt to evidence on the effectiveness of particular levels of fines, and in facilitating parity across business models (with the same upper limit on fines that are available to licensing authorities for ABS firms^{27, 28} also applicable to entities and individual barristers), without the need to put in place further legislation to impose different amounts.

41. While the order would create these powers, their precise implementation would be matter for BSB disciplinary arrangements (subject to LSB approval). In the case of fines, for example, it proposes continuing with lower upper limits for the

²⁶ Section 12 (3) of the Act.

²⁷ Under section 95 of the Act.

²⁸ <http://www.legislation.gov.uk/ukxi/2011/1659/article/2/made>

present.²⁹ Similarly, the BSB proposes that the possibility of being disciplined or disqualified from the activities listed above is limited to those it regulates currently. As discussed above at paragraph 26 in relation to appeals, changes would then be subject to consultation and the LSB's approval. This would include consideration of whether the BSB's proposal was consistent with the terms of the order.

42. Although broader than that consulted on by the BSB, the proposed approach is consistent with good practice in creating a consistent basis for regulation, regardless of the business model involved, with a view to consumer protection. This recognises that even though remedies may exist under a contract, enforcing them may not be straightforward where the interests of the approved regulator and regulated person are not necessarily aligned. Since the LSB's Decision Notice in 2014 was primarily concerned with the BSB's application to extend its regulatory remit to entities, it did not explicitly refer to statutory underpinning of regulatory functions for individual barristers.³⁰ However, the Notice reflected our position on interventions and enforcement.

Practice rules on engaging disqualified persons (Article 8 of the draft order)

What the order seeks to do

43. Article 8 would give the BSB a statutory power to make rules requiring barristers and entities, and their managers and employees to:

- check the list of disqualified persons before engaging a person to carry out any of the activities referred to in Article 7(2) (noted above), and
- seek the BSB's permission before using someone to carry out any activities from which they are disqualified.

44. The BSB would also be able to make rules specifying the effect that giving such permission has on a person's disqualification.

Rationale

45. It is appropriate for an approved regulator to have the ability to manage the involvement of those persons it has disqualified under its disciplinary arrangements in legal activities. This would mean that disqualification does not amount to an absolute prohibition, but instead allows a proportionate response to risks posed to the regulatory objectives.

²⁹ BSB Handbook, Rules r114, rE52, and Annex 1 paragraph 7, Annex 2 paragraph 5, Annex 4 paragraph 4, and Annex 5 paragraph 1.

³⁰ http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/20141201_BSB_DN_For_Website.pdf

Compensation arrangements (Article 9 of the draft order)

What the order seeks to do

46. Article 9 would provide the BSB with a statutory power to make compensation arrangements to help mitigate losses or hardship suffered by individuals and bodies as a result of certain failings or dishonesty by barristers or entities, or their employees.³¹ This would allow the BSB to make rules that may include the power to:

- establish and maintain (e.g. investing money and managing) one or more funds, and require barristers and/or entities to contribute to it through periodic payments
- take out and maintain insurance, and require barristers and/or entities to contribute to the premium payable for it through periodic payments
- require barristers and/or entities to take out and maintain insurance that satisfies prescribed criteria
- set criteria and the procedure to apply in deciding claims for compensation.

Rationale

47. The BSB does not consider it necessary to introduce compensation arrangements at this time, but the proposal recognises that this may change, for example, as the regulated market evolves.³² The introduction of this provision could help the BSB to act in a timely manner, if it does deem it appropriate, rather than having to first introduce additional legislation.

48. As with other provisions discussed above, the ability to introduce such arrangements would become available to the BSB for ABS firms in the event that its application to become a licensing authority is successful.³³ In this respect, the Act stipulates that licensing rules must contain appropriate compensation arrangements.³⁴ It does not, though, specify what “appropriate” means; that is for the individual licensing authorities to determine in this context.

49. To be clear, the BSB is not presently planning to introduce compensation arrangements. Its licensing authority application, for example, did not propose to introduce a fund or take other measures (principally in view of the prohibition on

³¹ See section 21 (2) of the Act for a full definition of “compensation arrangements”.

³² http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20150508_Licensing_Authority_Application.pdf

³³ Paragraph 19 to Schedule 11 of the Act.

³⁴ Section 83 (5)(e) of the Act.

those it regulates from holding client money). However, acknowledging that the market may change over time, the LSB and BSB have concluded that it would be sensible for the draft order to include the necessary statutory powers for the BSB to introduce such arrangements should they become necessary.

50. The combined effect of this provision and powers that would become available to the BSB as a licensing authority could therefore facilitate a proportionate and consistent approach to regulation, in terms of being able to decide to whom obligations should apply. As before, while the order would create these powers, their implementation by the BSB would involve a change to its regulatory arrangements. This would therefore be subject to consultation and approval by the LSB (which would include assessment of whether the BSB's proposal was in keeping with the terms of the order).

The draft recommendation and order

51. **Annex A** contains the draft recommendation and the draft order.

Question 1: *Do you have any representations on either the draft recommendation or the draft order?*

Question 2: *Does the drafting of the order meet the policy intentions set out above?*

The draft regulatory triage assessment

52. A draft regulatory triage assessment has been prepared by the BSB to accompany the order. **Annex B** contains the draft regulatory triage assessment on which views from respondents would also be welcome.

Question 3: *Do you have any comments on the draft regulatory triage assessment, in particular, the costs/benefits estimates and whether any additional costs/benefits should also be identified?*

How to make representations

53. We would prefer to receive responses electronically (in Microsoft word or PDF format), but hard copy responses by post or fax are also welcome. Responses should be sent to:

Post: Consultation Co-ordinator
Legal Services Board
One Kemble Street
London
WC2B 4AN

Fax number: 020 7271 0051

Email: consultations@legalservicesboard.org.uk

54. The consultation period will end at **5pm on Tuesday 22 November 2016**, twelve weeks after publication. In accordance with section 70(3) of the 2007 Act, you are given notice that any representation about the proposed section 69 order must be made to the LSB by the end of this period.

55. The LSB is happy to meet respondents to discuss views on the consultation if you would find that helpful. Please send requests to:
consultations@legalservicesboard.org.uk

56. We consider that this consultation satisfies the requirements of section 70 of the 2007 Act to publish a proposed draft order and proposed draft recommendation before making a recommendation to the Lord Chancellor under section 69.

57. The LSB plans to publish all responses received during the consultation period on its website. While the LSB is happy to discuss varying this general policy in individual cases, there is a strong presumption in favour of transparency. It will therefore note publicly that a submission has been received from an identified body which had withheld its consent for publication in the summary of the consultation.

Complaints

58. Complaints or queries about the LSB's consultation process should be directed to the Consultation Co-ordinator, at the following address:

Consultation Co-ordinator
Legal Services Board
One Kemble Street
London WC2D 4AN

Or by e-mail to: consultations@legalservicesboard.org.uk

Annex A – Draft recommendation to the Lord Chancellor and draft section 69 order which will be annexed to the recommendation

Draft recommendation by the LSB to the Lord Chancellor under section 69 of the Legal Services Act 2007

Proposed recommendation for the Bar Council

1. At its meeting on [date] the Legal Services Board decided to make a recommendation to the Lord Chancellor that she make an order under section 69 of the Legal Services Act 2007 (the Act) to enable the Bar Council to:
 - i. make regulations or rules allowing for appeals to the General Regulatory Chamber of the First-tier Tribunal (FTT) against decisions by the Bar Council (including arrangements enabling the FTT to suspend decisions where an appeal has been brought but not yet determined by the FTT)
 - ii. apply (with some amendments) the provisions of Schedule 14 to the Act to the Bar Council as an approved regulator of individual barristers and entities
 - iii. make rules to allow for gathering of information from individual barristers and entities for the purposes of assessing compliance with rules or regulations, or any code issued in its capacity as an approved regulator, with the ability to seek enforcement through the High Court
 - iv. make disciplinary arrangements to apply to all persons regulated by the Bar Council that, among other things, may include the revocation or suspension of authorisation or imposition of conditions on it, financial penalties and disbarment or disqualification from specified activities
 - v. make rules to apply to individual barristers and entities regulated by the Bar Council to allow controls on the use of persons that it has disqualified from specified activities under its disciplinary arrangements
 - vi. make compensation arrangements that would apply to individual barristers and entities, and to administer those arrangements.
2. A draft of the order is attached to this recommendation at **Annex A**.
3. In accordance with the requirements of section 70(2) of the Act, the Board published a draft of the proposed recommendation and draft order on **[DATE]** and invited representations about the proposals to be made to the Board by **[DATE]**. **[DELETE ONE: The Board has had regard to the representations duly made] or [no representations were received]**.

4. **[DELETE paragraph if no changes to the recommendation to the order in light of the consultation representations]**. In accordance with the requirements of section 70(5) of the Act, the draft order annexed to the recommendation differs from the draft published under subsection 2(b) in a way in which in the option of the Board, is material. The Board has therefore, before making the recommendation published on its website, published the draft order along with a statement detailing the changes made and the reasons for those changes.
5. In accordance with section 70(1) of the Act, the recommendation is made with the consent of the Bar Council.

Chairman, Legal Services Board

[DATE]

D R A F T S T A T U T O R Y I N S T R U M E N T S

2016 No.

LEGAL SERVICES, ENGLAND AND WALES

**The Legal Services Act 2007 (General Council of the Bar)
(Modification of Functions) Order 2016**

Made - - - - - *******

Coming into force in accordance with article 1

The Lord Chancellor makes the following Order in exercise of the powers conferred by section 64(2), (3) and (4), section 69(1), (4) and (6), and section 204(3) of the Legal Services Act 2007(a).

In accordance with section 69(2) and (3) of that Act, this Order is made following a recommendation made by the Legal Services Board to which was annexed a draft order in a form not materially different from this Order.

The Legal Services Board has made the recommendation with the consent required by section 70(1) of that Act and after complying with the requirements in section 70(2) to (5) of that Act.

In accordance with section 206(5) of that Act, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

Citation and commencement

1.—(1) — This Order may be cited as the Legal Services Act 2007 (General Council of the Bar) (Modification of Functions) Order 2016.

(2) This article and articles 2, 3 and 5 to 9 come into force on the day after the day on which this Order is made.

(3) Article 4 comes into force on the 22nd day after the day on which this Order is made.

Interpretation

2. In this Order—

“the Act” means the Legal Services Act 2007;

“relevant authorised person” means a person authorised by the General Council of the Bar (other than by the grant of a licence under Part 5 of the Act) to carry on an activity which is a reserved legal activity(b).

(a) 2007 c. 29

(b) “Reserved legal activity” is defined in section 12(1) of the Act.

Power to make regulations or rules providing for appeals to the First-tier Tribunal

3.—(1) The General Council of the Bar may make regulations or rules providing for appeals to the First-tier Tribunal against decisions made by the General Council of the Bar in its capacity as an approved regulator, including in its role, if any, as a licensing authority.

(2) The regulations or rules made under paragraph (1) may provide for the First-tier Tribunal to suspend the effect of a decision of the General Council of the Bar (whether or not the decision has already taken effect) while an appeal against that decision has been brought and has not yet been finally determined or withdrawn.

Power of intervention

4.—(1) Subject to the modifications in paragraphs (2) to (4), Schedule 14 to the Act (licensing authority's powers of intervention)(a) applies in relation to—

- (a) the General Council of the Bar in its capacity as an approved regulator (other than in its role, if any, as a licensing authority);
- (b) a relevant authorised person;
- (c) in the case of a relevant authorised person which is a body, a manager of the body, and
- (d) an employee of a relevant authorised person,

as it applies in relation to a licensing authority, a licensed body and a manager or employee of such a body.

(2) Schedule 14 to the Act is to be read as if each reference to—

- (a) a “licence” were a reference to an “authorisation”;
- (b) a “licensed body” were a reference to a “relevant authorised person”;
- (c) “the licensing authority” or “the relevant licensing authority” were a reference to “the General Council of the Bar”, and
- (d) a manager of a licensed body were a reference to, in the case of a relevant authorised person which is a body, a manager of the body.

(3) Paragraph 1 of Schedule 14 to the Act has effect as if—

- (a) for sub-paragraph (3) there were substituted—

“(3) For the purposes of sub-paragraph (2) a relevant insolvency event occurs in relation to a relevant authorised person if—

- (a) in the case of a relevant authorised person who is an individual, the person has been made bankrupt or has made a composition or arrangement with the person's creditors in England or Wales;
- (b) in the case of a relevant authorised person which is a body, in England or Wales—
 - (i) a resolution for a voluntary winding-up of the body is passed without a declaration of solvency under section 89 of the Insolvency Act 1986 (statutory declaration of solvency)(b);
 - (ii) the body enters administration within the meaning of paragraph 1(2)(b) of Schedule B1 to that Act (administration)(c);
 - (iii) an administrative receiver within the meaning of section 251 of that Act (interpretation) is appointed;
 - (iv) a meeting of creditors is held in relation to the body under section 95 of that Act (effect of company's insolvency)(d);

(a) Paragraph 11(9) of Schedule 14 was amended by section 91 of, and Schedule 12, Part 3, paragraph 189 to, the Postal Services Act 2011 (c. 5).

(b) 1986 c. 45

(c) Schedule B1 was inserted by section 248(2) of, and Schedule 16 to, the Enterprise Act 2002 (c. 40).

(d) Section 95 was amended by S.I. 2009/864 and 2010/18.

- (v) an order for the winding up of the body is made, or
- (vi) a compromise or arrangement between the body and its creditors (or a class of them) is in force;
- (c) in the case of a relevant authorised person which is a body, established outside the jurisdiction of England and Wales, the body is—
 - (i) subject to an event in its country or, as the case may be, territory of incorporation that corresponds to an event as set out in sub-paragraphs (b)(i) to (v), or
 - (ii) subject to an event that corresponds to an event as set out in sub-paragraph (b)(vi).”, and
- (b) for sub-paragraphs (5) and (6) there were substituted—

“(5) Where this Schedule applies in relation to a relevant authorised person by virtue of sub-paragraph (1)(a) it continues to apply—

 - (a) in the case of a relevant authorised person who is an individual—
 - (i) after the individual’s death (and for these purposes, the Schedule is to be treated as applying to a personal representative of the individual as it would apply to a relevant authorised person);
 - (ii) after the individual’s authorisation has been revoked or the individual’s authorisation has otherwise ceased to have effect;
 - (b) in the case of a relevant authorised person which is a body, after the body’s authorisation has been revoked or the body’s authorisation has otherwise ceased to have effect.

(6) For the purposes of this Schedule “relevant authorised person” includes—

 - (a) a person whose authorisation is suspended;
 - (b) a person to whom this Schedule continues to apply by virtue of sub-paragraph (5);
 - (c) except in this paragraph, a person whose authorisation has been revoked or whose authorisation has otherwise ceased to have effect.”
 - (4) Paragraph 18 of Schedule 14 to the Act has effect as if in sub-paragraph (2) there were inserted before paragraph (a)—

“(za) if the relevant authorised person is an individual who is or was a partner in a partnership, any of the individual’s partners or former partners,”.

Power to gather information

5.—(1) — The General Council of the Bar may make rules requiring a relevant authorised person to produce documents and provide information for the purpose of ascertaining whether or not the provisions of rules or regulations made, or any code issued, by the General Council of the Bar in its capacity as an approved regulator (other than in its role, if any, as a licensing authority) are being complied with.

- (2) Rules made under paragraph (1) may include provision that—
 - (a) the General Council of the Bar may, by notice, require a relevant authorised person to produce documents, or documents of a description, specified in the notice;
 - (b) the General Council of the Bar may, by notice, require a relevant authorised person to provide information, or information of a description, specified in the notice;
 - (c) the General Council of the Bar may, by notice, require a relevant authorised person to attend at a time and place specified in the notice to provide an explanation of any document produced or information provided by virtue of the rules;
 - (d) the General Council of the Bar, or a person appointed by it, may take copies of or extracts from a document produced by virtue of the rules;

(e) the General Council of the Bar may pay to a relevant authorised person such reasonable costs as may be incurred by that person in complying with a requirement imposed by virtue of the rules.

(3) A notice given to a relevant authorised person by virtue of rules made under paragraph (1)—

- (a) may specify the manner and form in which any documents are to be produced or information is to be provided;
- (b) must specify the period within which the documents are to be produced or information is to be provided;
- (c) may require documents to be produced or information to be provided to the General Council of the Bar or to a person specified by it.

(4) If a relevant authorised person refuses or otherwise fails to comply with a requirement imposed by virtue of rules made under paragraph (1) to produce documents, provide information, or comply with a notice under paragraph (2)(c), the General Council of the Bar may apply to the High Court for an order requiring the person to comply with that requirement.

Disciplinary arrangements: sanctions

6.—(1) — The General Council of the Bar may make disciplinary arrangements, including disciplinary rules, in relation to—

- (a) a relevant authorised person;
- (b) in the case of a relevant authorised person which is body, a manager of the body, and
- (c) an employee of a relevant authorised person.

(2) The disciplinary arrangements made under paragraph (1) may, in particular, make provision for—

- (a) the revocation or suspension of a relevant authorised person's authorisation;
- (b) the imposition of conditions on a relevant authorised person's authorisation;
- (c) ordering the disbarment by the relevant Inn of Court of a relevant authorised person who is an individual;
- (d) the imposition of a fine not exceeding £250 million in relation to a relevant authorised person which is a body and £50 million in relation to an individual;
- (e) the giving of a notice that an individual must complete such continuing development activities as may be specified;
- (f) the giving of a warning, a reprimand or advice in relation to future conduct.

Disciplinary arrangements: disqualification

7.—(1) — The disciplinary arrangements made under article 6(1) may include provisions enabling the General Council of the Bar to disqualify those individuals set out in paragraph (2) from one or more of the activities in paragraph (3) if the disqualification condition is satisfied.

(2) The persons are—

- (a) a relevant authorised person who is an individual;
- (b) in the case of a relevant authorised person which is a body, a manager of the body;
- (c) an employee of a relevant authorised person.

(3) The activities are—

- (a) acting as HOLP or HOFA of a relevant authorised person which is a body;
- (b) being a manager of, or being employed or remunerated by, a relevant authorised person which is a body;

- (c) being employed or remunerated by a manager or employee of a relevant authorised person which is a body, in connection with that body’s business of carrying on a legal activity^(a);
 - (d) being employed or remunerated by a relevant authorised person who is an individual, in so far as the employment or remuneration relates to that individual’s practice of a legal activity;
 - (e) being employed or remunerated by an employee of a relevant authorised person who is an individual, in connection with that relevant authorised person’s business of carrying on a legal activity;
 - (f) undertaking work in the name of, or under the direction or supervision of, a relevant authorised person, in so far as the work relates to that relevant authorised person’s practice of a legal activity, and
 - (g) being employed or remunerated by a body (corporate or unincorporate) in which one or more relevant authorised person holds a material interest, in so far as the employment or remuneration relates to that relevant authorised person’s practice of a legal activity.
- (4) The disqualification condition is satisfied in relation to an individual if—
- (a) that individual has (intentionally or through neglect)—
 - (i) breached obligations placed upon that individual by the General Council of the Bar, or
 - (ii) caused or substantially contributed to a breach of obligations imposed by the General Council of the Bar by a relevant authorised person, or a manager or employee of a relevant authorised person, and
 - (b) the General Council of the Bar is of the view that it is undesirable for that individual to continue to carry out one or more of the activities set out in paragraph (3).
- (5) The General Council of the Bar must keep a list of individuals who are disqualified by virtue of disciplinary arrangements made by virtue of this article and the activities from which they are disqualified.
- (6) In this article—
- (a) “HOFA” means an individual who is appointed Head of Finance and Administration for a relevant authorised person which is a body in accordance with rules made by the General Council of the Bar;
 - (b) “HOLP” means an individual who is appointed Head of Legal Practice for a relevant authorised person which is a body in accordance with rules made by the General Council of the Bar;
 - (c) “material interest” has the same meaning given in paragraph 3(1) of Schedule 13 to the Act.

Practice rules: engaging persons disqualified under disciplinary arrangements

8.—(1) The General Council of the Bar may make rules requiring a relevant authorised person to—

- (a) consider the list referred to in article 7(5) before engaging an individual to carry out any of the activities referred to in article 7(3), and
- (b) seek its permission before engaging an individual to carry out any activity from which that individual is disqualified by virtue of disciplinary arrangements made by virtue of article 7.

(2) The General Council of the Bar may make rules as to the effect that any permission given under rules made under paragraph (1)(b) is to have upon the disqualification of the individual the relevant authorised person is seeking to engage.

(a) “Legal activity” is defined in section 12(3) of the Act.

Compensation arrangements

9.—(1) The General Council of the Bar may make compensation arrangements^(a).

(2) For the purpose of giving effect to paragraph (1) the General Council of the Bar may make rules which authorise or require it to make particular arrangements and such rules may include—

- (a) establishing and maintaining one or more funds;
- (b) requiring a relevant authorised person or a relevant authorised person of a description specified by the rules to contribute to any fund established and maintained by virtue of sub-paragraph (a) by making periodical payments as specified by the rules to the General Council of the Bar;
- (c) provision as to the investment of any money that forms part of any fund established and maintained by sub-paragraph (a) and otherwise as to the management, administration, insurance or protection of such fund;
- (d) provision as to the taking out and maintaining of insurance with authorised insurers by the General Council of the Bar;
- (e) requiring a relevant authorised person or a relevant authorised person of a description specified in the rules to contribute to the premium payable on any insurance policy maintained by virtue of sub-paragraph (d) by making periodical payments as specified by the rules;
- (f) provision as to the management and administration of any insurance policy taken out and maintained by virtue of sub-paragraph (d);
- (g) requiring a relevant authorised person or a relevant authorised person of a description specified in the rules to take out and maintain insurance with authorised insurers;
- (h) prescribing the conditions which an insurance policy taken out and maintained by virtue of sub-paragraph (g) must satisfy;
- (i) the circumstances in which a compensation claim may and may not be made;
- (j) the form and manner in which a compensation claim is to be made;
- (k) the procedure for determining a compensation claim;
- (l) the extent to which discretion may be exercised by the General Council of the Bar in determining whether payment in respect of a compensation claim should be made, and
- (m) the minimum and maximum amounts payable in respect of a compensation claim or a compensation claim of a description specified in the rules.

(3) In this article “compensation claim” means a claim for a grant or other payment under compensation arrangements made by the General Council of the Bar.

Date

Name
Parliamentary Under Secretary of State
Ministry of Justice

(a) “Compensation arrangements” is defined in section 21(2) of the Act.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order modifies the functions of the General Council of the Bar in respect of its regulatory arrangements as an approved regulator under the Legal Services Act 2007 (c. 29) (“2007 Act”).

The regulation of legal services in England and Wales is governed by the 2007 Act. Under that Act only a person who is authorised or who is exempt from the requirement to be authorised may carry on a reserved legal activity (as defined in section 12 of the 2007 Act). Authorisation can be given only by an approved regulator or, in relation to a licensable body, by a licensing authority.

Article 3 enables the General Council of the Bar to make regulations or rules providing for appeals to the First-tier Tribunal against decisions made by the General Council of the Bar in its role as an approved regulator, including in its capacity, if any, as a licensing authority.

Article 4 applies Schedule 14 (licensing authority’s power of intervention) to the 2007 Act to the General Council of the Bar in its capacity as an approved regulator only and to those listed in article 4(1)(b) and (c) as it applies to a licensing authority and licensed bodies (or managers or employees of such bodies) subject to the modifications in article 4(2) to (4).

Article 5 enables the General Council of the Bar to make rules enabling it to serve a notice requiring a relevant authorised person to produce documents and to provide information for the purpose of ascertaining whether or not the provisions of any rules, regulations or code made or issued by the General Council of the Bar are being complied with. If a relevant authorised person refuses or fails to comply with a requirement set out in the rules the General Council of the Bar may apply to the High Court for an order requiring the person to comply with the requirement.

Article 6 enables the General Council of the Bar to make disciplinary arrangements, including disciplinary rules, in relation to a relevant authorised person or a manager or employee of a relevant authorised person.

Article 7 enables the General Council of the Bar to include in any disciplinary arrangements the power to disqualify those listed in article 7(2) from the activities referred to in article 7(3) if the disqualification condition referred to in article 7(4) is satisfied. It also requires the General Council of the Bar to maintain a list of individuals disqualified under its disciplinary arrangements and the activities from which such individuals are disqualified.

Article 8 enables the General Council of the Bar to make practice rules requiring a relevant authorised person to consider the list of disqualified persons referred to in article 7 before engaging an individual to carry out any of the activities referred to in article 7(3) and to seek the permission of the General Council of the Bar before engaging an individual to perform any activity from which that individual is disqualified. The General Council of the Bar may also make rules as to the effect of any permission given upon the disqualification of the individual the relevant authorised person is seeking to engage.

Article 9 enables the General Council of the Bar to make compensation arrangements. To give effect to such arrangements the General Council of the Bar may make rules which may include, amongst other things, the power to establish and maintain a compensation fund, to require relevant authorised persons to contribute to that fund, to take out and maintain insurance or to require relevant authorised persons to contribute to the premium payable for that insurance or to require relevant authorised persons to take out and maintain insurance with an authorised insurer.

A regulatory triage assessment has been prepared for this instrument and can be found at www.legislation.gov.uk or obtained from the Head of Legal Services Policy, Justice and Courts Policy Group, Ministry of Justice, 102 Petty France, London, SW1H 9AJ.

Annex B: Draft regulatory triage assessment

Bar Standards Board (BSB) analysis of impacts in respect of an order to be made under Section 69 of the Legal Services Act 2007 (to enable the BSB to amend its powers)

Regulatory Triage Assessment

Title of regulatory proposal	Bar Standards Board (BSB Section 69 Order) Modification of the functions of the General Council of the Bar
Unique identifying number	MoJ011/2015/RTA
Lead Department/Agency	Ministry of Justice
Expected date of implementation	December 2016
Origin	Domestic
Date	03/08/2016
Lead Departmental Contact	Mel Panteli
Departmental Triage Assessment	Low cost regulation/fast track

Rationale for intervention and intended effects

The Bar Council is an approved regulator under the Legal Services Act 2007, which acts through the Bar Standards Board (BSB). The draft Order seeks to modify some of the Bar Council's regulatory powers, in particular in relation to its regulation of authorised bodies (other than licensed bodies) although it does also contain some provisions which relate to authorised individuals. The Bar Council already has rules to do much of what is proposed but this legislation will place on a statutory footing, those non-statutory arrangements that already exist in the BSB Handbook. It also gives the BSB the ability to make rules providing for appeals against decisions by the Bar Council in its capacity as an approved regulator and, also for appeals when it becomes a licensing authority to the General Regulatory Chamber of the First-tier Tribunal (FTT). It also seeks to give the Bar Council a power to establish compensation arrangements.

Government intervention is necessary because these modifications can only be made by Order made by the Lord Chancellor under section 69 of the Legal Services Act 2007.

The aim of these changes is to enable the Bar Council to carry out its role more effectively or efficiently, to ensure more simplified enforcement processes. In the case of the appeal jurisdiction, the current arrangements which allow appeals against decisions made by a licensing authority to the High Court, were always intended to be temporary and therefore it is desirable to replace this with a permanent solution. In the case of the compensation arrangements, the power to make such rules is needed to safeguard clients' interests for the future. These powers will create consistency with other regulators in the legal sector and hence protect clients more effectively.

Viable policy options (including alternatives to regulation)

There are 6 options being considered which cover the following:

Option 1: Establish a jurisdiction for the FTT to hear appeals relating to BSB regulatory decisions.

Option 2: Establish a statutory power for the Bar Council to intervene into failing law practices.

Option 3: Establish a statutory power for the Bar Council to make rules requiring information or documents from those whom it regulates and enforce this in the High Court.

Option 4: Establish a statutory power for the Bar Council to make disciplinary arrangements, including disciplinary rules in relation to those regulated by it.

Option 5: To enable the above disciplinary arrangements to include provision about the disqualification of individuals regulated by the Bar Council.

Option 6: Establish a statutory power for the Bar Council to make compensation arrangements.

The preferred approach is to implement options 1-6. By implementing all 6, the Bar Council can achieve all of the powers that the BSB has identified as necessary. . Each proposal is, however, desirable and necessary on its own.

Initial assessment of business impact

Option 1 will have a monetisable impact of c. £33,600 on business over 10 years, which equates to £3,600 per year. This equates to approx. £48 per entity authorised by the BSB as a one-off contribution.

Option 6 will have a maximum monetisable impact of £87,000 per year on average for a five year transitional period, assuming the power to implement a compensation fund is used. This cost will be spread over all businesses regulated by the BSB (both individual practitioners and entities). This equates to approximately £6 per practising barrister, although the contribution made by each would vary, due to the income-based method of calculating barristers' practising certificate fees. After the five year transitional period, there will be a net reduction in business costs of c. £30,000 per year. So over a ten year period to total net impact would be £300,000.

Options 2-5 have a negligible impact on business.

Total estimated impact on business is therefore £93,720 per year if measured over 5 years. If measured over 10 years the impact will be £33,360 per year.


One-in, Three-out status

This measure is a qualifying regulatory provision under the Small Business, Enterprise and Employment Act 2015. The measure will result in costs to business and the costs have been assessed as an 'IN', in scope of the Business Impact Target and One-in, Three-out requiring a compensatory 'OUT'.

Rationale for Triage rating

The measure is in scope for the low cost fast track regulatory process. Our estimated total cost to business is £93,720 per annum.

Triage approval

	NAME	DATE
Departmental signoff (SCS):	Elizabeth Gibby	09/08/2016
Lead Economist signoff:	 Ewen Macleod Bar Standards Board	03/08/16
Better Regulation Unit signoff:	Sheila Morson	09/08/2016

The Deputy Chief Economist confirms this for the Fast Track as a deregulatory/low cost regulatory measure:	Andrew Meads	10/08/2016
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Supporting evidence

1. The policy issue and rationale for Government intervention

The BSB undertakes the regulatory functions of the Bar Council, an approved regulator under the Legal Services Act 2007 (LSA). The Bar Council's powers derive from its constitution and all members (and non-members who are authorised to undertake reserved legal activities by the Bar Council) agree to be bound by both its constitution and the BSB's regulatory arrangements (including the BSB Handbook). In relation to authorisation to conduct reserved legal activities, the BSB's regulatory arrangements are given a statutory underpinning by the LSA once approved by the Legal Services Board (LSB).

The BSB has identified a number of areas where additional powers are needed in order for the Bar Council to exercise the role of approved regulator more effectively and efficiently. These included identifying areas where it would be useful to extend, or place on a statutory footing via intervention, disqualification and amending their regulatory arrangements regarding appeals, the Bar Council's powers and functions via an order under section 69 of the LSA.

2. Policy objectives and intended effects

The rationale for amending the Bar Council's powers is primarily to ensure that a range of regulatory tools and functions may be exercised more effectively. This would ensure a level playing field between different regulatory regimes where different statutory frameworks exist. In order to ensure that the BSB has effective regulatory tools within a statutory framework so that it can undertake its role as a regulator properly, it needs a wider range of statutory powers.

The BSB believes that seeking an order under section 69 is the correct means to achieve these policy objectives, because there is no existing legislation that would provide the same or similar outcomes to those identified below. The BSB believes that the proposed order is the most proportionate way to deal with the issues that have been identified. However, the powers sought in the order need not lead directly to new regulatory arrangements or additional regulation.

In some cases the order will only place on a statutory footing non-statutory arrangements that already exist in the BSB Handbook. In others, the Order seeks to provide the BSB with powers consistent with other, similar, regulatory regimes.

3. Policy options considered, including alternatives to regulation

There are 6 options being considered which cover the following:

Option 1: Establish a jurisdiction for the FTT to hear appeals relating to BSB regulatory decisions.

Option 2: Establish a statutory power for the Bar Council to intervene into failing law practices.

Option 3: Establish a statutory power for the Bar Council to make rules requiring information or documents from those whom it regulates and enforce this in the High Court.

Option 4: Establish a statutory power for the Bar Council to make disciplinary arrangements including disciplinary rules, in relation to those regulated by it.

Option 5: To enable the above disciplinary arrangements to include provision about the disqualification of individuals regulated by the Bar Council.

Option 6: Establish a statutory power for the Bar Council to make compensation arrangements.

The preferred approach is to implement options 1-6. By implementing all 6, the Bar Council can achieve all of the powers that the BSB has identified as necessary. Each proposal is, however, desirable and necessary on its own. The only alternative to regulation is the status quo, as the desired changes can only be made using legislation.

4. Expected level of business impact

Option 1: Establish a jurisdiction for the FTT to hear appeals relating to BSB regulatory decisions.

The Order would enable the BSB to make rules to permit its decisions to be appealed to the General Regulatory Chamber of the First-tier Tribunal. At present, it is intended only that rules will be made in relation to appeals concerning entity authorisations and related decisions and the impact assessment reflects this (it would be possible to extend this to other decisions in the future, but as there are no plans to do so the impact of this has not been quantified).

Entities can appeal against the refusal of an authorisation application, the imposition of a condition or a modification of the terms of authorisation, a refusal to grant a modification of authorisation if requested by the entity, or the imposition of a suspension (other than as a result of disciplinary proceedings). In such cases, the entity can seek a review by the BSB's Qualifications Committee followed by an appeal to the High Court. Similar arrangements exist in relation to a litigation authorisation. Where the BSB concludes that an individual is unsuitable to act as a Head of Legal Practice (HOLP) or Head of Finance (HOFA) the individual or entity can seek a review or appeal in the same way.

The appeal route to the High Court was introduced as a temporary measure until the BSB could seek an order to give the jurisdiction for such appeals to the General Regulatory Chamber of the First-tier Tribunal (which was the stated policy objective in previous entity regulation consultations). This order will empower the BSB to make necessary rules providing for such appeals to be heard by the First tier Tribunal.

Costs:

Costs to HMCTS: HMCTS will recover its costs from the BSB – this will include both set-up costs and costs per hearing.

Costs to individuals or entities seeking to appeal: The BSB will not seek to recover the costs of appeals directly from those who are appealing. Those who wish to appeal will pay an administrative fee to HMCTS of £100 (plus an additional £500 if an oral hearing is required). This represents a saving on the equivalent costs that would be charged in the High Court. The remainder of HMCTS costs will be paid by the BSB and recovered from the regulated entity community as a whole. This will be taken into account in setting fees for entity authorisation and annual renewal. Based on the number of entities authorised in the first 6 months (35) the BSB would expect no more than approx. 70 entities to be authorised per year. Assuming similar numbers going forward, the BSB would expect one appeal per year, so the average increase to entity fees taking account of the costs discussed below would be approx. £48 per new entity per year expressed as a one-off (although the amount charged to each entity will vary depending on its size and could also be recovered through annual renewal fees rather than a one-off charge at initial authorisation). The 'set up costs', including the fee for the first 10 hearings will be paid out of a general BSB budget and recovered from entities over time

(hence the initial fee to HMCTS will be paid by practising certificate fees from the Bar as a whole).

Costs to the BSB: Because the BSB is not seeking to recover the costs of appeals directly from those who are appealing, the costs of HMCTS will be paid by the BSB from its general budget. This will be recovered from the authorisation fees of entities that are regulated by the BSB. These costs will include:

- Start-up costs: £3,600
- Ongoing average cost per case: £3,000 per appeal (assuming 90% of appeals will be decided on the papers and 10% will need an oral hearing)

Benefits:

Benefits to HMCTS: The current appeal route to the High Court was only agreed by HMCTS as a temporary measure on the understanding that this task would be taken on by the FTT in due course. This proposal ensures that HMCTS can recover all start-up and ongoing costs from the BSB. It also ensures that capacity in the High Court is not taken up by administrative appeals from the BSB. This would replace the current situation where appellants may be liable to pay costs in the High Court if they bring an appeal there.

Net impact of Option 1: Costs are estimated to be up to £33,600 over the first 5-10 years.

Option 2: Establish a statutory power for the Bar Council to intervene into failing law practices.

The BSB believes it is desirable to have a statutory power of intervention – to take control of client money and files when something has gone seriously wrong – into individuals’ practices and entities and to eliminate any residual risk that it be prevented from taking action to protect clients. There may also be cases where such a power, or the threat of it, is in the public interest as, in such situations, the regulator needs to protect the interests of clients, obtain alternative representation and secure their papers or other assets.

Currently, the BSB relies on non-statutory powers although these may take time and can be challenged. The proposed order will apply Schedule 14 of the LSA, subject to modifications, to the Bar Council as it applies in relation to a licensing authority and so enables the BSB to use the powers of intervention that it would have as a licensing authority if designated as such.

Costs:

Costs to BSB and regulated persons: No increased costs of seeking to enforce this power, as compared with the “do nothing” option, which would require the BSB to seek a court order in advance of taking any action.

The Order will enable the BSB to seek a court order to recover costs from those who are the subject of intervention and related persons, which will mitigate impact on the wider regulated community.

Benefits:

Benefits to the BSB and the public: The proposal will clarify the legal basis for the BSB's powers in this area. It will reduce the risk of challenge and provide clarity for regulated persons and the public.

Net impact of Option 2: The net impact of this proposal is negligible.

Option 3: Establish a statutory power for the Bar Council to make rules requiring information or documents from those whom it regulates and enforce this in the High Court.

The BSB does not have a statutory power to require the disclosure of information or documents but its regulatory rules require regulated persons to comply with requests to do so. Failure to comply constitutes misconduct that could lead to disciplinary action and, in extreme cases, the BSB could seek a court order to enforce such requests but this is not set out in statute and could be subject to challenge.

The proposal will give the Bar Council powers to gather information similar to those available to licensing authorities under the LSA. This will enable the BSB to give notice requiring disclosure of information or documents where it is necessary to seek the information for the purpose of investigating compliance with its regulatory arrangements and to enforce compliance with such a notice in the High Court.

Costs

Costs to the BSB, regulated persons and HMCTS: No increased costs predicted, as compared with the "do nothing" option.

Benefits

Benefits to the BSB and the public: The proposal will clarify the legal basis for the BSB's powers in this area. It will reduce the risk of challenge and provide clarity for regulated persons and the public.

Net impact of Option 3: The net impact of this proposal is negligible.

Option 4: Establish a statutory power for the Bar Council to make disciplinary arrangements, including disciplinary rules, in relation to those regulated by it.

The Bar Council's constitution permits it to enter into contractual arrangements with non-barristers (including entities and their owners and managers) under which they agree to abide by the BSB Handbook and submit to the jurisdiction of the Bar Tribunal and Adjudication Service. Whilst this

contractual relationship has been relied on to date, the Bar Council does not have an express statutory power to make disciplinary rules. The BSB believes these powers should be stated unambiguously in secondary legislation. The effect of the Order would be to give the Bar Council a general statutory power to discipline all “regulated persons” within the meaning of the LSA, which would include barristers, employees of anyone authorised to practise by the BSB as well as entities. In the case of barristers, there would be no practical change, other than the legal source of the power. In the case of employees, the BSB does not intend to exercise any new disciplinary jurisdiction over them so there will be no practical impact following the introduction of the Order.

Costs

Costs to the BSB and regulated individuals: Costs are expected to be negligible, because its processes and rules will be unchanged.

Benefits

Benefits to the BSB and the public: The proposal will clarify the legal basis for the BSB’s powers in this area. It will reduce the risk of challenge and provide clarity for regulated persons and the public.

Net impact of Option 4: The net impact of this proposal is negligible.

Option 5: To enable the disciplinary arrangements to include provision about the disqualification of individuals regulated by the Bar Council.

The BSB Handbook includes a power to disqualify a “regulated person”, which by virtue of section 176 of the LSA includes not only those authorised but also employees and managers of authorised persons.

As the current arrangements are largely contractual in nature, the absence of an express contractual relationship between the BSB and each individual employee means that it would be more appropriate for this power to be expressly statutory in nature. There are strong public interest reasons for ensuring that those who are employed by BSB regulated persons can be subject to disqualification in situations where they have caused or substantially contributed to a BSB authorised person breaching their duties.

Costs

Costs to the BSB and regulated individuals: Costs will be negligible, because processes and rules will remain the same.

Benefits

Benefits to the BSB and the public: The proposal will clarify the legal basis for the BSB’s powers in this area. It will reduce the risk of challenge and provide clarity for regulated persons and the public.

Net impact of Option 5: The net impact of this proposal is negligible.

Option 6: Establish a statutory power for the Bar Council to make compensation arrangements.

The primary reason regulators have compensation funds is to address the risks associated with handling client money. This risk is not currently addressed in the BSB's current regulatory regime, but the BSB acknowledges that its assessment of the risks inherent in the market may change over time, particularly with the onset of entity regulation and growing innovation in the sector. If the Bar Council is designated as a licensing authority it will acquire a power to establish a compensation fund for ABS entities in any event. The BSB therefore believes it is necessary to "future proof" its regulatory arrangements by seeking the same power in a section 69 Order to enable the Bar Council to do the same in its capacity as Approved Regulator acting through the BSB.

Costs

Costs to BSB and regulated persons: Any costs incurred would be as a result of changes to the BSB's regulatory arrangements that are not currently planned, following extensive consultation and an application to the Legal Services Board. The "do nothing" option assumes the BSB may set up an insurance-based compensation arrangement in any event. If this option is pursued, this could be replaced by a levy on the profession to establish a compensation fund. The value of such a fund has not been decided, but for the purposes of assessing the impact of this proposal, it is assumed that a fund of around £500,000 from which payments could be made would be backed up by a reduced insurance policy. If the fund were set up over 5 years, this would lead to an additional cost to the profession of £100,000 in the first year, which would reduce in subsequent years as the cost of the insurance policy reduces compared to the "do nothing" option. Once the fund is established the ongoing costs are assumed to be an annual £30,000 saving on the "do nothing" option. Any further levies on the profession would be dependent on claims against the fund, which have not been estimated.

Net costs are estimated as follows:

Year	BSB insurance (£000)	Levy on profession (£000)	Total costs (£000)	Net cost compared to "do nothing" (£000)
1	50	100	150	100
2	45	100	145	95
3	40	100	140	90
4	30	100	130	80
5	20	100	120	70

6 and subsequent	20	TBC	20	(30)
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Benefits to the BSB and the public: The proposal will clarify the legal basis for the BSB's powers in this area. It will enable a broader range of policy responses, should the identified risks in the market require the BSB to introduce compensation arrangements to protect the public.

Net impact of Option 6: The net impact is estimated as up to £435,000 in total for a transitional period of 5 years (£87,000 per year) followed by net benefits of around £30,000 pa thereafter.

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