

# **Appraisal of options for the Bar Standards Board's Authorisation Decision Making**

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## Executive Summary

1. This report was commissioned in order to assist in the Board in considering the future role (if any) of the current Qualifications Committee (QC). This is part of the Board's wider governance review.
2. The Board has already decided that responsibility for the majority of first instance authorisation decisions currently made by the QC's six Panels should be transferred to BSB staff.
3. I am asked specifically to make recommendations to the Board on whether the QC might be eliminated altogether, or whether it has a future role either: in complex case decision making; or in fulfilling an appellate or review function.
4. The report assesses the current authorisation decision making regime (at Section 2) and provides a comparison with the regimes in place in other UK Regulators (Section 3). Whilst the quality of decision making cannot be faulted, it is noted that the current BSB regime is more reliant on panel (rather than staff) decisions than many other Regulators.
5. The report also identifies the principles which underpin regulatory good practice in this area (Section 4), concluding that any internal review or appeal mechanism should be fair and open, should produce consistent outcomes and should be proportionate to the regulatory risk.
6. The first recommendation is that the QC should not have a role in making first instance decisions in complex cases. However, it is suggested that before the Board implement a regime which relies wholly on BSB staff to make first instance decisions, certain measures must be put in place to guarantee that the quality of decision making in complex cases does not fall as a consequence of this change (see paragraph 5.10).
7. The second recommendation is that a pool of panellists should be retained to: (a) hear appeals against decisions by the Inns of Courts' Conduct Committee; and (b) make decisions on *some* other appeal cases (which would be referred to them by BSB staff using defined criteria and guidance). The report sets out options for where such a panellists' pool might sit and suggests that the Board consider whether this function might be performed by a wider Adjudication pool, or whether – at least in the first instance – it should be carried out by a dedicated pool of panellists who would in effect be a revised (and smaller) Qualifications Committee (with no remaining governance role).
8. The costs of the proposed scheme are estimated and compared to the costs associated with the current decision making regime. The conclusion is essentially that whilst there may be a small saving in cash terms associated with the proposed new regime, this would be balanced against a potential small increase in staff resource required. Perhaps more importantly, the report suggests that the costs / savings are relatively small and that in making its decision the Board might consider other factors – the quality and speed of the process and the effect on the prevailing culture at the BSB - more important.

## Section 1      Background, scope and approach

### Background and scope

1.1      As part of its broad review of governance at the Bar Standards Board (BSB), the Board has decided to reduce or eliminate the role of committees in regulatory decision making and policy development. These responsibilities are to be transferred to BSB staff wherever possible.

1.2      As part of the preparation for this change, I am asked to consider the current role of the Qualifications Committee (QC) and how the QC's functions in decision making might be carried out in future. It is already agreed that oversight of policy development in this area will be the responsibility of the Board.

1.3      Specifically, the purpose of this report is to evaluate two possible decision making models. Option one would be to transfer regulatory decision making and policy development to BSB staff whilst retaining a smaller QC (or panels), in some form, to carry out an appellate function and possibly to provide some complex case decision making. Option two would be to eliminate the QC altogether, with the appellate function being carried out by some other means.

1.4      The underlying presumption, already agreed by the Board as I understand it, is that all or almost all first instance decisions (FIDs) in Authorisation will in future be made by BSB staff (with the QC possibly involved only by exception in the most complex cases). Currently, some authorisation FIDs are made by staff and some by the Panels of the QC (I examine the current process in more detail later in this report).

1.5      My discussions with those currently involved in the work of the QC would suggest that there are still concerns, in some quarters, about the Board's decision that FIDs should mainly be made by staff. However, that decision is made and it is not the purpose of this report to re-open that debate. My understanding is that an action plan is in place which would aim to mitigate the risks which might be associated with this transfer of decision making responsibilities.

1.6      It is important to bear in mind, when considering the recommendations of this report, that option one (as above) has two separate and distinct elements: (a) retaining the QC (or panels) as a route of appeal or review of FIDs; and (b) retaining the QC (or panels) to make complex case decisions. It is, of course, possible to recommend the retention of a QC (or similar) for one of these purposes but not the other.

1.7      It should also be borne in mind that option two (as above) gives rise to a number of different sub-options. If the appellate function is not to be carried out by the QC, then it might be carried out in any number of different ways (again, I will return to this theme later in the report).

### Approach

1.8      In producing this report, I am asked to:

assess the BSB's current authorisation decision making regime;

provide an account of good practice for delivering fair and transparent authorisation decision making in professional regulation;

assess the options against other relevant regulators' decision making regimes;

assess the advantages and disadvantages of the models, as compared to the current processes;

provide an analysis of the costs associated with the options;

identify any equality and diversity issues in relation to the options.

1.9 In order to produce this report, I have: attended a QC meeting (on 8 December 2015), both to observe the committee in action and to discuss with committee members their views on the future options (committee members were invited to send any further comments to me by e-mail); met with current and past QC office holders (in person and by telecon) and with senior BSB staff within the Supervision & Authorisation and Education & Training departments (including the manager of the QC support function); considered the relevant BSB procedural guidance and documentation; analysed statistical information relating to the QC's activities; and researched how other UK regulators – particularly those operating in a similar environment to the BSB – carry out Authorisation decision making and review.

1.10 I have also been allowed considerable time and patience by BSB staff and Committee members as I have familiarised myself with this area of the BSB's operations. My (occasionally simplistic) questions and requests for information have been dealt with in full, extremely speedily and with extraordinary good grace. Committee members and staff have been generous with their time and have invariably proved very willing to enter into extremely useful discussion and debate around the options for the future. I am grateful to all those who have assisted me in this work, but particular thanks are due to Oliver Hanmer, Joanne Dixon and Clodhna Judge.

## Section 2      The current authorisation decision making regime

2.1      There are essentially three separate streams of activity relating to authorisation at the BSB, which are currently carried out by separate teams. These are: entity authorisation; authorisation relating to individuals who have met the standard requirements by fully qualifying (in the UK); and authorisation relating to individuals who require a waiver or exemption from the standard or 'usual' requirements. It is worth considering each of these – and the differences in the way the functions are carried out – in more detail.

### Entity authorisation

2.2      Entity authorisation has been in place since January 2015. In that time, less than 50 applications have been received and processed. Applications for authorisation are assessed by staff members, who decide whether authorisation should be granted, granted with conditions or refused. There are a number of mandatory criteria to be met before an entity can be authorised. There are also discretionary criteria – against which applications are judged on a case-by-case basis. The Supervision Committee provide guidance and oversight for this work, but the decision making is by staff members.

2.3      Any requests for review or appeals against the first instance decision (FID) will go to the Qualifications Committee. So far, there have been no such requests – which is unsurprising since there have been no refusals of applications as yet.

2.4      At present, managers are satisfied that the process is operating effectively. There is clear guidance and operational process documentation and a forensic, in-depth approach is taken to analysing applications. Where risks are identified in accepting an application, further information and assurance is sought from the applicant to mitigate that risk. Service targets (to complete the process within 6 months at most) are being met, except in instances where there is a significant delay on the part of the applicant in providing required additional information.

2.5      The current process requires that all proposed decisions to refuse authorisation are first checked with the relevant manager. As stated above, this part of the process has not yet been exercised, since there have been no refusal decisions. However, because of the small volume of applications it has been possible for managers to be involved and to give direction where further information may be required from the applicant to mitigate a potential risk.

2.6      Plans are already in place to introduce a process for quality assurance of positive entity authorisation decisions. This will involve a 10% sample of successful applications being scrutinised by the Supervision staff and/or managers not directly involved in entity authorisation. The introduction of this audit process should provide assurance that entities who do not fit the criteria are not being authorised inappropriately.

2.7      Given the relatively young age of the entity authorisation process – and the small number of applications received to date – it is impossible to provide categorical assurances about the effectiveness of the process at this stage (some elements of the process have not yet been used in practice). However, the process has been developed under the eye of the Supervision Committee, it is well-documented, targets are being met and there are plans to introduce a comprehensive audit /

quality assurance check. The Board may wish to receive regular updates on the work being carried out in entity authorisation over the coming months.

2.8 For the primary purpose of this report, the important thing to note is that current entity authorisation procedures have FIDs made by staff, with the review / appeal route being via the Qualifications Committee.

## Individual authorisation through the 'standard' route

2.9 This is the route to authorisation - and practice - for those applicants who have a UK law degree, have completed the Bar Vocational Course and pupillage and in all other ways meet the usual academic and training requirements. For these individuals authorisation is more or less 'automatic', provided they are admitted to membership of an Inn of Court (see below). Decisions to grant authorisation are made by BSB staff. Again, the review route is via the Qualifications Committee (although this is seldom exercised given the straightforward nature of the decisions being made).

2.10 At present, no audit is carried out – again because of the straightforward nature of the decision. Any erroneous refusal of authorisation would presumably lead to a request for review and an overturning of the decision by the committee. It is difficult to see how an erroneous decision to authorise an applicant might arise. All applicants must register their pupillage at the outset and then provide a certificate of completion (signed by the pupil supervisor) with their authorisation application. With around 500 applications per year – and approved supervisors allowed only one pupil at a time – anything 'untoward' would likely be spotted by the BSB staff processing an application.

2.11 If the BSB were concerned about any remaining possibility of fraudulent applications, it would be relatively easy to add in another process step so that a BSB member of staff would contact the pupil supervisor direct in every case to confirm that pupillage had been completed and that the signature on the application form was indeed theirs. This would amount to 500 minor transactions per year, so whilst not without some cost, this would be minimal.

2.12 Where the BSB does differ from other UK regulators in this respect is in the effective 'outsourcing' of decisions about good character to the Inns of Court. All other UK regulators will make their own character checks before registering or authorising the individual in question (although often these may amount to little more than a self-declaration of any criminal convictions or cautions and/or sanctions by other regulators). It is not the primary purpose of this report to question this procedure, although it would be remiss not to point out the anomaly in the way the BSB carries out this function, particularly since it may be felt that this carries an element of risk in that the BSB is not wholly in control of access to its own register.

2.13 The authorisation process appears to be well-documented. There is, at present, no service target (or KPI) for processing these applications, which I assume is because they are straightforward and there has been no issue in the past with any backlog or delay in the applications process. As an aside (it not being the primary focus of this report), the BSB may wish to introduce performance targets in this operational area so that any possible problems in future are identified and addressed as early as possible by the relevant managers. If performance in this area is and has been uniformly good, it would not do any harm for the BSB to be able to demonstrate that statistically.

2.14 Again, the important point to note in terms of the primary question for this report, is that FIDs in this authorisation 'route' are for BSB staff and any appeal or request for review is again to the QC. The complicating factor is that the QC therefore operates as an appellate body for BSB staff decisions (albeit very rarely) and also for decisions by the Inns of Court to refuse membership (and therefore, by implication, authorisation). I will return to this issue later when discussing the pros and cons of doing away with the QC as the route of appeal in these circumstances.

### Individual authorisation through the Qualifications Committee route

2.15 For European or foreign applicants, for solicitors wishing to become barristers and for those applicants who require an exemption from, or waiver of, the usual academic or training requirements, authorisation can only be granted after consideration through the Qualifications Committee (QC) route. In essence, the FID in these cases is made either by a QC Panel or by BSB staff in the Qualification Regulations team acting on delegated authority from the QC (staff have been making decisions on delegated authority in this way since May 2014). In 2015, 739 (or 58.2%) of these decisions, out of a total of 1270, were made by BSB staff without referral to a QC Panel (around 40% of decisions were made by staff in 2014). I will return to this theme later in the report (see Section 5 in particular) – suffice to say at present that the QC has already delegated the majority of decision-making to BSB staff (albeit in the most straightforward cases). The route of appeal against these decisions is through the full QC itself.

2.16 It is worth noting here that the Panels and BSB staff make decisions across a very broad spectrum – not all related to individual authorisation. Panel 1 makes decisions about applications from: foreign lawyers; European lawyers; legal academics; solicitors and those wish to be granted temporary authorisation (amongst other things). Panel 2 deals with requests for dispensation from – or reduction in – the usual pupillage requirements. Panels 3 and 4 (which have been amalgamated) essentially consider requests about variance in the usual CPD requirement and applications for variance in the practising rules (so, they make decisions about existing barristers who are already authorised). Panel 5 deals with applications: from organisations who wish to become authorised pupillage training organisations; and from existing training organisations who wish to have exemptions from the usual rules around pupillage funding and/or advertising (so, decisions about organisations rather than individuals). Panel 6 handles applications for exemptions from the usual academic stage requirements. In 2015, BSB staff made some decisions in all of these areas with the exception of that covered by Panel 5, where all 62 decisions were made by the Panel itself. Of the other Panels, staff made more decisions than the Panel itself in the areas covered by Panels 1, 3/4 and 6. In Panel 2's area, staff made just over a quarter of all decisions, with almost 75% of decisions remaining in the Panel's hands.

2.17 The reason for setting out in detail above what each Panel does is simply to draw attention to the fact that some of the decisions made by the QC Panels – or BSB staff acting on delegated authority - may, effectively, deny an individual access to the profession (usually quite rightly, one would hope), which is extraordinarily significant for that individual and may be said to impact their fundamental human rights. Other decisions may simply have the effect of requiring an individual to undertake more training courses than they may have wished, or to sit a test (in the case of applications from overseas) which they may not have wished to sit. Although these decisions of course should not be taken lightly, they might be considered less impactful. This may be important in terms of how appeals against those decisions are considered and I will return to this theme later in the report.



2.18 The evidence suggests that Panel decisions are robust and well-reasoned. QC members who offered a view in response to this review were all convinced that their Panel's decisions were largely sound and that the quality of debate and discussion in the panel meetings was extremely high. If it could be argued that this might be expected (given the individuals' membership of the Panel), their opinion is supported by the statistics. In 2015, there were 1270 decisions on applications through this route, of which, only 27 (or just over 2%) were appealed to the full QC (the QC considered 29 appeals, but one related to a decision by the Inns of Court and one related to a decision made by the BSB's Records Office). The previous year saw 34 appeals to the QC (one re: a decision by the Inns of Court) on 1420 decisions (at a rate again of just over 2%).

2.19 The evidence also suggests that decisions made by staff in the Qualification Regulations Team (on delegated authority from the QC) are robust. This might be expected given that these decisions are at the more straightforward end of the spectrum (they may often simply be a question of whether or not the applicant has in fact done X or Y) and lend themselves to the establishment of simple criteria. The guidance for staff making these decisions is therefore relatively simple and there is not a great deal of judgement to be exercised on each case. There have been no appeals (to the QC) in recent years about these staff decisions, nor have any been challenged through the Courts. The team's manager also checked all staff decisions between May 2014 (when staff began making decisions in this area) and May 2015 - and since then has carried out an audit of 10% of these decisions. She has found no erroneous decisions in that time.

2.20 If we turn to the work of the full QC as the appeal route in these circumstances, the picture is much the same. Those members who offered comment suggested that the work of the QC was carried out in a thorough, organised and professional manner and that the quality of debate and discussion was invariably high. My own observation of the QC in action – albeit only at one meeting – confirmed this view. At that meeting, it was clear that all members were encouraged to contribute and that they did so. Dissenting voices were very much taken into account, discussion was thorough and well chaired and decisions were only agreed once a consensus had clearly been reached. The reasons for the decision were reiterated and agreed and, where appropriate, the committee were very clear about how their reasons should be recorded and conveyed to the applicant. Again, the statistics clearly support the view that the QC is making robust and clearly explained decisions. There was one appeal to the High Court against the 34 QC decisions made in 2014. This appeal was dismissed and the decision of the QC upheld. As yet, there have been no appeals to the High Court against the 29 QC decisions made in 2015. There is no doubt then that the QC, as the route of appeal, delivers high quality outcomes. This might be taken as an argument that the QC should be retained (in some form) to continue carrying out this function. I will return to this later in the report, but suffice to say for now that the question is not about the quality of QC decisions but about whether the QC is the 'gold-plated Rolls Royce' option for a function that could be equally well carried out by a less resource intensive (and speedier?) alternative.

2.21 Whilst this process clearly differs from other authorisation decision making, in that the FIDs are made by both Panels and BSB staff rather than by staff alone, the historical reasons for this are reasonably clear. Other individual authorisation decisions are straightforward and can be made against very clear guidance and easily interpreted criteria. The same is true to a great extent in entity authorisation. By contrast, the decisions made by the QC's Panels rely to a greater extent on judgement and are usually more complex.

2.22 That said, some of the Panels' decisions do appear to be relatively straightforward. Panels 5 and 6 – dealing with organisations providing (or applying to be authorised to provide) pupillage training and with academic stage exemptions appear to refuse a significant proportion of

applications. The others panels appear not to do so, which might be taken to imply that these decisions are relatively clear and straightforward in most cases (at least in so far as an absolute refusal is concerned).

2.23 There has also been a concerted effort over the last few years for the Panels to document the criteria that they use in making these judgements and to set down a framework of procedural guidance. This guidance would generally appear to be comprehensive and clear, although it is fair to say that some Panels may have found it easier to establish clear criteria for decision making than others. A fully comprehensive set of guidance, with clear decision making criteria would enable the BSB to move to a position where FIDs are made exclusively (or almost exclusively) by BSB staff. That said, given the disparities in the approach taken by the different Panels, I would suggest that it may be useful for the QC (before its dissolution or transition to a new form) and senior BSB staff to review the position and ensure that the guidance framework covers every type of decision made by the Panels in sufficient depth and detail to allow for clear interpretation and robust decision making by the staff empowered to make these decisions in future.

2.24 In terms of the implications for the issues which are the primary focus of this report, it is obvious that the clearer and more robust the guidance for decision makers, the more likely they are to be able to give comprehensive, logical and incontrovertible reasons for their decisions – and the less likely they are to want to have the fall-back of relying on a panel or committee to make decisions in the more complex cases. This should in turn reduce the opportunities for applicants to make (reasonable) appeals. And it should, at least in theory, make the consideration of any such appeals easier (and less likely to require a panel or committee).

## Summary - authorisation decision making (first instance decisions and reviews)

2.25 For our current purposes, it is important to be absolutely clear about the functional mechanisms, in the three identifiable streams of authorisation activity, for making first instance decisions (FIDs) and for reviewing those decisions.

2.26 In both entity authorisation and the 'standard' individual authorisation route, FIDs are made by BSB staff members, against clear guidance and criteria (agreed by the Board). Reviews or appeals against FIDs are via the full Qualifications Committee (QC), although these are extraordinarily rare. By contrast, for those applications considered through the QC route, FIDs may be made either by Panels of QC members or by staff members (on delegated authority). Reviews and appeals are again via the full QC – although in this case, whilst still relatively small in number, they are a more regular and routine occurrence.

2.27 The inconsistency in the way applications are handled is entirely understandable historically – with the more complex decisions gravitating to Panels – but may be entirely addressed if the Board were to decide that FIDs should in future be made entirely by staff members (see Section 5 below for detailed discussion of this issue).

2.28 The primary questions for this report are:  
whether the QC or Panels (or something like them) should make any FIDs at all (in the most complex cases); and  
whether the review / appeal route via QC (whether in its current form, and/or through panels rather than the full committee) should be retained.

## Section 3 Comparison to other Regulators

3.1 Before we turn to a comparison with other Regulators, it is worth bearing in mind that the BSB itself makes other decisions which have similarly significant impacts on the individual professionals concerned - in particular, at present, in Enforcement. As I understand it, the Board are to consider separately a proposal from Enforcement managers primarily about the future role and structure of the Professional Conduct Committee (PCC). That proposal, will address the current review mechanism in Enforcement (the 'comebacks' system). This system broadly relies on senior staff to consider requests for review of FIDs, although they will currently seek advice from members of the PCC where necessary and will refer a case back to the PCC if the FID was made by the PCC and if re-consideration is merited (if there is new information or good reason to believe that the original decision was flawed).

3.2 I also understand that the BSB is to introduce, during 2016, the proposed Quality Assurance Scheme for Advocates (QASA). Appeals against decisions made as part of this scheme (as to whether advocates should be accredited at various levels) would be to an Adjudicator drawn from a panel which is to be established by the BSB.

3.3 The table below sets out in (fairly crude) summary form, the decision making and internal review arrangements currently in place (or planned) for BSB functions and within other Regulators, in terms of who makes FIDs and who considers reviews / appeals against them. In essence, appeals are considered either: by the operational staff group in which the original FID was made (usually, by a specified senior manager or by the staff member at the next level of seniority above the person who made the FID); or by an individual, panel or committee who are appointed for that and/or other specific adjudicatory purposes (and who play no part in the operational teams who might make the FID). Regulators refer to the latter type of decision-maker by various names – adjudicator, panellist, committee member – and the relationship between the organisation and the decision maker may differ (they may be full-time employees, part-time employees, contractors paid according to work undertaken or associates of one form or another) - but the key to understanding the role (whatever the title given) is that these are decision makers who are intentionally and clearly separated out from the operational teams who carry out the relevant function.

3.4 As the Table shows, there is a fairly even split between Regulators whose FIDs are made entirely by staff and those whose FIDs can be made either by staff or by Panels / Adjudicators. For the latter group, the Table is something of an over-simplification. It is worth bearing in mind that where FIDs are made by staff *and* others, often Panels / Adjudicators are involved because staff choose to refer complex or difficult cases to them (on a case by case basis). This puts the onus clearly on the staff members involved to determine the appropriate 'route' for the decision. By contrast, the BSB's system relies on the clear delegation of authority from the QC to staff to make very specific categories of decision.

## REVIEW / APPEAL MECHANISMS – COMPARISON

NOTE: according to the colour coding below, yellow background indicates wholly staff decisions, light orange indicates decisions by both staff and adjudicators / panels / committees, and dark orange indicates decisions not made by staff.

	PROCESS	FIRST INSTANCE DECISION	INTERNAL REVIEW/APPEAL	INDEPENDENT REVIEW
<b>BSB PROCESSES</b>	ENFORCEMENT (PROPOSED)	STAFF / PANEL	STAFF (staff FIDs) PANEL (Panel FIDs)	YES - COURTS
	QASA (PROPOSED)	STAFF	ADJUDICATOR	NO?
	CURRENT QC PROCESS	STAFF / PANEL	COMMITTEE	YES - COURTS
	OTHER AUTHORISATION	STAFF	COMMITTEE	YES - COURTS
<b>OTHER LEGAL REGULATORS' AUTHORISATION PROCESSES</b>	SRA	STAFF / ADJUDICATOR(S)	ADJUDICATOR(S)	YES – COURTS (if SRA exhausted)
	CILEx REGULATION	STAFF	APPEALS PANEL	YES - COURTS
	IPRB	STAFF / BOARDS	BOARD (+ ADJUDICATOR)	YES - COURTS
	CLB	STAFF (CEO)	PANEL	YES - COURTS
	CLC	STAFF	PANEL	YES - COURTS
<b>HEALTHCARE REGULATORS (MAINLY)</b>	MOST REG / AUTH PROCESSES	STAFF	APPEALS PANELS / ADJUDICATORS	YES - COURTS
	GMC FTP PROCESS (R.12)	STAFF	STAFF	YES - COURTS
<b>ACCOUNTANCY REGULATORS' AUTHORISATION PROCESSES</b>	ACCA	STAFF / COMMITTEES	APPEALS PANEL	YES - COURTS
	ICAEW	STAFF / COMMITTEES	APPEALS PANEL	YES - COURTS

3.5 It is a simplification to put the authorisation procedures of all healthcare regulators (of which there are eight) into one category. There are differences in the various schemes, but broadly speaking, FIDs are made by staff and any review of a FID is by an appointed Panel (or individual).

3.6 The GMC's Rule 12 scheme – which relates to review of Fitness to Practise (FTP) decisions – is included in the table above simply because it does demonstrate that it is perfectly possible - legally and operationally – to have a scheme whereby staff decisions are reviewed by more senior staff within the same operational unit (usually, in that case, at Director level at least). It may also be worth mentioning here that in most, if not all, Ombudsman services, FIDs *and* any reviews are

carried out by staff members. This again sets a precedent that the BSB might wish to follow, although it is perhaps true that the Ombudsman services are not directly analogous to professional Regulators and that the decision makers are most often not involved in the day-to-day operational management of the investigatory function of the organisation concerned (there is, in other words a separation of functions between investigation and decision making).

3.7 Where reviews are carried out by Panels / Committees, the extent to which there are hearings (as opposed to consideration on the papers), the extent to which those hearings are held in public and the extent to which they are governed by specific procedural rules differs from organisation to organisation.

3.8 It could be argued that the BSB stands at the more 'conservative' end of the spectrum in terms of how FIDs are made. In common with some other Regulators, some FIDs are made by Panels rather than by staff members. And whether staff or Panels make these decisions is dictated by a clear and specific scheme of delegation, rather than by staff choosing whether to request consideration by the Panel or Adjudicator.

3.9 It is also apparent from consideration of the Table that if in future all reviews were to be carried out by operational staff alone, that would make the BSB something of an outlier – although the GMC's Rule 12 process does indicate that there is a precedent for this kind of arrangement, within professional regulation, which has worked successfully. Most, if not all, other Regulators' authorisation review processes involve consideration by at least a single Adjudicator if not, more usually, by a Panel or Committee. Single Adjudicators making these decisions, as per the BSB's current plans for QASA appeals, are in evidence at the SRA (where reviews may be carried out by a single Adjudicator or by a Panel of Adjudicators depending on the circumstances), the Healthcare Professionals Council (HPC) and, arguably at the Intellectual Property Regulation Board (IPRB), where an Adjudicator is involved only if the appellant remains unsatisfied after a review by the Board itself (it is arguable that this process is only sustainable due to the relatively small size of the regulated population).

3.10 Of course, being an 'outlier' is not necessarily a bad thing. One man's outlier is another's pioneer. Logically, any true progress in the field of regulation would be impossible if no organisation were willing to implement innovative processes or structures. That said, there are political risks in taking a new (or nearly new) approach, for example in terms of the organisation's credibility with its stakeholders. For the BSB, if a 'pioneering' approach were taken to the process for review of authorisation decisions, it would be important to ensure that the reasons for this were communicated very well to the profession, the wider public and the Legal Services Board. It also goes without saying that it would be more important than ever that the new processes were implemented successfully – and demonstrably so.

3.11 One of the other potentially interesting features of other Regulators' systems is that some organisations – notably CILEx Regulation, the Association of Chartered Certified Accountants (ACCA) and the Council for Licensed Conveyancers (CLC) – maintain Appeals Panels that consider appeals against decisions made in any of that organisations' functions (enforcement, authorisation and/or elsewhere). This provides an interesting model for consideration given that the BSB is currently reviewing its governance structure as a whole and is about to introduce QASA and potentially to reform its enforcement procedures (around the PCC stage).

## Section 4 Regulatory Best Practice

4.1 There is much published advice available for Regulators about best practice. In their 2000 publication *Five Principles of Good Regulation*, the Better Regulation Executive (BRE) suggested that regulation should be proportionate, consistent, targeted, transparent and accountable. These principles were reiterated by the Professional Standards Authority (PSA), which oversees health and social care regulators, in their 2010 publication *Right Touch Regulation*. The PSA added that regulators should be agile – i.e. able to anticipate change in their sector and respond accordingly. The BRE expanded its advice in its 2014 *Regulators' Code*, which clarified that regulatory activity should be proportionate to the identified risk, should be outcomes-focussed and should not impose unnecessary burdens on the regulated community. The Legal Services Board have also clarified their view. In their 2014 report on the legal regulators, the emphasis was on proportionality, assessment of risk, focus on outcomes and appropriate enforcement strategies.

4.2 This guidance should be borne in mind when we consider best practice in regulatory decision making (in terms of both first instance decisions and review / appeal). The guidance suggests that decisions should be based on an assessment of risk and focus on the likely outcomes of the process in question. This should mean that scarce resources are targeted at those practices, individuals or organisations which present a risk to the public – and that Regulators should avoid building costly or complex procedures to deal with decisions that will have little or no impact on public protection.

4.3 We can also assume that those scarce resources should also be used as efficiently as possible to deliver quality outcomes (in terms of public protection). This is supported by the BSB's own current governance review, which has proposed a number of guiding principles, including that decisions should be made at the most efficient and cost effective appropriate level; and that decisions must be made consistently and to a high standard.

4.4 Whilst there is no definitive guidance here on exactly how authorisation decisions should be made and/or how review and appeal processes should work, the published advice and guidance does give us a framework against which to judge any current or proposed model for carrying out those functions.

4.5 The Legal Services Board has no specific published guidance on how *internal* review / appeal mechanisms should operate. However, in considering how its own internal review process should work, the Board will wish to bear in mind the LSB's publication, in March 2014, of its report *Regulatory Sanctions & Appeal Processes: an assessment of the current arrangements*. This sets out the LSB's view that any decision by a Regulator which might, "... amount to a determination of a person's civil rights, which includes the right to practise one's profession" (paragraph 3.27) should be open to appeal to an entirely independent body (although the specifics are not important in terms of our current considerations, their recommendation was that the First Tier Tribunal should be the route of appeal against any such decision by a Regulator). The definition of the type of decision which should be open to such an appeal route would certainly cover the majority of the BSB's enforcement and authorisation decisions, which might in effect restrict access to – or continuation of – rights to practise as a barrister.

4.6 In terms of the BSB's authorisation processes, the LSB's broad requirement that all such decisions should be open to an appeal via an independent route is already satisfied (if not in the exact way that the LSB might prefer) – by dint of the fact that these decisions can be appealed to the High Court. Given that there are no plans for the BSB to deny applicants this access to the Courts (by seeking to make their own internal review decisions final and un-appealable), the LSB's views should not be taken as a call to do away with internal review processes altogether. It would be perverse if

the BSB were not able to correct its own 'errors' (in light of new information or simply on the basis of a second look at what would appear to be an unjustified or irrational decision) and avoid the cost, delay and drain of resources (for both sides) of having to go through the courts to get a decision reversed.

4.7 That being the case, the principles that the LSB seeks to uphold, by ensuring access to an independent appeal route – i.e. that processes should be fair, open, transparent and effective – should undoubtedly be manifest in any internal review mechanism that might precede recourse to the Courts.

4.8 In summary, taking all of the relevant published guidance into account, it is clear that any internal review / appeal process put in place by the BSB should be: fair, open and transparent; consistent; effective; outcomes-focussed; and, as importantly, proportionate to the risk which might be manifest in an uncorrected erroneous first instance decision (in this case, the risk that an individual might be wrongly denied access to their chosen profession). It is also clear that this review mechanism cannot be seen as an alternative to High Court appeals, but rather as a first means of attempting to resolve any issues satisfactorily before any recourse to the Courts.

4.9 Finally, the Board will also wish to bear in mind the LSB's previous criticisms of the BSB's governance and decision making arrangements. In essence, these were largely pointed at the fact that many of the BSB's governance structures were over-complex and reliant upon the involvement of large numbers of barristers (the regulated profession). This might suggest that the LSB would find the continuation of a large Qualifications Committee (with large numbers of barristers and/or a wider role than purely decision making) unhelpful – even if it were only to function as an appeal panel. More broadly, the BSB might be seen as an outlier, in terms of the broader regulatory field, if it were to maintain a decision making committee (in the QC) with as many as 21 members. Individual case decisions made by committees or panels of that size are now extremely rare in UK regulation and tend to be regarded as potentially cumbersome and inefficient.

## Section 5 Options for the future

### Complex case decision making

5.1 As identified above (paragraph 1.6), there are two separate elements to the issue I am asked to consider in this report. I will deal first with the question of whether the QC or its panels should be retained, in some form, to make decisions in complex cases. To an extent, this is what happens in the current process (see paragraph 3.4 above), with staff making the most straightforward decisions (usually where there is little or no discretion once the mandatory requirements have been met by the applicant) on delegated authority from the QC. In 2015, around 58% of the relevant decisions are made by staff members (with a 10% sample of those decisions subjected to a retrospective audit carried out by the Qualifications Regulations Manager to ensure quality and consistency – see paragraph 2.19 above). However, my assumption is that if the QC (and/or Panels) are to be retained in future to make complex decisions, the intention would be to bring about a further shift in the balance of decision making, such that the QC / Panels would be involved by exception and only in the most difficult and complex cases.

5.2 This question has to be considered against the background of the wider governance reform programme at the BSB. As part of this, the Board has already agreed: that regulatory case decisions should be made at the lowest appropriate level commensurate with sound, fair and transparent decision making; that such decisions should be made by staff members (rather than panels or committees) wherever possible; and that any committees should be the minimum size possible to maintain quality. The Board has also agreed to the establishment of an Advisory Pool of Experts (APEX), which will be independent of the Board's governance structure and will provide BSB staff with independent advice and expert input when required, on both policy development and on individual cases.

5.3 Against this background, it would arguably be perverse to retain the QC (in whatever form) to make decisions on individual cases, however complex they might be. Well-trained and motivated staff, with access to independent expert advice via APEX, should be capable of making first instance decisions on all authorisation cases without recourse to the QC or a QC Panel.

5.4 Staff decision making at the FID stage would also be in line with the majority (though not all) of the other professional regulatory bodies in the UK. Certainly, in those Regulators which deal with larger numbers of cases, there is a predominance of entirely or mainly staff-based decision making regimes (see Section 3 above).

5.5 There are, of course, risks associated with this approach. A number of those involved in the current process with whom I have discussed this work do have concerns, which appear well-reasoned and supported by some evidence, about whether the infrastructure is currently in place to allow the staff group to take over making these decisions in an effective and robust manner. There are also questions raised about whether the current staff group (taken as a whole) have the capability and/or inclination to take on this responsibility.

5.6 It is beyond the scope of this review to make a complete assessment of the current readiness of the staff group to take on this work. To an extent, the evidence that has been given to me is anecdotal, but it does seem that there is a concern - amongst both some QC members and management within the relevant departments - that there has been, in some quarters and at some times, a 'dependency culture' at the BSB and that *some* staff members have been happy to operate



in an environment where any remotely difficult or contentious decisions are 'pushed upwards' to senior managers or, more likely, to panels, committees or office holders. Again, any in-depth assessment of whether and to what extent such a culture exists at the BSB is beyond the scope of this report. It may be that it is more in evidence in relation to the work of some QC Panels than others. However, it would seem from the evidence I have that there is at least a risk here that should not be left unattended.

5.7 I am assured by the Directors of Supervision & Authorisation and Education & Training that this issue is recognised by the BSB and that a plan of action to address it is agreed - and has been shared with the Board (this is again set out in the covering paper accompanying this report). This will involve an element of re-structuring, with all authorisation work being carried out within the Supervision & Authorisation Directorate, where staff will be expected to demonstrate the flexibility to operate effectively in different areas of the operation. It also involves a transformation programme, through which current staff will be assessed and developed so that they have all the necessary skills, capabilities and support to give confidence to the Board that they are competent to make the relevant decisions.

5.8 It seems to me that to pursue the alternative course – and allow complex first instance decision making to remain in the hands of committee or panel members – would only serve to perpetuate any tendency amongst some staff members to rely too heavily on direction from senior managers and/or committee members. Any such tendency runs counter to the aims of the Board's governance reforms, which seek to place decision making in staff hands wherever possible. The Board may also wish to bear in mind that FIDs will be reviewable / appealable by one means or another (see below) and that any mistakes can therefore be corrected – and can, perhaps more importantly, be used as a stimulus for learning and improvement.

5.9 In this context, my recommendation would be that all first instance authorisation decisions should be made by BSB staff, supported and advised by their managers where appropriate, and by experts drawn from APEX where necessary. The responsibility to make decisions would then rest squarely with empowered staff members, who would be able – and encouraged – to ask for support and advice only where they think it is required.

5.10 I have no doubt that work is already underway to mitigate the risks associated with this change, given that it was already agreed that the majority of authorisation decision making should move to the staff group. However, for the sake of completeness, I would recommend that the Board ensure that:

- a. they receive regular updates on the transformation programme currently being carried out to ensure that staff are capable – and willing – to make all FIDs;
- b. APEX is developed and implemented effectively, with relevant expertise available to cover all areas on which authorisation staff might require advice;
- c. an appropriate and proportionate quality assurance programme is developed and implemented, so that the quality and consistency of staff authorisation FIDs can be monitored and promoted;
- d. the current guidance documents and decision making criteria agreed by the QC and its Panels are reviewed for completeness and effectiveness (to ensure that there are clear criteria for decision making to cover the work currently carried out by *all* Panels) and are then used by staff in making authorisation FIDs;

- e. an effective review / appeal mechanism is introduced to ensure that, where appropriate, erroneous FIDs can be corrected speedily and without undue bureaucracy (see below);
- f. that responsibility for the quality of FIDS – and for improving the decision making process in response to QA findings, reviews which identify an error or other information – is clearly allocated within the management structure of the Supervision & Authorisation Directorate.

## The route for reviews and appeals

### The nature of the review / appeal

5.11 When considering the best route for reviews of, or appeals against, authorisation FIDs, it is important to recognise that the applicant / appellant ultimately has the option of making an appeal to the High Court. It is this that provides the truly independent review that, as the LSB argues (see paragraphs 4.5ff above), guarantees the civil rights of the individual concerned.

5.12 The question for this report then is not about that entirely independent review / appeal process, but about the *internal* review that might take place before recourse to the Courts is necessary. This is, in effect, an opportunity for the BSB to recognise that the original decision it made was wrong (either in and of itself or in light of new information) and to put that right – without the need for both parties to involve themselves in a time-consuming and resource intensive Court process. The internal review process should be as complex / involved as is necessary to serve that purpose, but should not involve unnecessary – and disproportionate – bureaucracy, or place unnecessary burdens on either the appellant or the BSB.

5.13 It is also important to keep in mind the size and nature of the ‘problem’ that is being managed through this process. In the last two years, the QC has considered only 63 appeals against authorisation decisions (a rate of around 2.6 per month). Two of these concerned refusal of membership by the Inns of Court, almost all of the rest were about decisions made by the QC’s panels (with appeals against staff decisions being extremely rare). Although each case has to be considered carefully and fully – and is extremely significant to the individual involved – this is not an area of the BSB’s operations that need consume large amounts of staff or committee member resource. This will remain the case even if there is an upturn in the number of requests for review which will almost inevitably follow any radical change to such a process (particularly if that change moves decision making from panels / committees to staff). Even if the requests for review were to double (unlikely if the mitigation around the risks associated with the change are managed effectively – see paragraph 5.10), that would mean an average of just over 5 reviews per month

5.14 Given that this is an internal review process, the places to which appeals might go are limited in number. In essence, reviews might be carried out by BSB staff – either within the management line of the individual who made the FID or outside of that line (to allow a degree of independence) – or by panellists, committee members or adjudicators (i.e. associates of the BSB, who do not have an operational role) – this might be the QC (or some form of it) or some other pool of adjudicators or panellists.

## Principles of best practice

5.15 Before considering these options in detail, it is worth reminding ourselves of the best practice identified in Section 4 above. The review process should be open, transparent and fair - the appellant should feel that he or she has had an opportunity to put his or her case to the reviewer(s); that the reviewer(s) are not those who made the FID; that any further information provided by the BSB operational team (which made the FID) and considered by the reviewers has been shared; that the reviewers have given the matter due consideration; and that the reasons for their decision are fully explained. The review process, in operating in this way, should be effective in delineating those decisions which should be overturned or re-made. It should also be consistent, with decisions being made against clear and accessible criteria and/or guidance. Cases should be considered on their own merits but against the background of this framework and decisions should not be – or appear to be - arbitrary or to conflict with decisions in similar cases (unless the differences are clearly explained).

5.16 On the other hand, the review process should be as quick as is commensurate with the requirements outlined immediately above, it should focus on the outcomes (rather than the process itself) and it should be proportionate to the potential risk inherent in an uncorrected erroneous decision. In line with the BSB's own governance principles, the review process should be efficient, decisions should be made at the lowest appropriate level and should be made by staff (rather than panellists or similar) wherever possible and in so far as is compatible with the requirements set out above.

## The pros and cons of staff-led reviews and of panellist reviews

5.17 The pros and cons of the two broad options available to the BSB – review by senior staff or review by some form of appellate panel or committee – can be assessed in light of these principles of good regulatory practice.

5.18 To allow all reviews to be carried out by senior BSB staff would undoubtedly be in line with the approach recommended by the principles of the Board's governance review. Committee size would be kept to a minimum (in fact, there would be no need for a Qualifications Committee at all, assuming the recommendations set out above about complex case decisions are accepted). The process would operate quickly – and with the minimum of procedural complication. Given that there is recourse to the Courts after the internal process has been completed, it might be argued that a review by the line manager (or a colleague) to correct any obvious errors and/or to give consideration to new information would suffice to provide the opportunity for the BSB to avoid unnecessary challenges in Court where the appellant clearly has a case and the original decision *should* be overturned (or re-made).

5.19 Such a staff-based review process could very easily be designed in such a way that all the requirements of openness and fairness were entirely met. The manager responsible for the review could ensure: that the appellant had an adequate opportunity to make their case through representations in writing; that all information considered as part of the review was shared with all parties; that due consideration was given to the appeal; and that any decision was thoroughly explained to all parties.

5.20 Such a process would also assist the BSB in addressing any cultural issues around staff dependency on committee or panel members, by placing the responsibility for these decisions firmly and squarely with the staff group (who would have no option available to defer to panellists and/or to push difficult or 'awkward' decisions up and out to panels or committees). It would also be in line with the current process of review in the BSB's enforcement work, which (as set out above) allows

for review of staff decisions by the next management rank above those that were involved in making the original decision.

5.21 On the downside, a staff-led review process – particularly if carried out by the line manager of the person who made the FID – might not have that degree of independence that is necessary to convince the appellants (in particular) that the review is being taken seriously. It is certainly arguable that a line manager making these decisions might be seen to have (if not to have in reality) a conflict of interests. This might work either way, with managers either: (a) tempted not to uphold too great a proportion of appeals for fear that this might show their team to be operating ineffectively in making FIDs; or (b) upholding too many appeals (at risk to the public interest) for fear of being seen to be non-independent or unwilling to identify and correct mistakes. It might not be seen as healthy to have any of these considerations in the mind of the person making the review decision supposedly purely on the facts of the case.

5.22 Relying solely on staff members to carry out these reviews may also be seen to be slightly out of kilter with the majority of other UK Regulators (see paragraph 3.4 above). There are precedents for entirely staff-led – and effective – review arrangements, particularly in the GMC’s fitness to practise work. It is also likely that more Regulators will move in this direction as their processes are modernised, and particularly if increasing workloads drive a need for greater efficiency. However, the BSB should be aware that if it goes for this option it will at the very least be in the vanguard and may, at least for a while, be seen to be an outlier when compared to the majority of other UK Regulators.

5.23 Although it may be a temporary consideration, I suspect that a number of current QC members might suggest that there are risks inherent in, at one and the same time, moving both the majority (at least) of FIDs from Panels to staff (as the Board has already agreed) and the appeal function from the Committee itself to staff. This is a valid point. Not only is there always more risk in radically changing more ‘moving parts’ of a function or process at one time, but there is also the point that, in this case, doing away altogether with the QC and its panels will lead to the total loss to the organisation of a great deal of expertise which has been built up in the membership of the QC over a number of years. That said, whilst there will always be risks inherent in a transition to a radically new approach, these need not always be seen as good arguments against the proposed change per se, but rather as warnings that the change needs to be managed effectively – and possibly over a greater time period.

5.24 Nonetheless, retaining some form of appellate panel or committee (in whatever form – and I will return to this later in the report), at least in the short term, will put the BSB’s review processes more in line with the majority of other UK Regulators. It would also potentially allow the retention of at least some of the expertise which currently resides in the Committee’s members. A panel process would lend itself very well to meeting the requirements of fairness and openness. It would also perhaps be more convincing for appellants in terms of the degree of independence of the reviewer from the original decision maker.

5.25 There are potential disadvantages to a review process that is *entirely* panel-based. Not least, there might be a risk of delay and/or an overly bureaucratic process (particularly in cases where the original decision was clearly in error or where genuinely new information has come to light).

5.26 That said, there is one other very specific reason why it might be advisable to retain some form of panel or committee to make at least some review decisions. As mentioned above, the current QC not only acts as the route of review for authorisation decisions made by the six QC Panels and by BSB staff, it also is the point of appeal against decisions by the Inns of Court to bar an

individual from membership of the Inns (and so deny them entry to the profession). I comment earlier in this report about the fact that 'good character' decisions, leading to authorisation by the BSB (or not), are made outside the BSB itself, but that is not the relevant point here. These decisions are currently made by the Inns of Court Conduct Committee. This Committee has 20 members nominated by the four Inns, who are either barristers or Judges. It has 10 lay members, appointed by the Tribunals Appointments Body. It meets to consider individual cases in panels of at least three members. Committee hearings are usually in public and the applicant can insist that they are present in person and heard by the Committee. Against this background, it would seem inappropriate, if not downright odd, for decisions made by the Inns Conduct Committee to be reviewed on appeal by a single member of BSB staff (however senior). Although these reviews are very small in number (there was one such appeal in 2015, six in 2014), it would be sensible to retain a panel of some sort to hear them.

## Section Six Recommendation

### A hybrid approach

6.1 If it is accepted that it is sensible for the BSB to retain some form of panel to hear appeals against decisions of the Inns of Court Conduct Committee, then this brings with it the possibility that that same panel might be used to consider some other appeals or reviews, in clearly defined circumstances, whilst leaving open the option that senior staff members might be perfectly well placed to deal with others. In this way, the BSB might be able to benefit from a hybrid structure which might not only bring the best of both worlds (staff-led review and panel-led review), but might also allow effective mitigation of many of the risks associated with either approach (if they were to be adopted in 'pure' form).

6.2 Allowing senior staff to make review decisions alone, in cases where they felt this to be appropriate, but to revert to the proposed panel for a decision, where that was appropriate, might bring a number of benefits. Not least, those cases where a request for review clearly had no merit could be dealt with very quickly and efficiently, as could those at the other end of the spectrum – where an error had clearly been made or new information was available which made a reversal of the original decision necessary. In essence, this would allow a very swift and flexible response on the part of the staff group in those cases where there was little doubt about which way the review should go.

6.3 Where cases were more borderline, novel, or raised issues which were of significance for the regulation of the profession, the staff member carrying out the review would refer the case to the panel for a decision.

6.4 If the Board accepts this proposal in principle, a detailed plan of action would need to be developed, both to set out in greater detail exactly how this process would work and to timetable the transition (see also Section Eight below). In broad terms though the salient features of the proposed process would be as follows.

### An Appeals Panel

6.5 There would be available to BSB staff a pool of individuals (barrister and lay) who would meet in panels of at least 3 members (with lay and barrister members and with a lay majority – or at least an equal number of lay members) to:

- (a) consider appeals against Inns of Court membership decisions; and
- (b) consider appeals against - or requests for review of - authorisation first instance decisions made by BSB staff members.

In both types of case, the Panel would consider all relevant material, make the decision and issue a determination setting out the reasons for that decision.

6.6 Where this pool of panel members would sit within the organisational structure of the BSB is a matter that requires further thought and discussion, if the current recommendation is accepted in principle. However, it seems to me that there are two broad options in the context of the other changes planned for the governance structures of the BSB.

6.7 The first option would be to retain – as an entirely separate entity – a smaller Qualifications Committee, clearly with a far narrower functional brief than the current QC. Given the size of the proposed panels and the likely volume of business (even if the number of requests for review were to rise significantly in the wake of the introduction of the new FID making regime), it is unlikely that the BSB would need to engage more than 7 or so individuals to carry out these functions. If this were the chosen option, then the BSB might recruit afresh to the proposed QC pool (I suspect a number of current QC members would make excellent candidates if they could be persuaded to apply). Alternatively, to smooth the transition and possibly as a temporary measure before a recruitment exercise further down the line once the process is established, the BSB might consider co-opting current QC office holders and/or panel chairs or members to carry out this role (if they were willing to do so).

6.9 The second option might be for the BSB to follow the example of other UK Regulators - CILEx Regulation, the Association of Chartered Certified Accountants (ACCA) and the Council for Licensed Conveyancers (CLC) – and establish a centralised Panel that might make decisions and/or consider appeals in any of the organisations’ functions. This Panel might then provide a route not only for appeals against authorisation decisions but also for appeals against decisions made in the Quality Assurance Scheme for Advocates (QASA), for example, and/or make decisions in the BSB’s Enforcement work (whether FIDs or appeals). It might be argued that the qualities required to make all of these judgements are similar, if not the same – panellists would require excellent analytical skills, a logical and organised approach, an ability to work in small groups to come to decisions, and the ability to explain in writing the reasons for decisions made in often very complex and difficult cases. This option has the added attraction of making the organisational structures as simple as possible. In making this point, I fully realise that the structures and processes in Enforcement are themselves being reviewed at present and that changes in this area may make this suggested amalgamation of functions inappropriate.

6.10 Of course, it would be perfectly reasonable for the Board to conclude that the first option (a smaller QC) should be implemented in the immediate future – allowing perhaps for a less complicated and smoother transition – whilst nonetheless agreeing that the amalgamation of this decision making function with others should be considered at an appropriate time in the future.

### **Review process and decisions to refer to the Appeals Panel**

6.10 In the spirit of the Board’s expressed wish to reduce the work of BSB committees (or panels) to a minimum, and to place decision making in the hands of BSB staff wherever possible, the decision to refer an appeal (against an authorisation decision made by BSB staff) to the Panel would be made – against very clearly defined criteria - by managers within the operational teams. Appeals against Inns of Court Conduct Committee decisions would, of course (see the rationale above) be automatically put before a Panel.

6.11 There would essentially be a three stage decision making process within authorisation. The first instance decision (FID) would be made by the appropriate BSB operational staff member. The vast majority of these would, of course, be uncontroversial and would go unchallenged. Audit and QA regimes would be in place to ensure consistency and quality in decision making by staff members (see above).

6.12 Where a request for review of the FID were received, the second stage would be for a BSB manager to consider that request. This would be the line manager of the person who had made the original decision, if he or she had not been involved in any way with the FID. If they had been involved, then the request would be considered by another manager within Supervision &

Authorisation. The BSB would need to support - and potentially develop – managers in making these decisions. Guidance should be developed - and followed (and audits should be carried out to ensure that decisions were in line with that guidance). Managers should also be allowed to request (and receive very quickly) legal advice – either from the BSB’s internal legal team or from outside the organisation, where necessary – and/or expert advice from a member of APEX.

6.13 At this (second) stage of the process, Managers would consider the review request against an established set of criteria. Whilst these would need to be worked out in more detail before the proposed process is implemented, they would essentially allow review where:

- (a) relevant new information had come to light which would call into question the original decision AND/OR the original decision was palpably in error;

AND

- (b) it would be in the public interest to carry out a review (taking into account, amongst other things, the impact of the decision on the applicant concerned).

[NOTE: the Board may wish to bear in mind that the BSB has legal advice (obtained in 2012 from Richard Drabble QC of Landmark Chambers) that, to paraphrase, *under the current process*, an appeal should lead to a re-hearing of the case (and not to a decision about whether the original decision was within the bounds of reasonableness). Assuming the Board accepts the recommendation of the Report as it stands, it would be necessary to put the nature of the proposed review beyond doubt as and when Rules are amended – as they will need to be in any case if the role of the QC is to be removed or substantially changed.]

6.14 This would allow the manager in question to filter out and close down (without recourse to the Panel) all of those review requests which provided no new information and/or had no merit. This decision would be made against clearly established criteria, set out in guidance – and again, all such decisions should be subject to rigorous quality assurance. Full explanations for such a decision would of course be provided to the applicant.

6.15 At this stage, managers would also be empowered (again without recourse to the Panel) to amend or reverse decisions where there was a clear error in the FID or where new information made it absolutely apparent that the FID should be reversed or amended. Again clear criteria and guidance would need to be available to the managers making this decision and decisions should be subject to appropriate quality assurance to ensure that the framework was being followed.

6.16 The final option, in cases which could be determined by the relevant manager against the established filtering criteria, would be to refer the matter to the Panel for a decision. It might be expected that any case which was novel, and/or borderline, and/or raised significant regulatory issues would be referred to the Panel.

6.17 In my view, however, whilst the established criteria for this filtering process might require referral to a Panel on the grounds of novelty or regulatory significance, or where the case is borderline, they should not do so on the grounds (alone) that the case is complex (or involves voluminous paperwork). The BSB staff group should have the capability – and resource – to deal with complexity without recourse to committee or panel members. I refer earlier in this report (see 5.7 above) to assurances given to me that there is in place a programme to ensure that the staff group has the capacity and capability to make all FIDs and to be the first stage in this proposed review process.



## Summary

6.18 In summary, under the proposed process, all requests for review of an authorisation FID made by the BSB will be considered by suitably trained and senior BSB staff. They may - where appropriate, according to criteria to be established before implementation - make a decision themselves either that the appeal has no merit and should not be referred to the Panel or that it is clear that the original decision is palpably erroneous and should be reversed (without referral to the Panel). In all other circumstances, cases will be referred to an Appeals Panel made up of suitably qualified lay and barrister members, which will decide whether or not the appeal should be upheld. That same Panel will also consider appeals against decisions made by the Inns of Court (relating to Inn membership). In all of these cases, the Panel will issue a determination explaining its reasoning.

6.19 The Board may also wish to consider establishing a formal means of monitoring activity around reviews, with reporting back to the Board itself. If it then became apparent that the proposed Appeals Panel was not active in a great number of cases, or that its decision were in effect very straightforward in most cases (to the extent that clear and simple decision making criteria could be developed), then thought could be given to moving to an entirely staff-led review decision making regime at some point in future.

## Costs comparison

6.20 For the current process, member fees and expenses associated with QC and QC Panel meetings, for the 12-month period 1 December 2014 to 30 November 2015, were as follows:

**Full QC:** 7 meetings, total fees/expenses £8,835.34, so average cost of meeting: £1,262.19

**Panel 1:** 7 meetings, total fees/expenses £2,038.50, so average cost of meeting: £291.21

**Panel 2:** 7 meetings, total fees/expenses £2,161.00, so average cost of meeting: £308.71

**Panel 3/4:** 9 meetings, total fees/expenses £1,759.87, so average cost of meeting: £195.54

**Panel 5:** 7 meetings, total fees/expenses £2,286.00, so average cost of meeting: £326.57

**Panel 6:** 11 meetings, total fees/expenses £3,194.44, so average cost of meeting: £290.40

That equates to a cost (of member fees and expenses only) of just over £20,300 per annum for all meetings of the QC and its Panels. It should be noted that this is – compared to the costs of other Regulators relating to similar functions – extraordinarily cheap. This is of course due to the fact that the barristers involved carry out this work *pro bono* – and a result of the fact that many of the members claim no expenses (particularly those who are based in London). That the work by barristers is *pro bono* may have equality and diversity implications, which I consider in more detail below. I should also say that it is for the Board to determine whether this situation should persist (and I believe this matter is under review), but I will attempt to comment later in this section (see paragraph 6.32) on the possible costs implications of any change in this position, at least in so far as they relate to the proposed recommendations of this report.

6.21 I am told that it is impossible at present to isolate printing and photocopying costs relating specifically to the work of the QC and its panels given that these come from a central (and

undifferentiated) BSB budget. It can be estimated that the total cost (for 50 meetings in total) is somewhere in the region of £5,000-£10,000. Estimates suggest that around 1.5 days of staff time is dedicated to preparation for, attendance at and follow-up to, each QC and QC Panel meeting.

6.22 At this point, it is important to stress that the purpose of this report is not to assess the impact of the decision already made by the Board to shift the making of the majority of the authorisation FIDs from the Panels to the staff group. In essence, then, costs relating to the Panels – and how these might compare to any additional staffing costs associated with making the FIDs are not a concern for this report. I assume that this has been dealt with elsewhere and I am told that the Board will be given a full description of the planned staffing changes at the BSB in a covering paper which will accompany this report. The only implication here is that if the Board accepts my recommendation (see paragraphs 5.9 and 5.10) that all FIDs, however difficult or complex, are made by staff (with appropriate expert advice where necessary), there would be no costs associated with retaining any of the current QC Panel activity (the resource required to replace the QC Panels in carrying out this task being provided in the re-shaped Supervision and Authorisation teams).

6.23 If we then consider the work currently carried out by the full QC in acting as the route of appeal against all authorisation FIDs, the costs associated with this particular activity (based on December 2014 to end November 2015) would be: £8,835 (fees and expenses); plus around £2,000-£3,000 (printing and photocopying costs); plus 10.5 days of staff time (at 1.5 days per meeting). This comes to a total of c. £12,000 plus staff time.

6.24 This needs to be compared to staff and panel activity under the proposed new scheme. In order to make this comparison, we need to make a number of assumptions about likely levels of appeal / review activity and the proportion of requests for review that can be determined entirely by staff members without recourse to the Panel.

6.25 As set out above, the full QC has, over the last two years, dealt with 63 requests for review of an authorisation FID (including 2 appeals against Inns of Court decisions). There were almost 2700 FIDs which went through the QC route. This low rate of appeal is no doubt due to the fact that most of these decisions are straightforward and uncontentious and to the manner in which applications are handled by BSB staff and the QC panels. As long as the quality of decision making and explanations to applicants does not drop as a result of the planned move of all FIDs to BSB staff (and it should not drop if the measures recommended above – at paragraph 5.10 – are adopted), there is no reason to suspect that the rate of appeal will increase – except in so far as one might expect an increase with the introduction of a new and as yet untested process. Nonetheless, it might be as well to make a rough and conservative assumption (precise predictions are difficult) that the rate of appeal might double – at least in the early days of the new process. If that were the case, there would be just over 60 appeals per annum, at an average rate of five per month.

6.26 It is impossible to make a definitive estimate of the amount of such appeal requests that might be determined by staff without recourse to the proposed panel. In 2013, approximately 32% of QC reviews led to some amendment of the original decision. In 2014, this had dropped to 18.5%. And in 2015, there has been a further reduction to 11.5%. It should be stressed that some appeals may have ultimately been refused, but nonetheless had some merit and/or were close to the line between being upheld and not being upheld. However, it would not be an unreasonable assumption that something like (at least) two thirds of appeals were ultimately without great merit. It might also be safe to assume that the majority of these could be picked up by managers operating the proposed procedure set out above. There would also presumably be some of the cases where the FID was reversed or amended where it would have been clear that this needed to be done. Although this is somewhat speculative and should be taken with a pinch of salt given the nature of the

underlying assumptions, it would not be perverse to suggest that at least 50% (being conservative again) of appeals might be determined by managers without the need to trouble the proposed Panel.

6.27 On the basis of those assumptions, the Panel might be asked to make decisions on a maximum of around 30 cases per annum. It would appear that, at present, the full QC handles an average of around four cases per meeting (29 appeals in 2015 and a rate of 7 meetings per 12 months). If we assume that a smaller Panel would deal with cases at the same rate (again, a conservative estimate given that a smaller Panel should in theory be able to proceed more quickly), then the new Panel might be expected to be convened 7.5 times per annum (30 appeals cases at 4 per meeting).

6.28 Given the proposed quorum for the new Panel (at least three members, at least two of whom would be lay) – and assuming that barristers continued to work *pro bono* – there would be two lay members' fees (assuming the same rate as for current QC / Panel members) at £154, per meeting, plus expenses. Looking at the levels of expenses claimed at Panel meetings (see above) by 4 / 5 members (usually 2 lay plus 2 or 3 barristers), we might expect expenses per Panel meeting to come at most to approximately £250.

6.29 On the basis of all of those assumptions, costs compare as follows:

**CURRENT FULL QC** (see paragraph 6.21)

7 meetings per year of 21 members

Fees and expenses at those meetings: £8,835

Printing and photocopying: approximately £2,500

Staff time: 10.5 days

**PROPOSED PANELS**

7.5 meetings per year of (on average) 4 members

Fees and expenses at those meetings: £4,185 (£308 fees, plus £250 expenses, at 7.5 meetings)

Printing and photocopying: approximately £500 (4 member copies as opposed to 20 at roughly the same number of cases reviewed per annum)

Staff time: 12.25 days (7.5 meetings x 1.5 days)

This amounts to a net cash saving of around £6,650 per annum, to be balanced against a loss of approximately 1.75 additional staff days (again, I am assured that this very small increase could be absorbed within current staffing levels once the Supervision and Authorisation functions are restructured, as per the covering paper to this report).

6.30 This costs analysis does need to be treated with some caution. There are a number of assumptions made which are no more than crude estimates – necessarily so in most cases, given that the proposed new process has not been trialled and there is therefore no data to work with. However, what I think becomes clear is that even if some of the estimates are wildly out, the figures involved are relatively small (although this assumes continued *pro bono* input from barrister members). On that basis, the Board might conclude that the financial implications of the proposed

change will be relatively minor. The real issue here is about the quality and speed of the process itself.

6.31 The other factor to be taken into account, of course, is that managers in the Supervision & Authorisation Directorate would, under the proposed scheme, be spending time assessing requests for review that under the current scheme simply go direct to the full QC. Again, however, the volumes are relatively small, with – according to the assumptions set out above – a worst case scenario of about 60 decisions to be made on review requests per year. Of course, these cases each have to be considered carefully and the full case papers – and representations – analysed. Given the nature of the work, however, it would be a real push to suggest that cases would take, on average, more than a day (at most) to consider. That would then amount to potentially 60 additional days of effort. However, the impact is likely to be far less, given that managers currently have to read the papers, familiarise themselves with the case and be ready to provide advice to the QC. Taking that into account, the required increase in management resource is marginal. Again, I am assured that this can be absorbed within the new Supervision & Authorisation teams, whose managers and staff will be required to work flexibly to provide resource where it is needed (see the covering paper to this report). At worst, if an additional 60 days is required, that amounts effectively to one quarter of a full time management post. Again, even if the estimates are significantly out, one might argue that the resource implications should not be the primary driver of the Board’s decision in this case.

6.32 To return very briefly to the issue of whether barristers should continue to work for the QC and its Panels on a *pro bono* basis, I should report that there is a strong feeling amongst QC members that barristers should be paid a fee, at the very least for equality and diversity reasons (see below). As set out above, this is not an issue that I am asked to consider in this report. The costs calculations above assume the status quo. It is perhaps sufficient for our current purposes to point out that if the BSB decides at some point in future to provide a fee for barristers’ work, the potential savings associated with implementation of the recommendations of this report become greater. If the current process were to persist, there would be nine or ten such fees payable per QC meeting (and 7 meetings per year). If the recommendations are accepted, then there would be one or two such fees per session (and 7.5 sessions per year).

## Equality and diversity implications

6.33 As long as the proposed new Panel’s members are recruited with Equality and Diversity (E&D) in mind, it is difficult to see any E&D implications in the proposal before the Board. However, it would be wise to carry out a full Equality Impact Assessment of the proposed new process once it is fully worked up in detail.

6.34 There is a broader issue (also mentioned above) relating to the fact that barristers involved in the work of the BSB currently provide their services *pro bono*. I am aware that the Board have recognised this issue and that consideration will be given to whether this is an appropriate arrangement in each of the BSB’s spheres of activity. It might be argued that where the time required of a particular barrister for BSB activity is extensive, then not paying a fee might have E&D implications – if, for example, some sectors of the profession were unable to contribute because of the level of their earnings. In this particular case, though, there may not be much of an issue – the proposed Panel will meet 7.5 times per year (on current estimates), with approximately half of its members attending each session. The expected commitment would therefore amount to no more than 4 or 5 sessions per year. Whilst there is significant time spent in preparation for each session, in addition to actual attendance at the meetings, giving up that amount of time is unlikely to crucially

impact on many individual barristers' ability to 'donate' that time *pro bono*. Nor would the payment of a fee even significantly higher than the fee currently paid to lay members (£154 per session – preparation time included) be likely to encourage sectors of the profession currently unengaged with the BSB to seek to become involved.

## Section Seven

## Risks and mitigation

7.1 Many of the risks inherent in implementing the recommended process and structure will be clear from the Sections above. However, it is worth setting out the major risks – and potential mitigation - separately here. If the recommendations of this report are accepted, then a detailed programme and timetable for implementation – which dovetails with other developments at the BSB – will need to be put in place by BSB managers, with Board oversight. I will deal with issues around the timing of the change below (in Section Eight), but suffice to say for now that the following Sections should be not be seen as being in any way an effective ‘substitute’ for comprehensive planning and implementation of the proposed change as and when the proposals are agreed.

### Management of the transition

7.2 This brings us very nicely to the first major risk involved in implementing the proposed change, which is essentially that the transition is not managed effectively and that either the new systems are simply not ready to operate at the agreed time and/or they operate ineffectively. It should be stressed that this is a very real risk in any organisation which tries to implement reasonably radical restructuring and/or process change whilst relying entirely on existing operational management resources to carry out and manage the change. As ever, whether this can be achieved successfully will depend upon the extent of the changes being made and the extent to which current management resources are fully occupied in keeping the current process running effectively to deal with current and anticipated demands. I am not in a position to make this judgement for the BSB, but I assume that this issue will be covered in the covering paper which accompanies this report. It may well be that there is sufficient management resource in place in key areas to handle both management of the current workflows and management of the change, but the Board will wish to be assured of this – and would be well advised to keep this under review as the change programme is implemented.

7.3 Members of the Board will be entirely familiar with the steps which should be taken to mitigate this risk. If the recommendation is accepted, the next step will be to agree a change programme brief, with clear aims and a timetable. Clear lines of responsibility for delivery will need to be delineated – with executive roles clear, as well as defined programme sponsor(s) and a board to oversee the programme as a whole (I would recommend that this should involve one or more BSB Board members). This programme should then be run in accordance with accepted programme and project management principles. Risks and issues should be identified and kept under constant review. A detailed timetable should be agreed, with dependencies identified and milestones set. The frequency and route of reporting of progress should also be established. It should be clear how authorisation is agreed to regard stages in the programme as completed and to move on to the next stage of the development.

## Staff capacity and capability to make review decisions and run the process

7.4 It is broadly accepted by the QC members and BSB managers to whom I spoke during this review, that the current BSB staffing and structure would not have the capability to run the proposed new process without a degree of development, training, recruitment and re-structuring. These matters are dealt with in the covering paper to this report, which sets out how the BSB intends to build and develop this capability over the coming months. Before outlining possible other steps to mitigate this risk, it may be worth reiterating that the risk is not, in a sense, spread evenly across the QC Panels' activities. It may be much more of an issue with the work carried out by those particular Panels where it has so far been difficult to delegate decision making to staff members (as set out above at paragraph 2.16, this applies especially to Panels 2 and 5).

7.5 Much of the mitigation against this risk is set out in the paper accompanying this report. It should also be noted that the recommended process in itself contains something of a safeguard against the risk, in that it is proposed that staff should, in appropriate cases, refer cases to the proposed review / appeals Panel.

7.6 Beyond the development of the staff group and the proposed re-structuring (covered in the accompanying paper), other mitigation against this particular risk would include:

- (a) ensuring that the procedural guidance for staff (including criteria for decision making) is clear, comprehensive and to the point (I recommend above that guidance around all FIDs should be reviewed and agreed by the QC before the new process is introduced – this may help to keep in check the numbers of requests for review - but there should also be similarly clear and comprehensive guidance in place around the review process itself);
- (b) ensuring that the proposed Advisory Panel of Experts (APEX) includes a number of individuals who might be called upon to advise staff both in making FIDs (again reducing the risk of appeal) and in considering requests for review (the Board may wish to give some thought to whether QC Panel members who have built up expertise in this area might be invited to join APEX – perhaps especially those who have been members of Panels 2 and 5);
- (c) implementing, as part of the planned BSB-wide Assurance Framework, a comprehensive, documented and regular programme of quality assurance of the decisions being made by staff as part of the review process (I suggest a similar step in terms of FIDS earlier in this report), with reporting of results through to BSB managers, to the Audit Committee which is proposed as part of the wider Governance reforms, and through them to the Board itself).

7.7 I would also recommend that, as part of the plans for the transition, the BSB conduct a pilot to test – and improve where necessary – the proposed staff-led review process. Whilst it is not for me to determine the detail, it would perhaps be perfectly possible to include a three-month pilot period within the programme plan for the implementation of the proposed changes. This period would, of course, need to be followed by a review – and adjustments if necessary – before the scheme were introduced in full. This might involve, once all other development work (for example on guidance and staff development / re-structuring) were completed, joint running of the new scheme alongside the old. In effect, for that period, staff would be asked – as part of the usual preparation of review case for QC - to make a (mock) decision and to set out their reasoning (as they would need to do if the new process were to be fully introduced). This might then be compared to the actual outcome of the QC's consideration of the case under the current process. Data – and case

studies – might then be derived which would inform BSB managers and the Board of any further work required before the new scheme were fully implemented.

## External credibility

7.8 There is a risk that, if not managed effectively, the proposed changes might lead to a loss of credibility with the BSB's main 'constituencies'. These might be considered to be: the wider regulatory world (including primarily the Legal Services Board); the general public (users of Barristers' services); and the profession itself. Losing credibility and suffering reputational damage with any of those constituencies is to be avoided and the BSB should be slow to introduce any change which might lose to loss of confidence on the part of any of those groups. In this particular case, although some members of the public might, if asked, express concerns about the loss of an 'independent' (i.e. non-BSB staff) lay voice in some decision making on reviews, the main risk might be that the profession sees any move to more staff-led decision making as a false step. Whilst not many would now argue that professional regulation should be entirely led by the professionals, it is broadly accepted that professional input is required in order to ensure that the regulator retains knowledge and expertise in how the profession operates in practice.

7.9 Of course, this does not necessarily mean that in order to retain credibility, the BSB needs to involve a barrister in every decision. Part of the mitigation against this risk will be to ensure that sufficient explanation of the proposed changes is given to all constituency groups, including barristers. This might make it abundantly clear that the BSB staff members making these decisions will have access to professional and other expertise - through APEX - and that they will refer appropriate cases to the proposed Appeals Panel for a decision. The existence of the Appeals Panel, in and of itself, may also help to convince any doubters that the proposed system has sufficient robustness and a 'safety net' for staff to refer cases where decisions are borderline and/or difficult.

7.10 The steps to be taken to ensure a successful implementation of the new system (as described above) – if carried out effectively *and* publicised appropriately – might also help to convince all of those with an interest in the work of the BSB that the new decision making regime is being implemented in a thorough and effective manner and that the quality of decision making will not suffer as a result.

7.11 The Board may wish to suggest that BSB managers develop a specific communications plan (as part of the wider programme plan), which might seek to identify the best means to get across messages about the benefits of the proposed new arrangements. This might involve the use of any or all of: the website; social media; printed communications; presentations etc.

## Volume of review requests

7.12 It is possible that the number of review requests would exceed the numbers forecast (very roughly) above in Section 6 (paragraphs 6.20-6.29). Although it seems reasonable to suggest that, if the implementation is managed effectively (with appropriate information provided to applicants as well as other groups), the number of requests for review should no more than double, this is very much an assumption – and cannot be based firmly on any data analysis, given that the proposed process has not yet been piloted or run in reality. Some Regulators have, in the past, experienced unpredicted increases in case workloads – on occasion partly fuelled by, for example, mis-information put out through the internet, or by a belief amongst the population affected that some



change in process might work to their benefit. Whilst there is no reason to suspect that something of that nature might happen in this case, it might be as well for the BSB to make contingency plans to deal with unexpectedly high number of review requests at some point following the introduction of the new process.

7.13 As set out above, the real resource required in dealing with these review requests is more to do with intellectual capacity than with volume. The very worst case scenario set out above suggests that it might require one day of senior management effort to deal with one review request. A swift calculation would show that, even against that worst case, and even if requests ran at four times the already doubled number assumed as part of the calculations set out so far in this report (see Section Six), that would require only approximately one additional management post to be created to deal with the unexpected influx of requests. The numbers of review requests being received should, of course, be monitored very closely as and when the new procedure is implemented, but the Board may feel confident that a contingency budget provision for one additional member of staff (at the appropriate grade) would be sufficient to cover all possible eventualities.

## Complexity

7.14 There is a perfectly reasonable argument – particularly at a time when the BSB has been criticised by the LSB for ‘over-bureaucratic’ processes – that the regime set up for review of authorisation decisions should be as simple as possible (i.e. should have as few steps or stages as is commensurate with achieving quality in decision making). There can be no doubt that the simplest solution in this particular case would be to have all FIDs and review decisions made by BSB staff (with access to expert advice – from APEX – where appropriate). This solution would certainly make for a ‘cleaner’ governance structure.

7.15 As discussed above though, it would be very difficult at the present time (and unless and until the Inns of Court ‘good character’ decisions are made by some other means) to do away completely with any form of appeals panel. If that is accepted, then the ‘cleaner’ governance structure is out of reach in any case (at least in the short term). It is also my view that an appeals panel such as the one recommended at Section Six (to hear Inns of Court appeals and to make decisions in other appropriate cases) does bring advantages – again, at least in the short term. It does represent a less radical departure from the current position (so minimising some of the other risks associated with the move from the current process), it allows a ‘fall back’ and support for the staff group as they take on greater responsibility, and it may well make the new regime easier to ‘sell’ to external interest groups – especially the profession itself.

7.16 Mitigation against this risk comes again in a clear and well-publicised rationale for the proposed changes, which can be used to handle any potential criticism of over-complexity. There is also here an imperative for BSB staff not to over-use the Appeals Panel and to refer cases to the Panel only where the guidance and criteria suggests it. Again, the BSB will need to monitor this situation – both through the suggested pilot phase (asking staff members to record when they would – hypothetically - have referred a case to the panel) and through the implementation of the process into operational practice. As mentioned above (paragraph 6.19), it may be that over time, with careful monitoring and management, the BSB could move to simplify the process by removal of the Panel option (except in Inns of Court appeal cases). It is a matter for the Board and for BSB management as to whether they regard this as a goal, for which they should explicitly aim.

## Section Eight The transition – interdependencies and timetable

8.1 It should be clear that any implementation plan for the proposed changes would involve a number of discrete tasks which would need to be completed before the new process began to operate. The BSB would, for example, need to: change the statutory framework, rules and standing orders, where necessary; review and sign-off decision making guidance for staff; set up, as part of the proposed Quality Assurance Framework, quality assurance systems so that effectiveness and quality in the new process were properly monitored – and reported; implement comprehensive data collection and reporting processes in respect of the new decision making regime; establish (recruit and train etc.) a pool of Appeals panellists; and, if my recommendation is adopted, pilot the new scheme by parallel running with the current system for a period of time.

8.2 The examples of tasks given above are – intentionally – all, in essence, internal to the specific change (implementing a new authorisation decision review process) itself. They are not things which the BSB is hoping to achieve for other reasons and they are not independent of this specific change programme. If all of the tasks which are a prerequisite of introducing the proposed new regime were of this nature, then it would be relatively easy to recommend a specific timetable - with a start date immediately after the Board's agreement to the proposed changes and with a target end date.

8.3 However, in this case, there a number of interdependencies between this particular change and wider developments at the BSB. In particular, it would not be possible to implement the proposed new process at all unless and until APEX is in place and operating effectively (at least not unless the BSB wished to introduce some interim solution to allow staff members access to expert advice). It would also be at the very least extremely unwise (if not impossible) to implement any new scheme before the on-going review of staffing capacity and capability (described in the covering paper to this report) were complete, or before the governance reforms more broadly had established QA and audit reporting routes through the proposed new Audit Committee. If the Board also wish to explore the possibility of a single Appeals Panel to assist with not only authorisation decision reviews, but also with other areas of the BSB's work, then there is another set of interdependencies.

8.4 It is beyond the scope of this report to attempt to set out a timetable for delivery of those wider developments on which this particular proposed change may depend. For that reason, it is impossible at present for me to define a timetable for delivery of the proposed new authorisation decision review process. I assume that the BSB has a centralised and integrated overall plan for delivery of the wider governance changes which will implement the desired move to smaller and/or fewer committees and more staff decision making. That being the case, further work needs to be done to integrate the proposed change into that wider programme plan - and then to present the Board with a timetable for delivery.

8.5 All of that said, it may be appropriate to conclude with a reiteration of the steps which such a timetable should include.

8.6 First, all of the risk mitigations set out in Section Seven above will need to be in place before significant progress is made with implementation. As set out in more detail above, these will include:

- (a) establishment of an agreed programme plan, with all interdependencies taken into account, and with an appropriate management and oversight structure;

- (b) ensuring that there is sufficient management resource assigned to that plan;
- (c) including in that plan an on-going assessment of the risks associated with the changes;
- (d) agreement of the staff development plan set out in the covering paper with this report;
- (e) finalisation of guidance and criteria for decision making in the relevant processes;
- (f) effective establishment of APEX, to ensure the expertise available covers all relevant areas and is easily and quickly accessible;
- (g) establishment of effective quality assurance around decision making and process;
- (h) sufficient piloting of the proposed new scheme;
- (i) agreement of a communications plan associated with the changes;
- (j) agreement of a contingency plan for resourcing the work associated with appeals if and when the number of review requests increases.

8.7 The Board may also wish to consider whether a step-by-step approach to the proposed changes is appropriate. For example, it would be possible to gradually move the work of the QC Panels (making FIDs) to the staff group over a period of time. Those Panels where staff already make the majority of decisions – or where there is completely comprehensive and detailed guidance on decision making – might pass full responsibility for FIDS to staff earlier than those which currently make all or most decision themselves and/or where the guidance is less developed. This might provide an opportunity to test the new process in the safest territory first and to make adjustments if necessary before rolling the new scheme out in possibly more difficult areas.