

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

Modernising regulatory decision-making

Consultation Paper

8 March 2018

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Modernising regulatory decision making

About this consultation paper

Who is it for?

This consultation will be of interest to consumers of legal services, members of the Bar, and bodies and individuals involved in regulatory disciplinary systems.

What is its purpose?

We are seeking views on planned changes to the way in which we handle incoming information about those whom we regulate, including the creation of a Centralised Assessment Team, and our approach to independent decision-making, which involves the creation of a new decision-making body.

How long will the consultation run for?

The consultation will run for 12 weeks from **8 March 2018 to 31 May 2018**.

How to respond to this consultation

Responses should be sent to Jake Armes, Projects and Operations Officer:

- by email to: consultationresponses@barstandardsboard.org.uk; or,
- by post to: **Professional Conduct Department
Bar Standards Board
289 – 293 High Holborn
London, WC1V 7HZ**

You are welcome to address all or some of the issues set out in this paper and also to provide observations on issues not specifically covered by the questions.

Responses can also be provided by telephone by prior arrangement. Please contact Jake Armes at the addresses above or on **0207 611 1444** to arrange a suitable time.

We will summarise the responses received and will publish the summary document on our website. If you do not want your response or a summary of it published, please make this clear to us when you reply.

Introduction

1. As part of our ongoing work to modernise the way in which we regulate the Bar, the Bar Standards Board (BSB) is planning significant changes in our approach to regulatory decision-making. We are intending to reshape the way in which we handle incoming information about those whom we regulate and reshape our approach to independent decision-making. The plans are designed to ensure that our regulatory decision-making reflects good practice, is risk-based and where appropriate, independent of the profession and the Executive of the BSB. We are confident that the changes will allow us to regulate in a more efficient and modern manner, consistent with our governance principles.
2. The plans set out in this paper reflect the programme of work outlined in our 2016-19 Strategic Plan in which we committed ourselves to: *“centralising work to assess incoming information and reports about activity in the profession and market as a whole”* and *“aligning regulatory decision-making to the Regulatory Objectives more consistently and clearly through improvements to the governance of independent decision-making”*. The changes in our regulatory approach therefore focus on:
 - a. Ensuring that incoming information is captured and assessed consistently by creating a centralised function, the Centralised Assessment Team, to act as the single point of contact for incoming information; and by reframing our relationship with the public by removing the distinction between “complaints” and other types of information received, to allow for a more holistic approach to addressing concerns about those whom we regulate; and
 - b. Modernising our approach to regulatory decision-making by creating a single body, the Independent Decision-Making Body, which will be responsible for taking all regulatory decisions that require independent input.
3. The rationales for these changes are set out in the relevant Parts of this consultation paper. They stem from our need to update our regulatory systems to ensure we are carrying out our regulatory functions in accordance with our statutory regulatory objectives¹ and the regulatory principles set out in the Legal Services Act 2007². Those principles include the requirement that our regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed³ and also that they take account of best regulatory practice.

¹ Section 1(1) of the Legal Services Act 2007

² Section 1(3) of the Legal Services Act 2007

³ Section 28(3) of the Legal Services Act 2007

4. To ensure that we are regulating in line with the regulatory objectives and principles we adopt a risk-based approach to our regulation which means that we identify the risks that could prevent the regulatory objectives from being met and then focus our attention on those risks we consider pose the biggest threats to the public interest.
5. Our approach to risk has matured in recent years and is set out in three published documents: our Risk Framework⁴; our Risk Index⁵; and our 2016 Risk Outlook⁶. We now need to take the next step in developing our risk-based approach by ensuring that risk is applied consistently to regulatory decision-making across the organisation and that we take a more joined-up approach to risk assessment. We believe we can achieve this by centralising our functions for handling incoming information and creating a Centralised Assessment Team. Part 1 of this paper provides more information on the rationale for, the functions of, and the implications of, creating this Team.
6. We have also, since 2014, been carrying out a review of our governance arrangements with a view to ensuring independence from the profession in our approach to regulation while maintaining appropriate and essential input from the profession in shaping our strategy, policies and carrying out our day to day work. Independence in our regulatory activities is not only good practice but required under the Internal Governance Rules set by the Legal Services Board⁷.
7. So far, the outcomes of our Governance Review have resulted in substantial changes to the structure of our governance arrangements, which have included: separating policy making functions from decision-making functions; reducing the number of Committees involved in our regulatory regime from eight to four; and creating a better demarcation between Executive and non-Executive functions.
8. However, we need to go further. The next stage of our Governance Review has looked at our arrangements in relation to our regulatory decision-making functions as carried out previously by the Qualifications Committee and currently by the Professional Conduct Committee. These Committees have provided excellent, expert and high-quality decision-making for many years. However, their size and the way they operate is no longer compatible with best regulatory practice.
9. We have already disbanded the Qualifications Committee and replaced it with three-person Authorisations Review Panels, drawn from a larger pool of

⁴ Our Risk Framework is a summary of how we identify and manage risks in the legal system. See:

https://www.barstandardsboard.org.uk/media/1751663/bsb_risk_framework_16pp_5.4.16_for_web.pdf

⁵ Our Risk Index catalogues the risks we have identified in the market that could result in poor outcomes for the public and consumers. See: https://www.barstandardsboard.org.uk/media/1751667/bsb_risk_index_12pp_5.4.16_for_web.pdf

⁶ Our 2016 Risk Outlook is a forward-looking report which highlights the biggest risks we identified to the regulatory objective in 2016. See: https://www.barstandardsboard.org.uk/media/1751659/bsb_risk_outlook.pdf

⁷ http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/Internal_Governance_Rules_Version%203_Final.pdf

reviewers recruited for the purpose. We now intend also to reform our enforcement decision-making by disbanding the Professional Conduct Committee and creating a single body to take all regulatory decisions requiring independent input i.e. the Independent Decision-Making Body. Part 2 of this paper provides more information on the rationale for, functions of, and implications of creating this new Body.

10. The plans set out in this paper for reshaping our approach to handling incoming information and our regulatory decision-making processes have already been researched and considered extensively by the BSB. The Board has already made a commitment in principle to create a centralised assessment function; and to provide independent decision-making by means of smaller decision-making panels taken from a larger pool of decision-makers appointed for that purpose. Nevertheless, in seeking views, the BSB is still open to considering other options if there are compelling reasons to do so that we have not already considered. So before implementing the proposed new approaches, we want to seek views on whether there are any substantial concerns about the proposals in this paper and whether those proposals could be refined to make the revised systems more effective. We also need to make substantial changes to our regulatory framework to put the changes into effect and we are seeking views as to whether the amendments to the framework (Standing Orders and BSB Handbook Regulations) adequately support our proposals. Part 3 of this paper sets out the detail and rationale for the proposed amendments and the revised regulations can be found in Annex 2.

11. An overview and summary of the proposed changes, as compared to current decision-making systems, are set out here. These pages are intended to be a starting point for consultees in considering the detail contained in the other parts of this paper.

The current system	The proposed system
<p>Information received by the BSB is dealt with differently according to the way in which it is received, it may have to be considered by more than one part of the BSB which duplicates effort and causes confusion (eg information received on a complaint form must be handled in accordance with the Complaint Regulations but the same information could be dealt with as a supervisory matter if not received that way).</p>	<p>The centralised assessment function will perform all initial assessments of incoming information and will decide which parts of the BSB should receive the information for any necessary regulatory action. No separate handling of, or reference to, “complaints”.</p>

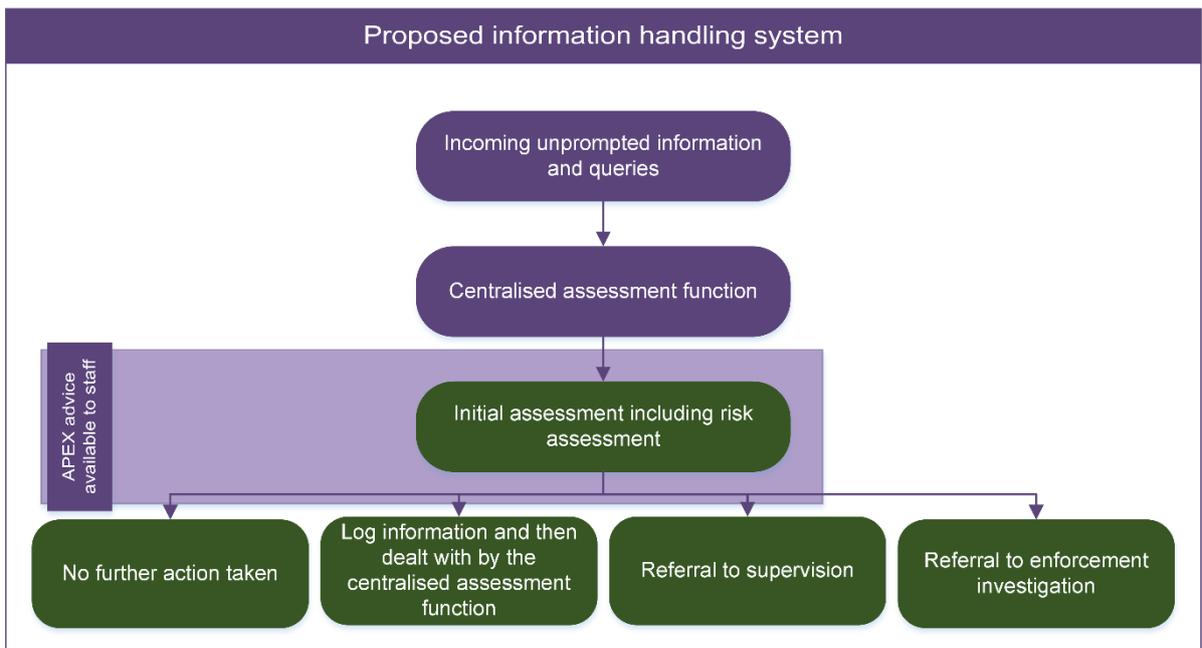
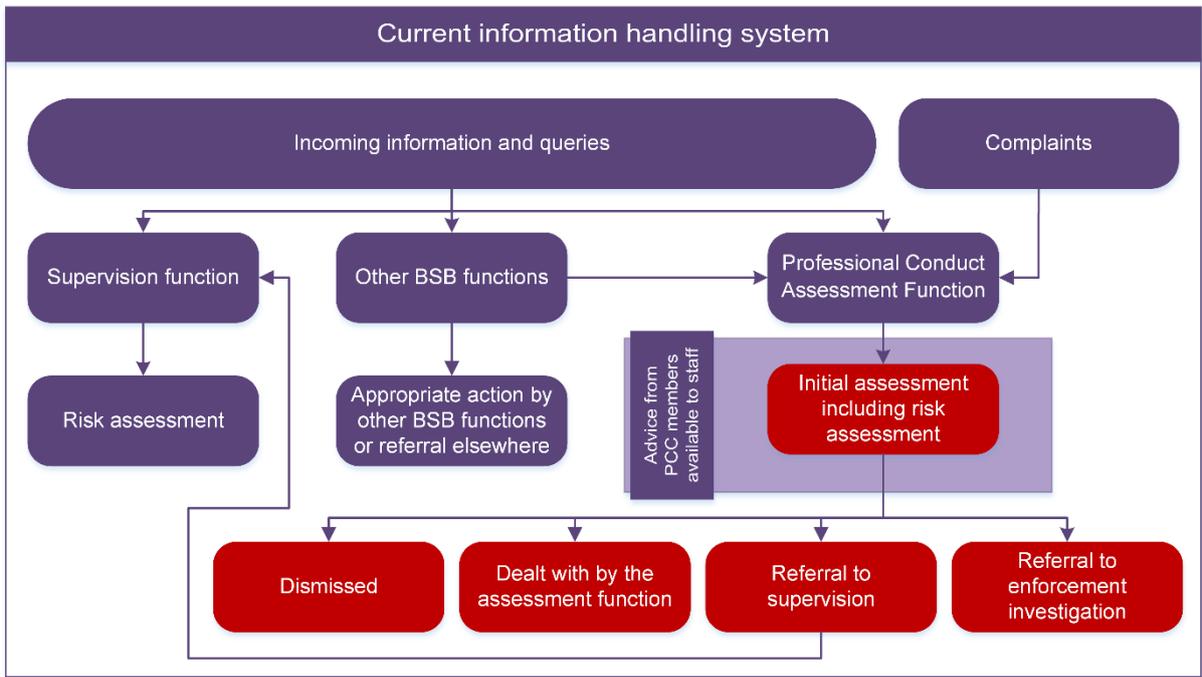
Power to take initial decisions on “complaints” vested in the PCC but actually taken by the Executive in nearly all cases	Power to take initial decisions vested in the Executive with appropriate quality assurance mechanisms in place.
69% of post investigation decisions taken by the Executive in 2016-17. More serious or complex cases referred to PCC.	Majority of post investigation decisions taken by the Executive with advice from APEX where needed. More serious or complex cases referred to IDB.
Authorisations Review Panels (ARP) decide authorisation appeals with advice from APEX when needed	IDB decides authorisation appeals with advice from APEX when needed
PCC has 32 current members (19 lay and 13 barristers, with more barristers currently being recruited) divided into two teams each having a lay majority.	IDB pool has 30 members (20 lay and 10 barristers). Membership will be kept under review and more recruited if needed. Panels of 3, 5 or 7 members, depending on complexity of case, drawn from the pool to take decisions and always maintaining a lay majority.
One team meets every three weeks.	An IDB panel meets once a week or at least once a fortnight.
<p>PCC’s two teams of half the membership decide:</p> <ul style="list-style-type: none"> - administrative sanctions - final decisions under the Determination by Consent procedure - whether to refer allegations of professional misconduct to disciplinary action following investigation 	<p>IDB panels decide:</p> <ul style="list-style-type: none"> - administrative sanctions - final decisions under the Determination by Consent procedure - whether to refer allegations of professional misconduct to disciplinary action following investigation

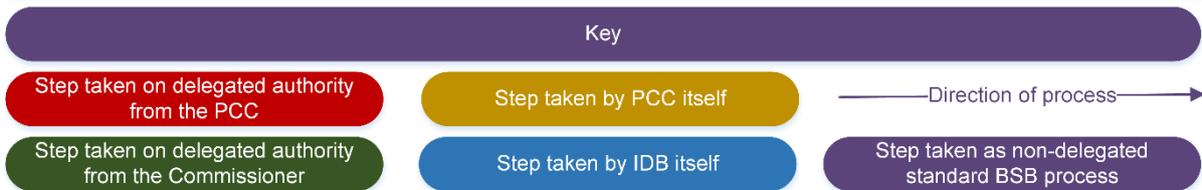
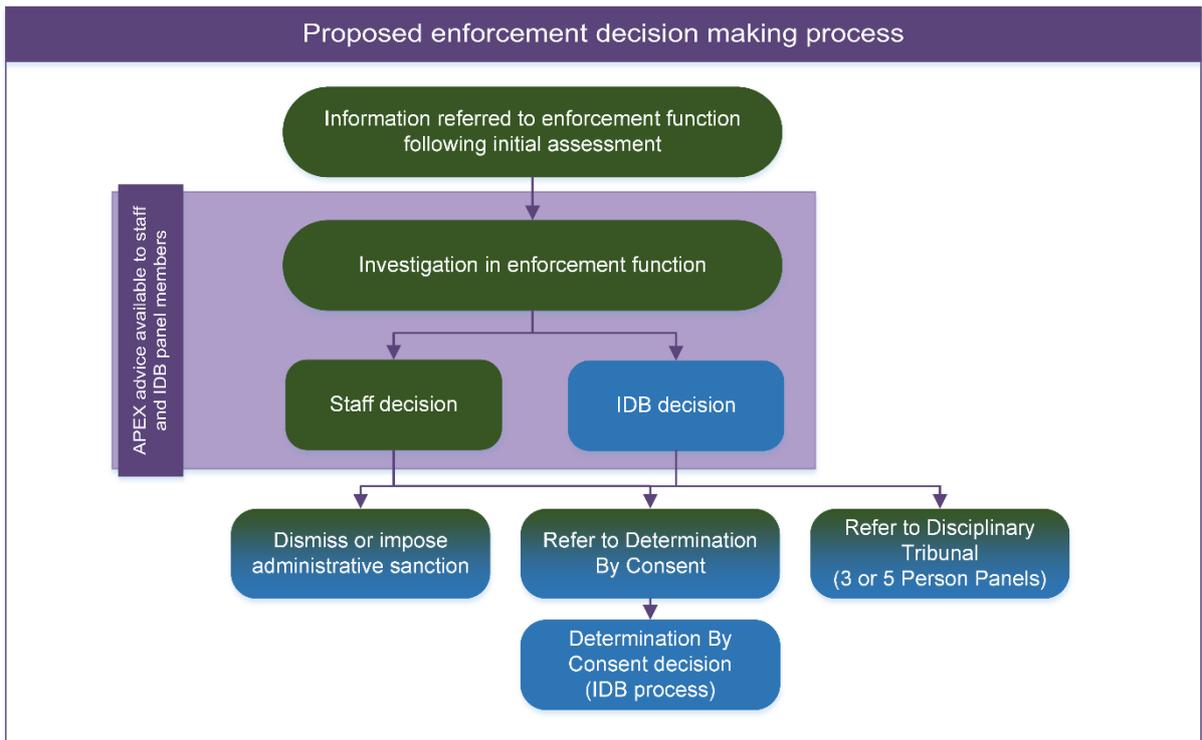
	<ul style="list-style-type: none"> - appeals on waiver and authorisation decisions⁸ - appeals against decisions to authorise entities - appeals against Inns of Court Conduct Committee decisions
Chair of PCC can be lay or barrister	Chair of IDB can be lay or barrister
Chair of PCC can order immediate interim suspensions	Chair of IDB can order immediate interim suspensions
PCC members receive summary case reports (previously prepared by a PCC member but now successfully piloted prepared by Executive). Full file available on request.	IDB panel members receive summary case reports (prepared by Executive with expert advice from APEX where needed) <u>and</u> a copy of the full case file.
Large panels make taking part by phone or video conference difficult	Smaller panels and enhanced technology make taking part by phone or video conference much easier
Large panels mean detailed reasons for decisions are difficult to agree and record	Smaller panels mean detailed reasons for decisions are easier to agree and record
Identity of the subject of an allegation and of the information provider anonymised	Identity of the subject of an allegation but not the information provider anonymised
Final decisions on disciplinary sanctions in more serious cases made by independent 3 or 5 person panels (with lay, barrister and sometimes judicial members) in usually public hearings	Final decisions on disciplinary sanctions in more serious cases made by independent 3 or 5 person panels (with lay, barrister and sometimes judicial members) in usually public hearings

⁸ These appeals are currently considered by Authorisations Review Panels but were formally considered by the Qualifications Committee.

provided by the Bar Tribunals
and Adjudication Service (BTAS)

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Structure of this paper

12. This consultation paper is divided into four Parts:

Part 1 – A Centralised Assessment Function – covering the rationale for the creation of a centralised function for handling incoming information and setting out the proposals for how it will operate as well as the implications of creating the Team.

Part 2 – The Independent Decision-Making Body (IDB) – covering the rationale for the creation of a single body for taking all regulatory decisions that require independent input and setting out the proposals for how the body will operate as well as the implications of creating it.

Part 3 – The Regulatory Framework – covering the amendments required to our regulatory framework to support the proposals in Parts 1 and 2.

Part 4 – Quality Assurance and Equality and Diversity – covering the quality assurance mechanisms we intend to put in place to ensure our revised approach is robust and the equality and diversity issues raising from our change in approach.

Questions

13. We are seeking views on five questions which are set out at the end of each Part of this paper:

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

Part 1: Question 2 – Do you have any views on the proposal to move from the concepts and terminology of complaints, to the concept of “receiving information”?

Part 2: Question 3 – Do you have any views on the proposals for, and future structure and functioning of, the Independent Decision-Making Body?

Part 3: Question 4 – Do you consider the revisions to the Standing Orders, the Enforcement Decision Regulations and the consequential changes to the BSB Handbook will be effective in supporting the change in our approach to regulatory decision-making?

Part 4: Question 5 – Do you consider the changes in approach to our regulatory decision making could create any adverse impacts under the Equality Act 2010?

Part 1 – A Centralised Assessment Function

14. This Part of the consultation paper: sets out the rationale for the BSB's proposal to create a centralised assessment function in the form of a Centralised Assessment Team; provides details of how we propose the team will operate; and, looks at the implications of adopting this new approach.

Rationale for creating a centralised assessment function

15. As outlined at paragraphs 4-5 above, the BSB takes a risk-based approach to regulation and in doing so we try to focus our resources on the areas of risk that represent the biggest threats to the public interest. Our Risk Framework, Index and Outlook provide a coherent and robust structure to manage risks but we now need to ensure that this structure is applied consistently across all our functions and our regulatory decision-making.
16. Since 2014, the Professional Conduct Department (PCD) and the Supervision Department (now part of the Regulatory Assurance Department (RAD)), have applied formal risk-assessment methodologies to the cases/issues they deal with. However, because each department's approach to assessing risk was developed independently, and before the BSB-wide risk approach had matured, each department uses similar but slightly different risk assessment methodologies. This can result in an inconsistent organisational view of risk.
17. Further, information about the activities of those whom we regulate can be received via multiple avenues and handled under a range of processes. For example, information submitted on a complaint form (an "external complaint") must be handled in accordance with the highly structured system set out in the Complaints Regulations. In contrast, the same information, if not set out on a complaint form, could be treated as a report and assessed as to whether it warrants the BSB raising an "internal" complaint of its own motion, or it could be treated as a supervisory matter and handled under the supervision processes.
18. Therefore, the way in which information is initially processed can be dependent on where and how it was received. In some cases, information may overlap functions and require that it is subject to initial assessment by more than one department. Although departments work closely together to ensure that information is directed to the right place and handled according to the most appropriate process, the current systems inevitably lead to duplication of work and inefficiencies. Most importantly, the different initial assessment processes we operate can cause confusion for both the profession and public.

19. As we set out in our 2016-19 Strategic Plan, we believe a better approach to handling incoming information is to centralise our current separate functions and apply one assessment process to all types of unprompted information we receive (i.e. information that we have not specifically requested). This will allow us to take a more holistic approach to handling information by capturing and addressing it in an efficient and consistent manner using one risk assessment methodology. We are confident that a centralised approach will allow us to provide a more effective and coherent service for the public and the profession.
20. We therefore propose to create a Centralised Assessment Team (CAT). Details of how the team will operate are set out in paragraphs 25-29 below. The Team will replace the current initial assessment functions performed by the Professional Conduct Department and the Supervision Team as well as taking on responsibility for handling all general enquiries about our services and regulatory remit. It will be the single point of contact for all unprompted information, including what we currently class as complaints.
21. To support this centralised and holistic approach, we also intend to remove the distinction between “complaints” and other types of information we receive (for example, reports from members of the profession in line with their reporting obligations, or referrals from within the organisation about non-compliance with regulatory requirements (e.g. failure to pay a practising certificate fee or to comply with CPD obligations)).
22. Since 2010, when the Legal Ombudsman was created to deal with complaints about the service provided by the profession, we have been prohibited, under the terms of the Legal Services Act 2007, from ordering any form of redress in response to complaints from the public. Our role as a regulator is to ensure, in the public interest, that the regulatory objectives are met, the standards of the profession are maintained, and the profession acts in accordance with the obligations set out in the BSB Handbook. However, our continued use of complaints terminology has proved confusing for the public and creates inaccurate expectations that our remit includes resolution of their personal concerns.
23. Further, the complaints process set out in the Complaints Regulations for handling what we term “external complaints” requires that having received a complaint, if we decide that it does not require regulatory action, we have to “dismiss” it. In doing so, complainants inevitably perceive that we are also dismissing the validity of their concerns. Given that over 70% of complaints are eventually “dismissed”, the current system can create dissatisfaction, misconceptions and a potentially negative relationship with the public.

24. We therefore intend to cease using the terminology of complaints but instead treat all incoming information about the profession as just that - “information” - which may or may not require regulatory action. This change in approach will allow the CAT to process all information received in the same way using the same assessment tests. In doing so we hope to create a more transparent and positive relationship with the public as well as manage expectations more effectively. The new approach will not change the types of information we will accept or the options we have to address any concerns that come to our attention. We will also continue to inform the public of what action, if any, we propose to take in relation to the information they have submitted.

The Centralised Assessment Team (CAT)

25. CAT will act as the single point of contact for all types of unprompted information and queries received by the BSB. This includes, but is not limited to:
- a. what we currently class as external complaints;
 - b. reports or concerns about Chambers, entities or members of the Bar;
 - c. reports made by members of the Bar under their reporting obligations⁹;
 - d. information obtained from public sources such as news reports;
 - e. reports from internal departments about non-compliance with practising requirements;
 - f. information about education providers and their performance; and
 - g. general enquiries about our services and regulatory remit.
26. CAT will primarily be an assessment and referral team. It will be responsible for deciding whether to refer information to other teams to take regulatory action e.g. the Professional Conduct (enforcement) or Supervision Teams. It will operate according to clear, agreed and publicly available policies and criteria for assessing information.
27. **Submission of information to CAT:** CAT will operate a system that allows all information to be submitted via “information report forms” available online.
28. **Decision-making:** the Executive will be responsible for taking decisions at the initial assessment stage although such decisions will be limited to deciding that the information *does not require* regulatory action (formal decisions *to take* regulatory action will be made by other relevant teams). In line with the BSB’s governance principles, decision-making within CAT will be delegated to the lowest appropriate level taking into account the complexity of the information. This means that trained staff members will initially assess all information without recourse to a Committee or other independent decision-maker. This reflects the current position in relation to complaints whereby 95% of initial assessment

⁹ See rules rC65 and rC66 of the BSB Handbook.

decisions are taken by the Executive under delegated authority from the Professional Conduct Committee (PCC).

29. **Support and advice:** where the information presented to CAT is particularly complex or requires specific knowledge of an area of law and / or practitioner insight, the Executive will be able to obtain advice from the BSB's Advisory Pool of Experts (APEX). This pool includes barristers, academics and commercial experts with a variety of specialisms and a diverse knowledge base. APEX's role will replace the function the PCC currently performs in providing advice on complaints at the initial assessment stage. To support the increase in demand for advice from APEX, the panel will be expanded, and new members will be recruited, or transferred from the current PCC.

Implications of creating the centralised assessment function

30. **Changes to the regulatory framework:** as the intention is to operate one central system for handling incoming information, using a separate system for handling "external complaints", as set out in the Complaints Regulations, will no longer be appropriate. Instead, all information will be handled in a very similar way to that which is currently used in determining whether the BSB should raise an "internal complaint" of our motion based on information received. The handling of "internal complaints" is only covered at a very high level in the current regulations and the detailed process is set out in publicly available policy and procedural documents.
31. We intend to replicate this approach in the new assessment system and therefore the detailed functions of CAT will not be enshrined in the regulations except for the general powers for the Executive to seek information, refer matters to other bodies and take decisions not to act on information received.
32. Also, the current Complaints Regulations vest all powers to take initial decisions on "complaints" in the PCC although such decisions are, in nearly all cases, taken by the Executive. To facilitate the centralised approach and allow all information to be handled in the same way, we intend to transfer the current PCC power to take decisions at the initial assessment stage to the Executive.
33. Therefore, to support the centralised approach and the change in terminology, we will need to introduce a new set of regulations to replace the current Complaints Regulations (see Part 3 – Regulatory Framework). No substantive changes to the Handbook are needed to allow CAT to handle other types of information as the current processes are not enshrined in our regulations.
34. **Reviews of decisions:** the removal of the powers vested in the PCC at the initial assessment stage will require an alternative mechanism to be put in place

to review decisions taken by CAT not to act on information received. Such decisions in relation to complaints only are currently subject to review by managers in the Professional Conduct Department and, where the decision was taken by a senior manager (or on advice from the PCC) by experienced members of the PCC. We consider it important to retain a system of review and extend it to all decisions taken by CAT. We therefore propose to keep in place a system of review by a more senior person/manager and consideration is being given to appointing suitably qualified and trained independent persons to undertake reviews of decisions taken by the Executive. The details of the final review mechanism are still to be determined but it will include some form of review independent of the Executive.

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

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

Part 2 - Independent Decision-Making Body (IDB)

35. This Part of the consultation paper sets out the rationale for the BSB's proposal to create an Independent Decision-Making Body (IDB); provides details of how it is proposed it will operate; and looks at the implications of adopting this new approach.

Rationale for creating the Independent Decision-Making Body

36. As outlined at paragraphs 6-8 above, since 2014, the BSB has been carrying out an ongoing review of our governance arrangements. The aim of the review is to ensure that our arrangements reflect modern and best regulatory practice. In particular, we want to ensure that our arrangements are, as required by the Legal Services Act 2007, independent of the profession but still maintain appropriate and essential input from the profession in shaping our strategy, policies and carrying out our day to day work. In line with good practice, it is also important that we retain a function that allows for some relevant decisions to be taken independently of the Executive. This mitigates the risk that we become divorced as a regulator from the views of the public and the profession when taking decisions on serious issues.
37. The first phase of our governance review, which was implemented in January 2016, left in place the operational decision-making Committees (i.e. the Qualifications Committee and the PCC). The Qualifications Committee, which had 19 members, was responsible for taking decisions on waivers from the Handbook requirements; deciding appeals from Executive decisions not to authorise an entity; and, deciding appeals from the Inns of Court Conduct Committee on the discipline of students. The PCC, which has up to 45 members but currently has 32, is responsible for taking all decisions on complaints including decisions following an investigation to impose administrative sanctions or refer cases of professional misconduct to an independent Disciplinary Tribunal. The PCC also has the power to determine charges of professional misconduct, with the consent of the barrister, under the Determination by Consent process.
38. As part of the first phase of the governance review, the Board made a commitment to review the operation of these Committees to ensure our regulatory decision-making functions were operating in line with best practice for a modern regulatory regime and reflecting our governance principles. Our governance principles are set out in full at Annex 1 but include the principles that:

- a. decisions should be delegated to the lowest level appropriate, whilst also ensuring an appropriate quality of decision-making and management of risk;
 - b. all Committee structures should be of the minimum size possible to maintain quality;
 - c. all structures and processes must protect our regulatory independence and comply with the Legal Services Board's Internal Governance Rules; and
 - d. having a lay majority in decision-making underlines the BSB's independence. Where decisions are taken at Board or Committee level, they should have both lay and barrister input.
39. The second phase of the governance review therefore focussed on our regulatory decision-making. To assess what changes might be necessary to our decision-making functions, the BSB commissioned an independent consultant to carry out two separate reviews: one review focused on the PCC and enforcement decision-making; and the other focussed on the Qualifications Committee and authorisation decision-making. Both reports are available on our website.¹⁰
40. The review of the enforcement decision-making was carried out against the background of comments made by the Legal Services Board's (LSB) in its first report on the BSB's performance against the regulatory standards framework. The LSB said:

"We [...] consider that the current approach of relying on a large professional conduct committee appears overly complex and bureaucratic. The committee currently has 56 members (reducing to 46 over the next three years) divided into two teams... We note that recent changes have given more decision-making powers to executive staff. However, the LSB considers that more should be done to empower the executive staff to make decisions and to use the committee and other experts only for more complex matters and, even then, perhaps primarily in an advisory rather than decision-making capacity. Such an approach would be appropriate considering the vast majority of decisions are

¹⁰ A Review of the Bar Standards Board's Enforcement Decision Making
http://www.barstandardsboard.org.uk/media/1924538/a_review_of_the_bar_standards_board_s_enforcement_decision_making.pdf

Appraisal of options for the Bar Standards Board's Authorisation Decision Making
http://www.barstandardsboard.org.uk/media/1924542/appraisal_of_options_for_the_bar_standards_board_s_authorisation_decision_making.pdf

whether to prosecute rather than reaching a determination by consent. It would also reflect best practice found in other regulators.”¹¹

41. The outcomes of the two reviews were similar in that both concluded that independent input to regulatory decision-making remained essential and was in line with good regulatory practice. However, the BSB in operating such large decision-making Committees was an outlier when compared to other regulators. Both reports also included options for reshaping the Committees into pools of decision-makers from which small panels could be constituted to take decisions.
42. Further information about the review of enforcement decision-making is set out below. In terms of the review of authorisation decision-making, the Board has already implemented changes arising from that review. In August 2017, the Qualifications Committee was disbanded. In its place Authorisation Review Panels were introduced. These are panels composed of three members (two lay and one barrister), drawn from a pool of panellists recruited to review first instance decisions taken by the Executive. Responsibility for providing expert advice to the Executive now lies with APEX and additional members were recruited for this purpose.
43. The report of the independent review of the enforcement decision-making functions of the PCC made a number of observations and conclusions. The report recognised the quality of the decision-making that the PCC provides but also identified concerns about its efficacy and independence from the profession as demonstrated by the following comments:

“The current decision-making regime delivers quality results, largely due to the excellent input of both Professional Conduct Committee (PCC) members and Professional Conduct Department (PCD) staff.

However, there are ‘structural’ issues with the current arrangements [...] the size of the PCC may mean that there is a perception of a lack of independence in that body’s decision-making. More prosaically, it may also mean that decision-making is not carried out in the most efficient manner.”

“It is worth noting that the BSB’s PCC is an extreme outlier [as compared to other professional regulators] in terms of Committee size....”

“... with a larger group it takes more effort to ensure that all members are entirely up-to-speed on developments in regulatory law, case precedent or the organisation’s stated policy and standards (and have taken these fully on board in their decision-making).”

¹¹ Paragraph 7.3, Developing Regulatory Standards, May 2013, Legal Services Board, http://www.legalservicesboard.org.uk/Projects/pdf/bsb_regulatory_standards_final.pdf

In terms of the greater number of eyes looking at a case being a “good thing”, there is little evidence to suggest that a well trained panel of three, recruited for the appropriate skills and experience, given appropriate training and support, familiar with the standards expected by a regulator and having access to all relevant case information and documents... would “miss” anything about a case that would be picked up by a fourth or fifth panellist. The possibility that this might be the case becomes vanishingly small when we consider the supposed potential impact of a 14th pair of eyes.”

44. The report put forward three options for reform of the enforcement decision-making processes which were:
1. retaining the PCC in its current format;
 2. transferring the PCC membership into a pool of decision-makers from which small groups of three (or more) members could be appointed to take decisions; or
 3. moving to a model of “Case Examiners” (one lay and one barrister) employed on a part time basis to take decisions, by agreement, on enforcement cases¹².
45. The Board was not supportive of Option 1 as it accepted that having a PCC with such a large membership was out of line with modern practice. It was also not supportive of moving to the Option 3 model although it recognised that other regulators are increasingly adopting it. In principle, the Board considered exploring Option 2 was appropriate, particularly considering the decision to adopt such a model for authorisation decisions.
46. To inform its decision, the Board asked the Executive to carry out research into the viability of moving to this model. This research was carried out over a 12-month period between November 2016 and November 2017 and during that period the Board also considered detailed draft proposals on how a system of smaller decision-making panels might operate. The research indicated that moving to Option 2 would be viable both operationally and financially and the expert advice that could be provided by APEX would be a suitable alternative to advice provided by members of the PCC. The Board was satisfied that any potential increases in staff costs would be counteracted to a large extent by the savings in no longer operating a large Committee.
47. The Board therefore took the decision to move ahead with developing a version of Option 2. Given its decision to set up Authorisations Review Panels on a similar model, the Board also took the view that it would be more effective to set

¹² The Case Examiner model is one increasingly in use by professional regulators and nearly all healthcare regulators have adopted the model in varying forms.

up one central pool of independent decision-makers from which small panels can be drawn to take all types of regulatory decisions requiring independent input. This will allow decision-makers to have a broader understanding of the BSB's regulatory remit and avoid decision-makers taking decisions on the basis solely of knowledge of only one aspect of our regulation.

48. The BSB therefore intends to create a single Independent Decision-Making Body (IDB) that will replace both the PCC and Authorisations Review Panels and, if necessary in the future, take any other decisions that require decision-making independent of the Executive.
49. We believe the creation of the IDB will assist with modernising our decision-making arrangements in line with good practice but will also ensure the retention of vital input from the profession at the same time as ensuring independence of the regulatory processes. We also believe it will enhance public confidence in our regulation of the profession.

The Independent Decision-Making Body (IDB)

50. The paragraphs below provide more detail on how we intend the IDB to operate.
51. **Remit of the IDB:** the intention is that the IDB take all regulatory decisions requiring independent input and therefore, at the point of its creation, it will be empowered to take the following regulatory decisions:
 - a. Decisions on whether to refer allegations of professional misconduct to disciplinary action following a formal investigation and, where appropriate, decisions on whether to impose administrative sanctions (currently taken by the Executive and the Professional Conduct Committee);
 - b. Final decisions under the Determination by Consent procedure (DBC)¹³ (currently taken only by the PCC);
 - c. Decisions on appeals against authorisation outcomes and reviews of decisions on waivers from the Handbook requirements (currently taken only by Authorisations Review Panels);
 - d. Appeals against decisions to authorise entities (currently taken only by Authorisations Review Panels); and

¹³ DBC is an alternative way of dealing with cases which would normally be referred to a disciplinary tribunal. The process is entirely voluntary and requires express written consent. Under DBC a case is dealt with on the papers and the Professional Conduct Committee of the BSB decide whether the allegations of professional misconduct are proved and, if so, what sentence to impose. The PCC powers of sanction are limited to imposing the maximum of a fine.

- e. Appeals against Inns of Court Conduct Committee decisions (currently taken only by Authorisations Review Panels).
52. In the initial stages, it is likely that decision-making on authorisations will be kept separate from enforcement decisions with different IDB panels being convened to consider decisions in each area. However, in time it is intended that all IDB members will be trained to take decisions across the full breadth of the IDB functions and therefore it will be possible for one panel to consider both authorisation and enforcement decisions.
53. **Executive decision-making:** the intention is that the Executive will take most regulatory decisions, but the IDB will be used to provide independent decisions in the more serious enforcement cases and in relation to reviews/appeals of authorisation decisions. This approach does not differ greatly from current practice. In 2016/17 staff in the Professional Conduct Department took 69% of all post-investigation enforcement decisions and staff in the Regulatory Assurance Department take all first instance decisions on authorisations. There is still room to increase Executive decision making on enforcement cases but, on the whole, only serious/complex cases or matters requiring an independent point of view are now referred to the PCC. This position will be replicated in the system for referring cases to the IDB.
54. **Expert advice for the Executive:** we recognise that the Executive will require expert advice on cases from time to time. Such advice is currently provided to Authorisations Review Panels by APEX members. The intention is that all advice, including that required for enforcement cases, will under the new arrangements be sourced via APEX. This will allow for the separation of advice and decision-making functions in line with good practice. New members of APEX will be recruited to provide advice on enforcement decisions and the intention is that the expertise of APEX membership will cover the main areas of law that commonly give rise to “complaints”.
55. We also recognise that it is not realistic for the APEX membership to cover all areas of law. Therefore, where advice is required on enforcement cases that falls outside the knowledge of both staff and APEX members, we intend to source advice from relevant specialists in the profession on an *ad hoc* basis. Our research indicates the need for such *ad hoc* advice will be limited. In any event, the ability to secure APEX, as well as *ad hoc* advice, is likely to afford the BSB a more robust system than relying on the changing membership of the PCC which at times has left us without members who can advise on the areas of law and practice that most commonly give rise to “complaints”.
56. **Membership of the IDB:** The IDB will consist of a pool of members from which IDB panels will be convened. Our research indicates that about 30 members will be required initially to support the work of the IDB: 20 lay and 10 barrister

members. The numbers will be closely monitored, and more members recruited if the pool proves to be too small. The rationale behind a relatively small pool is to ensure that members sit regularly on panels and thereby maintain and develop in-depth knowledge and experience. All members of IDB will be paid a meeting fee in line with the Board's decision to commence payment of barrister members of our Committees from 1 April 2018. This should allow us to attract a broader and more diverse range of panel members and allow us to place greater expectations, in terms of time commitment, on barrister members of the IDB than we can currently under the pro bono system.

57. **Composition of IDB panels:** the size of the IDB panels will differ according to the decision being taken. However, the intention is that panels will normally consist of three members: two lay and one barrister. The Authorisations Review Panels already meet in panels of three with a lay majority and our view is that three-person panels should be able to take decisions on most enforcement cases. However, it is envisaged that panels of five or even seven members may need to be convened to take decisions on complex enforcement cases or those that raise novel issues or have wider implications for the profession.
58. The intention is that IDB panels will always have a lay majority in line with our governance principles. Where a five or seven-member panel is convened the lay majority will be retained, with panels of three lay members and two barrister members or four lay members and three barrister members respectively. This retention of a lay majority is intended to ensure that any decisions taken have the support of at least one lay member of the panel. This reflects, to some extent, the current position in relation to PCC decision-making where the lay members present at a meeting have a veto on decisions to dismiss a complaint if the majority of the lay members present do not agree to the dismissal. The veto does not apply to decisions to refer cases to disciplinary action or impose administrative sanctions.
59. The lay veto was first introduced when the PCC had only a handful of lay members as compared to the barrister membership, but has become less relevant in recent years with the PCC moving to almost equal lay and barrister membership. In the new decision-making regime, with decisions being taken by small panels, we do not consider such a veto is necessary and indeed it could hamper panels in taking decisions.
60. **Chair of the IDB:** we intend to appoint a standing Chair of the IDB to act as the representative head of the IDB and provide guidance and mentoring to panel members. We also intend to appoint a small number of other Office Holders (the number has yet to be decided) to support the Chair in carrying out the role. The "Office Holders" will not be given separate or additional powers and all decisions will be taken by IDB panels except in one respect: the Chair of the IDB will be

given the express power, under the Interim Suspension and Disqualification Regulations, to order immediate interim suspensions (see paragraph 109 below).

61. The Chair of the IDB could be either a barrister or a lay member as is currently the case with the Chair of the PCC. While the “Office Holders” of the IDB will sit on panels, they will not necessarily be expected to chair individual meetings. Instead, we intend to train a number of members, both lay and barrister, to perform this role at meetings so that we can support the increased frequency of meetings. The role of the standing Chair of the IDB will therefore be separate to the role of chairing IDB panels.
62. **Presentation of evidence to IDB panels:** currently the PCC takes decisions at meetings based on summary case reports prepared by PCC members which include recommendations for disposal of cases. These summary reports are anonymised so that the name and gender of the barrister and the “complainant” are not evident unless these details are directly relevant to the consideration of the issues in the case (see also paragraphs 79-82 below). Decisions of the PCC are based on these summary reports but the full file on a case is available for PCC members to look at prior to the meeting in the BSB Office and is also available at meetings.
63. Under the proposed new arrangements, the intention is that the Executive will in most cases prepare all summary reports required to support IDB panel decision-making. This will, in line with good practice, leave the IDB to be solely a decision-making body with no responsibility for case preparation. A pilot exercise has been ongoing for nearly a year to test the efficacy of this proposal whereby staff have been preparing and presenting reports to the PCC. The pilot has proved successful and feedback indicates that Executive reports are an effective means of presenting summary information to decision-makers on relatively straightforward cases.
64. However, it is recognised that in a minority of cases, the complexity of a case will fall outside the capabilities of the Executive to prepare an effective summary report. Our research indicates that this will occur in about 10% of cases. Where expert assistance is required to prepare reports, we intend to seek assistance from members of APEX.
65. **Provision of the full case file to IDB members:** the move to small panels has the significant advantage that IDB panel members can be provided with an electronic copy of the full case file in advance of the panel meeting and the file will be available via the same means at IDB meetings. Under the current system, providing an effective means for 20 or more PCC members to have access to the full file and expect them all to read it, is not practical. However, providing a case file to three people is realistic. We consider this will provide an

improved basis for decision-making compared to the current system under which, in practice, only one member of the PCC may have detailed knowledge of the file.

66. **Frequency of meetings of IDB panels:** the PCC is currently divided into two teams with a meeting of one of the teams scheduled every three weeks: the volume of cases does not warrant the cost or administrative resource required of bringing together a large number of members on a more frequent basis. However, this has the disadvantage that cases requiring a PCC decision may be unduly delayed awaiting the next meeting. Where a case is put back for further enquiries, but reserved to the original PCC team, it can therefore take six weeks or more for it to be reconsidered and longer over the summer period when there are no PCC meetings in August.
67. With the introduction of small panels to take decisions, we consider that it will be cost effective and efficient to hold IDB panel meetings once a week, or at least once every fortnight. Therefore, the number of cases considered by an IDB panel will be fewer than that considered by the PCC at its current, less frequent meetings. Further, the reduced volume of cases considered by IDB panels, will allow for more detailed and informed discussions as well as the recording of specific reasoned decisions on each case (see paragraph 71 below).
68. **Virtual meetings of IDB panels:** Currently meetings of the PCC are held at the BSB office in London. Members can attend remotely by telephone or by video conference but, given the size of the PCC, this is not an effective means to conduct discussions. The intention is that meetings of IDB panels will be supported by enhanced technology that will allow panel members to attend, if necessary, via video conference.
69. The use of remote meeting facilities, and small panels, will create more opportunities for those who live outside London, both lay and barrister, to be involved in the BSB's regulatory decision-making system. It will also make it easier for those with disabilities to participate. We consider these are significant benefits and will assist in promoting greater diversity in the range of people who are able to participate in the BSB's regulatory decision-making.
70. The increased frequency of meetings and the use of technology should also improve the flexibility in convening meetings and the timing of those meetings which may not need to be held at the end of the working day as is currently the case. This is likely to create efficiencies in case consideration and swifter progress of cases. Further, the ability to convene *ad hoc* meetings of IDB panels at short notice will be greatly enhanced. Such an option is not possible under the current system.

71. **Recording decisions of IDB panels:** currently, decisions of the PCC and Authorisations Review Panels are recorded by a “secretary” drawn from the Executive. Authorisations Review Panels provide detailed reasons for their decisions. However, PCC decisions to refer cases to disciplinary action are recorded using a standard wording format that refers only to the relevant threshold criteria in the regulations for referring cases. This is because agreeing the wording of detailed reasons which reflect the consensus at a meeting is difficult given the large number of members present at PCC meetings. While the current approach of recording general reasons for decisions is considered adequate, it is better practice to record more detailed reasons for decisions to refer to disciplinary action. IDB panels will be small enough to allow for the wording of detailed reasons for decisions to be agreed and recorded at a meeting thus allowing for greater transparency in decision-making. We have been testing this at the pilot meetings (see below) and it has worked well.
72. **Pilot meetings:** Since September 2017, the IDB Project Team has been holding pilot three-person IDB meetings to test the proposals outlined above in relation to enforcement decision using old decided cases that have been anonymised and altered but still reflect the types of cases the IDB will deal with. The pilot so far has worked well and has identified areas where improvements to the system can be made. The feedback from participants, who are current PCC members, indicates that, on the whole, they welcome discussion in smaller groups as well as the provision of the full file and they consider decision making remains robust. The pilot meetings will continue throughout 2018 when we will also be testing the use of five and seven-person panels.

Implications of creating the IDB

73. The proposals outlined above will have a number of implications for the way in which independent decision-making is managed by the BSB in the future. These are covered in the paragraphs below.
74. **Revisions to the BSB’s Standing Orders and the enforcement regulations:** To facilitate the creation of the IDB, the BSB’s Standing Orders will need to be amended to remove the remit of the PCC and create a remit for the IDB as well as vest direct powers in the Executive to take decisions. How we intend to do this is set out in Part 3 of this paper. Also, the current Complaints Regulations, which vest all complaints decision-making powers in the PCC, will need to be replaced with new regulations expressly covering the powers of the Executive and the IDB to take decisions.
75. **Knowledge retention:** it is essential that the knowledge and experience of current PCC and Authorisation Review Panel members is retained and transferred to the new system to ensure continuity. To facilitate this, current

members of the PCC, whose terms have not expired, will be eligible to transfer either to the IDB or to APEX, subject to meeting the required competencies and limitations on length of service. It is envisaged that members of the PCC will generally be able to meet the requirements for both groups given the similarity in the current functions and skills required for membership of the PCC and that required for IDB or APEX. Members of the Authorisations Review Panels will transfer automatically to the IDB, since their length of service allows for this and they have already been through a recruitment and selection process for their new roles. It may be necessary to recruit new members to the IDB and, if so, they will be recruited under the agreed procedures set out in the Standing Orders.

76. **Developing the depth and breadth of the knowledge of IDB members:** the BSB acknowledges that the use of small panels to take decisions, particularly three-person panels, will reduce the input from the profession in enforcement decision-making. However, the pilot exercise described above (see paragraph 71), indicates that taking decisions in smaller panels will not diminish the quality of decisions. Also, the use of expert advice provided by APEX members, several of whom are themselves barristers, will mitigate some of the risk associated with the reduction in barrister input. Indeed, in some cases it will improve the quality of decision-making through better access to advice on specific areas of legal practice. APEX members will also be able to provide impartial advice disassociated from any role in deciding the outcome of a case. Further, the ability to convene five and seven-person panels will allow for wider barrister input in complex cases.
77. We also intend to use our access to enhanced technology to create an “extranet” providing comprehensive supporting information for IDB members. This will provide an accessible mechanism to keep members up to date and ensure they are aware of decisions taken by the IDB.
78. Regular training and knowledge-sharing seminars will also be scheduled, building on current practice. These sessions will be intended not only to develop knowledge but also to allow for exchange of views and learning from others’ experience.
79. **Anonymised decision-making:** the current practice in cases presented to the PCC is that summary case reports are anonymised to remove the name and gender of both the barrister subject to consideration of enforcement action and the “complainant” in the case, unless the gender of either person is relevant to the decision in the case.
80. The BSB wants to retain the concept of anonymisation in the new system as it assists with ensuring decisions are not tainted by unconscious bias. However,

this is more problematic if the full case file is provided to IDB panel members. We have carried out research with companies that provide redaction services and the results indicate that it is possible to anonymise a full file in relation to the barrister's name and gender and for the contents of documents to remain comprehensible. Such external redaction services can be provided at a reasonable cost and can turn around files in a week.

81. However, the anonymisation of the name and gender of, what will be known in the future as, the "information provider" (often the "complainant" in the current system) is much more problematic and creates significant difficulties with ensuring that the documentary evidence remains comprehensible. The BSB's decision to anonymise the identity of "complainants" was not based on any clear evidence that there were disparities in the treatment of complainants with protected characteristics. Indeed, our data in this area is limited and not sufficiently reliable to draw firm conclusions. The decision to anonymise case reports in relation to the complainant was taken as a logical next step from anonymising the identity of the regulated person. However, it is essential that IDB panels can understand the evidence that is presented to them in order to take robust decisions.
82. The proposal to provide IDB panel members with the full file is a significant change. We are of the view that anonymising the identity of the "information provider" throughout the case papers (as opposed solely to doing so in the covering case report as is currently the case) would have a detrimental impact on panels' ability to understand the case papers and take effective decisions. We therefore intend to continue anonymising the name and gender of the professional subject to an allegation, but we do not intend to anonymise the name and gender of the "information provider".

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

Part 3 - Regulatory Framework

83. As outlined in Parts 1 and 2, the proposals in this paper carry with them a need to rewrite parts of the BSB's regulatory framework. Therefore, this Part of the paper details the amendments we propose to make to our regulatory framework to support the new approach to handling incoming information and regulatory decision-making.

Changes to the regulatory framework - overview

84. There are two main areas where changes need to be made. First, our Standing Orders will need to be revised to establish the IDB (see paragraphs 86-88 below). Second, the current regulations governing the handling of "complaints" about the conduct of the regulated community (the Complaints Regulations, Part 5, Section A of the BSB Handbook) will need to be replaced with new regulations on enforcement decisions that reflect: the creation of the Centralised Assessment Team and the IDB; the change in terminology; and the vesting of enforcement decision-making powers directly in the Executive and the IDB (see paragraphs 92-99 below). No substantive changes to the Handbook are required in relation to authorisation review decisions as the relevant changes were made in 2017 when Authorisations Review Panels were created. The only amendments required will be limited to changing the nomenclature by replacing references to Authorisations Review Panels with references to the IDB.
85. The following paragraphs outline the main changes to the Standing Orders and the Enforcement Decision Regulations.

The Standing Orders

86. The Standing Orders (SOs) of the BSB is the key governance document that sets out the principles and rules for regulating the proceedings and business of the Board and its Committees, including membership, remit and appointment. The SOs is the means by which the BSB establishes its Committees, panels or any other formal group required to conduct the business of the BSB. They currently include the terms of reference for the PCC and Authorisations Review Panels and the requirements in relation to their composition. The SOs therefore need to be amended to establish the role of Commissioner (see paragraphs 95-99 below) and the IDB.
87. The intention is not to stipulate the size of the IDB membership but instead to provide that the membership should be of a sufficient size to allow for its functions to be performed effectively and efficiently. This will give the BSB flexibility to increase or decrease the size of the pool of members according to need. However, the parameters for the size and composition of the IDB panels

convened from the IDB pool will be stipulated in the SOs with a minimum size of three, a maximum of seven and a lay majority in all cases.

88. We do not intend to include in the SOs specific provisions as to the size of the IDB panels required to take particular types of decisions. Instead these requirements will be included in publicly available policy documents. This approach replicates the current SOs in relation to Authorisations Review Panels which provide only that such panels are convened to ensure that all relevant requests for review are determined fairly, effectively and in accordance with relevant regulations and guidelines. Again, the rationale for this is to provide flexibility in the BSB's decision-making arrangements: it will allow for the size of panels to be adapted in the light of experience without the need to amend the SOs.

The Enforcement Decision Regulations

89. The proposed new "Enforcement Decision Regulations" can be found in Annex 2. The new regulations are directed only at decisions in relation to potential enforcement action, as is the case with the current Complaints Regulations, and do not cover other processes for handling information.
90. In general, the approach to drafting the new regulations has been to specify each stage of the assessment, investigation and disposal process chronologically in much the same way as the Complaints Regulations are currently structured. Each section of the new regulations covers a different stage of the process and each begins with a breakdown of the powers of the decision-makers at that stage.
91. It is hoped that this will make the regulations easier to follow, particularly for lay people, thereby making the decision-making regime more transparent. We have also tried to ensure that each section of the regulations stands alone so that readers can determine if a person or body has relevant powers or responsibilities at any given stage without having to make an undue number of cross-references to other sections. This approach does lead to a level of repetition, but we consider the benefits in terms of clarity and ease of access warrant this.

Creation of the role of Commissioner and vesting in Executive of decision-making powers

92. The current Complaints Regulations vest all powers to take decisions on "complaints" in the PCC and the Executive is only empowered to take decisions by virtue of delegated authority given by the PCC. This constitutional position is out of line with modern and efficient regulation. Executive decision-making is a

feature of most professional regulatory regimes, but it is unusual for the Executive to derive its decision-making powers from the independent decision-makers.

93. Therefore, to allow for relevant enforcement decision-making powers to be vested directly in the Executive, we intend to mirror the construct employed by many other regulators by creating a senior Executive role from which all executive powers to take decisions on enforcement issues will be delegated. This will allow the Board itself to remain outside the enforcement decision-making regime.
94. Such a role is a statutory requirement for many regulators and is normally titled “Registrar”. However, we do not consider such a title would be appropriate within the context of the BSB’s regulatory regime as although we operate a “register”, holding central records of the profession is currently managed by the Bar Council. While the BSB has joint responsibility with the Bar Council for issuing practising certificates, creating a role with the title “Registrar” could be misleading. Nevertheless, we consider a similar construct would be appropriate and effective to vest decision-making powers in the Executive.
95. We therefore intend to create the role of “Commissioner” which will be performed by the Director General of the BSB. This also mirrors the arrangements of other regulators whereby the role of “Registrar” is also performed by the Chief Executive or other senior member of the Executive¹⁴. This approach will also allow, in the future and if necessary or desirable, for the functions of the Commissioner to be exercised by a separate post holder without the need to change our constitutional arrangements.
96. By vesting Executive powers to take enforcement decisions in one role, the powers can then be delegated to staff members through the usual scheme of delegations used for other Handbook decision-making powers. This will create a consistent governance regime, in contrast to the current position whereby the PCC’s decision-making powers sit outside the standard lines of delegation.
97. The draft new regulations are predicated on this construct. The Commissioner’s powers to take decisions are set out at rE2, rE12, rE14, rE19.2 and rE19.4 of Annex 2 and cover powers to: decide not to act on information received; determine that information should be treated as an allegation; investigate allegations; impose administrative sanctions; and refer cases to disciplinary action.

¹⁴ A similar construct was previously used by the Legal Ombudsman Service whereby the Chief Executive and the Chief Legal Ombudsman roles were distinct but held by the same post holder. The Legal Ombudsman separated these functions, in 2016, by creating two different post holders, but is now looking to combine them again into a single post holder. The new Independent Office for Police Conduct also uses a similar construct.

98. The new regulations also give IDB panels direct powers to decide not to act on allegations, give advice, impose administrative sanctions and refer cases to disciplinary action (see rE 22.1-rE22.4 and rE24 at Annex 2).
99. The decision-making powers of the Commissioner and the IDB overlap. This is deliberate and designed to replicate the current position whereby the Executive is authorised to take a range of decisions that the PCC can also take. This current overlap in decision-making powers works well and we want to ensure the flexibility it affords is retained in the new arrangements. However, it will require, as is the case in the current system, comprehensive operational policies demarcating the decisions that can be taken by the Executive and those that must be referred to the IDB¹⁵. We do not see this as problematic so long as the decision-making lines remain transparent.

Changes to terminology

100. As indicated above in Part 2, we intend to move away from the use of “complaints” terminology. Therefore, the new regulations will no longer refer to complaints but instead use the terms “information” and “allegations”. The former refers to any information received which requires assessment by the Centralised Assessment Team. Where information is assessed as revealing a potential breach of the BSB Handbook that requires formal investigation with a view to imposing an administrative sanction or taking enforcement action, it will be treated as an “allegation” as opposed to a “complaint” (see rE12 of Annex 2). This means that the new regulations will no longer distinguish between information received from external or internal sources. Instead all information, from whatever source, will be processed in the same way and be subject to the same assessment tests.

Removing the regulations concerning the initial assessment process

101. As set out in Part 1, the regulations no longer include a separate and prescriptive process covering the initial assessment of “complaints”. Instead, the Commissioner has been given the general power to gather information for the purposes of assessing whether there has been a potential breach of the BSB Handbook (see rE2.1 of Annex 2). The detail of the initial assessment process will be set out in publicly available policy and guidance documents using criteria based on our risk assessment methodology.

¹⁵ Under the current system cases referred to investigation are categorised, and the designated category determines whether decisions can be taken by the Executive or whether they must be taken by the PCC
https://www.barstandardsboard.org.uk/media/1763065/150810_-_pg11_-_categorisation_of_complaints_-_live_updated_september_2015_.pdf

Powers to refer information to other organisations

102. We have retained the powers for the BSB to refer information to other bodies or persons but the power to do so has been vested in the Commissioner as the IDB will have no role in the initial assessment of information (see rE4-rE11 of Annex 2).

Test for deciding whether information should be treated as an allegation

103. We are proposing that the threshold criteria for deciding whether information should be treated as an allegation should be slightly different to the criteria currently used to determine whether a complaint should be dismissed or referred to investigation. The new allegation test (see rE12 and rE13 of Annex 2) is different to the current test for investigation referrals in two ways: first, the relevant components of the current test have been merged into a clearer single regulation, and second the test itself includes a specific risk/public interest criterion that more transparently allows for the possibility of information that represents a breach of the Handbook being assessed as not appropriate for investigation due to the low risk it presents. These revised threshold criteria will also be underpinned by publicly available policy and decision-making guidance documents as is currently the case with the Complaints Regulations.

Time limit for submission of information

104. The Complaints Regulations currently include a time limit for the submission of complaints of 12 months from the date of the conduct. This time limit can be waived if consideration of the complaint is in the public interest having regard to the regulatory objectives. The time limit is very rarely the sole reason for dismissing a complaint and the public interest criterion is the pivotal factor in determining whether an “old” complaint should be taken forward. We therefore intend to remove the time limit from the regulations and all decisions will be based on whether the alleged conduct represents a risk to the regulatory objectives and can be fairly and properly investigated (see rE13 of Annex 2).

Deferred sentences

105. The concept of deferred sentences was removed from the Disciplinary Tribunal Regulations last year but remained in the Complaints Regulations for transitional reasons. As the transitional arrangements are no longer needed, all references to deferred sentences have been removed.

Power to expedite

106. The power to expedite cases is currently available to the PCC. Under this provision the PCC can order that the service of charges on a regulated person is expedited. This reduces the time limit for service from ten weeks to five. The power is rarely used by the PCC and we do not consider it would be appropriate for IDB panels to have the power to order this, given the intended separation of the IDB from the Executive which also means that the IDB will have less direct knowledge of casework processes. We therefore propose not to include such a power in the new regulations.

Attendance on Chair or other nominated person

107. Currently, one of the options available to the PCC when dismissing a complaint, where the complaint nonetheless gives rise to concern about a regulated person's behaviour, is to order that the person "attend" on the Chair of the PCC or another nominated person to receive formal advice. The nominated person might be a Leader of a barrister's circuit, a senior member of the barrister's Inn, or even a Head of Chambers. This involves a face to face meeting to give the advice. It may be that using such a method to give advice would have a more significant impact on a barrister than a letter of advice, but it is difficult to regulate transparently and extends the regulatory regime to those who have no formal regulatory powers. Our view is that this means of giving formal advice is not appropriate in a modern regulatory regime and therefore we are not intending to include it in the new regulations. The ability for an IDB panel to give formal advice will remain (see rE24 of Annex 2), but such advice will be provided only in writing.

Referrals to Fitness to Practise and Interim Suspension Panels

108. Currently the Complaints Regulations include the power for the PCC to refer cases to Fitness to Practise and Interim Suspension panels although the substantive regulations governing these processes are contained in different sections of the Handbook¹⁶. Referrals under these processes are managed by the Executive and confirmed by two Office Holders of the PCC (one lay, one barrister) but never by the full PCC.

109. The intention is that the IDB will be able to recommend to the Executive that a case is referred to a Fitness to Practise or Interim Suspension panel, but the formal referral will be made by the Executive. The only exception to this is decisions on the imposition of immediate interim suspensions. Such decisions are currently reserved to the Chair of the PCC and we consider it right to retain

¹⁶ Part 5.C and Part 5.D of the BSB Handbook cover Interim Suspension and Fitness to Practise respectively.

independence in such decisions. Therefore, it is proposed that decisions under the new regime will be reserved to the Chair of the IDB. This merely requires a change in title of the decision maker currently included in the Interim Suspension Regulations from the Chair of the PCC to the Chair of the IDB. All other referral powers included in the relevant regulations will be changed to the Commissioner rather than the PCC.

Consequential amendments

110. A number of minor consequential amendments will also need to be made to the Handbook to reflect the change in terminology and the creation of the IDB. These include removing the word “complaint” throughout the Handbook as well as references to the “PCC” and the “Complaints Regulations”. These will be replaced with the appropriate references to “information” or “allegation”, “the Commissioner”, “IDB” and the “Enforcement Decision Regulations”. Amendments will also need to be made to the Definitions section of the Handbook (Part 6) to remove and include relevant definitions. Finally, the correct cross-references to the Enforcement Decision Regulations will need to be inserted in place of references to the Complaints Regulations.

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

Part 4 - Quality Assurance and Equality and Diversity

Quality Assurance mechanisms

111. The BSB currently has in place a range of quality assurance mechanisms and checks and balances to assure that our processes are operating effectively, decisions are consistent and lessons are learnt to allow for continuous improvement. These mechanisms will remain in place under the new systems but adjusted to reflect the change in responsibilities. We will continue to employ staff with appropriate qualifications and skills to take decisions. Currently all Executive decision-makers in this area hold at least a law degree and all members of the team responsible for carrying out investigations, and taking post-investigation Executive decisions, are legally qualified. We intend to continue and enhance this level of legal expertise within the Executive.
112. At an individual case level, senior management currently monitor cases and carry out spot checks and reviews of decisions taken by the staff and this will continue. A log of lessons to learn from cases is maintained by the Professional Conduct Department and regular management meetings are held to agree action on issues arising. It is intended that such a log will also be maintained by CAT. The ability for information providers and members of the profession to request reviews of decisions, also provides an important check on decisions taken and the Enforcement Decision Regulations give an express power to the Commissioner and the IDB to reconsider any allegations that have been disposed of.
113. Currently a percentage of decisions taken by the Executive on behalf of the PCC, are reviewed by a sub-Committee of the PCC (the Quality Review Sub-Committee (QRSC)) every six months to ensure the delegated authorities from the PCC are being exercised effectively by the Executive and decisions are reasonable. That review mechanism, which has been in operation for four years, has not revealed any issues with Executive decision-making. Under the new regime, with the separation of the Executive and independent decision-making functions, it would not be appropriate for the IDB to perform a quality assurance role in relation to the Executive. As the Executive powers will in future be delegated from the Commissioner to staff, it will be for the Commissioner to ensure that the delegations are being exercised effectively and the decisions taken by the Executive remain of a high quality. To assist the Commissioner in doing this, the BSB is considering replicating the functions of the QRSC in some form by developing an external audit mechanism that will include input from the profession and lay involvement. By this means we intend to maintain oversight of the quality of Executive decisions.

114. It would of course be inappropriate for the BSB to review individual decisions of the IDB as this would compromise its independence. However, the IDB will be expected to submit an Annual Report to the Board on the activities of the IDB and trends in decision making. IDB members will also be subject to annual appraisal.
115. At a wider level, both CAT and the decision-making teams (Professional Conduct and Supervision) will continue to submit annual reports to the Board, which will be published. Our Planning, Resources and Performance Committee will also continue to monitor the performance of the Executive against agreed performance indicators and our Governance, Risk and Audit Committee (GRA) will monitor risks arising from the system including receiving reports on individual cases where the decisions of Executive or IDB have been criticised by an external body such as a Tribunal or the High Court. GRA will also, via our internal audit contractor, be able carry out audits of our assurance mechanisms to ensure that they remain fit for purpose.
116. This range of assurance mechanisms will allow us to monitor closely the operation of the system and the proposed changes to ensure they are operating effectively and the decisions remain of a high quality.

Equality and Diversity

117. The BSB has been mindful of equality and diversity issues when developing the proposals for both CAT and the IDB and we carried out equality impact assessments that have been updated regularly as our plans have matured. Our view is that there are no obvious adverse impacts for those from the protected groups (but see paragraph 119 below). We consider both proposals will promote equality and diversity. The centralising of our assessment functions will allow for more consistent risk-based decision-making and better monitoring of those decisions to ensure any potential indications of disparities in treatment are identified and addressed. It will also allow for trends in incoming information to be identified more easily and appropriate action taken to address any issues of equality in the way the Bar or the market is operating.
118. Similar benefits will also flow from the creation of the IDB, which will allow independent decision-making to be consistent across all relevant functions and for that decision making to be monitored consistently. Further, the use of new technology, the reduction in the size of the decision-making group and the increased flexibility in timing of meetings is likely to provide more opportunity for members of the IDB to be taken from a wider geographical area. The Board's decision that barrister Committee members (including the IDB members) will be paid in the future will also provide opportunities for a wider diversity of members of the Bar to be involved in the profession's regulatory decision-making.

119. We recognise, however, that the proposal that we do not anonymise summary case reports and case files in relation to the characteristics of the information provider when presenting cases to the IDB, is to some extent a step backwards as compared to the current position (see paragraphs 79-82 above). However, we must balance the potential implications of this with ensuring the efficacy and quality of IDB decisions. It is essential that IDB panels can fully understand the content of the material being presented to them and the integrity of the decision-making process would be severely compromised if they were unable to do so. We therefore consider this proposal is justified. We have also taken into account that the decision to anonymise the characteristics of complainants in case reports for the PCC was not based on evidence of disparities in outcomes for complainants. Nevertheless, we will closely monitor the outcome of IDB decisions for any indications of potential bias.

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

Timetable

120. The current outline timetable for implementation of all proposals in this consultation paper is 1 April 2019 but this is subject to available resources and operational readiness.

Consultation questions

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

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

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

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

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