

BAR STANDARDS BOARD

REGULATING BARRISTERS

Modernising Regulatory Decision Making – BSB Response

Introduction

1. In May 2018 the Bar Standards Board (BSB) closed its consultation on “Modernising Regulatory Decision Making” (the consultation)¹. This report summarises the responses received and sets out our views on the consultation responses.

Responses to the consultation

2. The BSB received seven responses to the consultation and we are very grateful to all those who took the time to provide their views on these important proposals.
3. Responses were received from the following individuals and organisations, however, not all responses addressed every question:
 - The four Inns of Court – The Honourable Societies of: the Inner Temple; the Middle Temple; Gray’s Inn; and Lincoln’s Inn
 - The Bar Council
 - The Legal Ombudsman’s Office
 - A current Vice-Chair of the Professional Conduct Committee (PCC)
4. The plans set out in the consultation 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 proposed changes in our regulatory approach therefore focus on:
 - Ensuring that incoming information is captured and assessed consistently by creating a centralised function, the Centralised Assessment Team, to

¹ ‘Modernising Regulatory Decision Making’, Bar Standards Board, May 2018, accessible at: https://www.barstandardsboard.org.uk/media/1924546/modernising_regulatory_decision_making_-_consultation_paper.pdf

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;

- 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; and
 - A number of changes to our regulatory framework to put the changes into effect, this includes a new set of BSB Handbook Regulations and some changes to our Standing Orders.
5. The following questions and our responses address these proposals, we have described any decisions we have made in relation to each proposal on the basis of the consultation responses.

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

Overview of responses

6. All responses which addressed this question were broadly positive, with the Bar Council, the Legal Ombudsman (LeO) and the Inns of Court supporting the proposal in principle. Middle Temple did not provide substantive comments, saying that it regarded such matters as falling within the BSB’s operational remit.
7. Paragraph 34 of the consultation paper related to reviews of decisions made by members of the Centralised Assessment Team. The paper proposed that a system should be put in place which allows for the decisions of staff members to be reviewed by more senior members of staff within the organisation. The paper also noted that consideration was being given to how best to establish a further level of review for these decisions independent of the Executive². When giving their response both Inner Temple and Gray’s Inn stated that they did not believe they had been given sufficient information to be able to comment.
8. In giving its response to the first question, the Bar Council raised a concern with the drafting of the proposed regulations due to the broad powers it confers upon the Commissioner (see also paragraph 55).

² ‘*Modernising Regulatory Decision Making*’, Bar Standards Board, May 2018, Paragraph 34, accessible at: https://www.barstandardsboard.org.uk/media/1924546/modernising_regulatory_decision_making_-_consultation_paper.pdf

BSB Response

9. We are pleased that there is general support for the proposal to create a Centralised Assessment Team. However, we recognise that more work needs to be carried out to create robust review and assurance mechanisms appropriate to the new decision-making structure. Work on this has been ongoing and has progressed since the consultation paper was issued in March. The mechanisms still need to be formally agreed. However, they will consist of an independent review of decisions taken by the Executive where the person presenting the information, or a regulated person, disagrees with a decision. Such reviews will be carried out by suitably qualified persons appointed for the purpose.

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”?

Overview of responses

10. The responses in relation to this question were broadly positive, with all respondents who answered the question supporting the proposed changes in principle. In particular, the LeO response noted that it too had changed some of the language it uses for similar reasons. There were, however, three specific concerns about the detail of the proposal raised.
11. Inner Temple and Gray’s Inn drew attention to the part of the consultation paper which proposed that we stop using the term ‘dismissed’ and ‘dismissal’. The concern raised was that the subject of a complaint would lose the certainty that comes with the use of a strong term such as ‘dismissed’. It was suggested that the raising of a complaint against someone causes them a degree of reputational damage, which is alleviated by a definitive outcome such as a ‘dismissal’.
12. The Bar Council noted that moving away from the use of the terms ‘making a complaint’ and ‘complaints’ made sense but that the suggested replacements ‘providing information’ and ‘information’ may be too vague. The Bar Council suggested ‘report a concern’ as an alternative replacement.
13. Lincoln’s Inn agreed that the present distinction between complaints and other information was unhelpful, noting that a complaint requires a deliberate decision to make a formal complaint and that might discourage consumers from submitting useful information to us.
14. Lincoln’s Inn was of the view that the regulations should spell out additional criteria for when a matter is not going to be treated as an allegation. This included the suggestion that ‘exceptional circumstances’ could constitute a reason for not treating matters as an allegation and that this would include frivolous, vexatious and mischievous allegations.

BSB Response

15. We are grateful for the responses received to this question. In considering the responses we have noted that there appears to have been some confusion about the proposals, in particular, what exactly is meant when we say we are removing the use of the term 'dismissed' and the nature of the regulations.
16. This question was contained within Part 1 of the consultation paper which covered the proposed new Centralised Assessment Team. Paragraph 23 and 24³ covered the terminology changes which were addressed by this question. The intention of the proposals is to remove the language of 'complaints' throughout the process with the Centralised Assessment Team receiving 'information' and potential breaches of the Handbook being referred to the enforcement function as 'allegations' rather than complaints. Associated with that change is the proposal to remove the term 'dismissal' from this initial assessment stage of the process, on the basis that the new system will not require a matter to be "dismissed" but merely a decision that no regulatory action is necessary.
17. The move away from complaints terminology is not intended to stop us from using clear language in the responses we provide to consumers or on our website to describe our remit. We will continue to make it clear what action we can take and our reasons for not taking forward issues presented to us. However, the advantage of ceasing to use the terminology of 'complaints' is that it will help to manage expectations as to what action we can take as well as create a clear distinction between our role in maintaining professional standards and the role of complaints handling bodies such as the Legal Ombudsman in resolving complaints.
18. However, in light of the consultation responses, we have reconsidered the proposed use of the terms "information" and "information provider" at the preliminary stage of the process. We have accepted that these are not necessarily user-friendly terms and agree that alternative terminology should be found. The final terms that we will use is under discussion, but it is likely that we will use the terms "report" and "person who made the report" to refer respectively to all types of information presented to us and to those who have presented it
19. We are firmly of view that it be inappropriate to use the term "dismissed" in relation to information/reports received under the new arrangements. To reintroduce this term at the preliminary stage undermines our attempts to reframe the relationship with the public and move away from terminology that implies that the BSB has made a value judgement about the content of the individual concerns raised. Our decisions on information received (as is currently the case) are about whether any regulatory action should be taken. Our view remains that

³ 'Modernising Regulatory Decision Making', Bar Standards Board, May 2018, Paragraph 23-24, accessible at: https://www.barstandardsboard.org.uk/media/1924546/modernising_regulatory_decision_making_-_consultation_paper.pdf

using alternative terminology to “dismissed”, such as “no regulatory action required”, is more appropriate and sufficiently definitive.

20. The second part of the terminology proposals, the removal of the use of the term ‘dismissed’, is not intended to stop us from using definitive language after a matter has been referred for potential enforcement action as an “allegation”. We agree that it is important that we are clear and definitive about what is happening as a result of any investigations we carry out in to allegations. Therefore, the term “dismissal” will still be used when communicating, and recording, the outcome of formal investigations of allegations. However, the dismissal will relate solely to the allegation (raised by the BSB) and not represent a potentially pejorative decision on the validity of the person’s original concerns.

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

Overview of responses

21. The responses to this question indicated broad agreement with the need to reform our approach to independent decision making. However, there were differing views as to how reform should be achieved.
22. The Bar Council was the only respondent who explicitly disagreed with the proposal to disband the PCC. In the Bar Council’s view, the PCC has been an effective body which produces high quality decisions. The Bar Council’s primary concern is that the changes will lead to a loss of practitioner knowledge provided by the wide range of backgrounds of PCC members. In addition, the Bar Council does not believe a clear justification for the changes has been articulated nor any justification for the Legal Services Board’s view that the separation of expert advice and decision-making is a problem that exists with the PCC.
23. While the Bar Council’s stance is clearly one of opposition to the proposal, it also helpfully provided comments on the specifics of the IDB system. In doing so the Bar Council raised a concern about the composition and size of IDB panels. The consultation paper proposed a panel size of three individuals (two lay and one barrister) with the ability to use panels of five and seven members if appropriate. The Bar Council’s concern is that this will not allow for a range of views and a meaningful discussion. Its view is that the default position should be five-person panels and the ongoing pilot exercise should be used to test this suggestion.
24. The four Inns of Court each took a similar position to the proposals for the IDB. They agreed with the need for change. However, they queried why the Case Examiner model had been rejected by the BSB particularly as it was presented in the independent research paper as being the model that best represented current

good practice. The Case Examiner model is described in the independent report produced by Capsticks Consultancy Services⁴:

“This option would see the BSB engage individual decision makers (both barrister and lay) to make assessment and referral decisions in pairs (one barrister, one lay). These decision makers would work either within the BSB offices or from home, consider all case papers electronically and agree the outcome between them (based on guidance formulated with the Board’s approval). Case Examiners would be expected to work on a part-time basis (although this might be as little as one day – or even half a day – per fortnight, if that suited them). To retain credibility, the barrister CEs would arguably need to be in practice (or very recently retired from it), whilst the lay CEs might be expected to be engaged in (or recently retired from) the kinds of activity that make them suitable to carry out the CE role.”

25. The Inns of Court also provided feedback on the specifics of the IDB model and raised a number of concerns.

26. Middle Temple noted that:

- a. The use of virtual meetings could impact on the fairness of the decision making and suggested that face-to-face meetings be the norm.
- b. Lay participation, while important, should be carried out in line with clear guidelines on qualities and qualifications for lay members.

27. Inner Temple noted that:

- a. The decision not to anonymise case files other than in relation to the barrister subject to an allegation(s) would not be appropriate and put forward that both the barrister and complainant identities should both be anonymised.
- b. The Executive may take too many decisions under the proposed new regime, in particular Fitness to Practice and Interim Suspension referrals, and that the decision-making powers of the Commissioner and the IDB appear to overlap.
- c. The removal of the time limit may prejudice the barrister due to the degradation of witness memory as time passes.

28. Lincoln’s Inn offered a two-part response which both provided feedback on the IDB proposal and suggested a series of improvements. Lincoln’s Inn noted that:

⁴ ‘A Review of the Bar Standards Board’s Enforcement Decision Making’, Neil Marshall, Capsticks Consultancy Service, Paragraph 5.6, accessible at: https://www.barstandardsboard.org.uk/media/1926652/a_review_of_the_bar_standards_board_s_enforcement_decision_making.pdf

- a. The use of a panel system may create inconsistency in decision making between panels, given that the membership will change from panel to panel, and that training would not be a suitable means of addressing this.
- b. The need to setup panels would retain the delays caused by the need to setup PCC meetings.
- c. The decision to refer to the IDB would be for serious/complex cases and matters requiring independent input but that the criteria for when these thresholds are met are not clear.
- d. There is no clear need for both APEX and IDB independent decision making and that having both sources of decision making would not be appropriate.
- e. It confuses the role of panel and lay involvement. With the latter being most appropriately used for setting and reviewing policy relating to authorisation, supervision, enforcement and risk.
- f. It is not necessary to always have lay membership on a panel. Lincoln's Inn suggests that a situation where lay membership is not necessary would be for referral decisions where the IDB panel is not making a decision on the substance of the allegation.
- g. It is not clear what the criteria are for the use of three, five and seven-person panels and that, because only complex matters should be being referred, there is no need for any variation in panel size.

29. Gray's Inn noted that the APEX proposal should be supported by specific guidance on when advice should be sought from APEX, on the basis that people don't "know what they don't know" and may therefore miss important points.

BSB Response

30. The responses from the profession in relation to this question demonstrate that there is no consensus as to the approach the BSB should take to reforming independent decision making.
31. **Size of panels:** those that responded and commented on this issue had very different views and we have considered those views. The BSB rejected the Case Examiner model several years ago having considered the contents of the independent report and we consider there is no compelling reason to revisit this issue now. While, it is accepted that the independent report did state that the Case Examiner model was considered good modern practice it also pointed out this option represents the biggest shift away from current structures and processes and so is undoubtedly the option which presents most risk. We are also conscious that the option of adopting a Case Examiner model was not

presented in the Consultation paper and therefore was not an option on which others were asked to comment

32. While, in principle, we remain of the view that three-person IDB panels may be sufficient to take independent decisions on enforcement issues, we have been persuaded by the consultation responses, that five-person panels will be more appropriate for enforcement decisions in the early stages of the new regime. Therefore, we will make this change. This change in our proposals was also informed by informal feedback from the pilot three-person IDB meetings that have been held since the end of 2017, which indicates that the views of the one barrister on the panel may hold too much sway and a panel may be more balanced if there is input from two barristers.
33. However, we consider that our Standing Orders should not dictate that IDB panels must consist of five persons. This is for two reasons. First, the current Authorisations Review Panels operate very effectively as three-person panels and therefore there is no reason to change their composition even when they are reconstituted as IDB panels. Second, experience may show that five-person panels are not necessary for enforcement decisions and therefore it would be inappropriate to enshrine in the Standing Orders that such decisions must be taken by five-person panels. Our view is that the size of the IDB panel can be effectively covered by policy as long as the Standing Orders provide for a minimum of three people with a lay majority. However, we consider creating a default position of five-person panels for enforcement decisions means that it is not necessary to make any provision to constitute panels larger than five.
34. We recognise that constituting five-person panels for enforcement decisions and three-person panels for authorisation appeals will undermine one of the principles of the new arrangements i.e. that IDB panels should be able to handle a range of decisions. However, we are of the view that careful scheduling will address this issue and potentially a five-person panel could reduce to three persons during one meeting to allow different cases to be considered.
35. **Virtual meetings** in relation to virtual meetings, we have taken into account the consultation responses but our view is that it would not be appropriate to set the default position as meetings being in person with virtual meetings being the exception. This would undermine our stated desire to extend participation in our regulatory decision-making to a wider range of people. Nevertheless, we recognise that appropriate and effective technology is essential to ensuring that the proposal to allow for virtual meetings operates efficiently. We will closely monitor the development of the relevant technology and we will ensure, at a strategic level, that the relevant IT systems development is progressed to allow effective implementation of the proposals for virtual meetings.
36. **Qualifications of panel members:** we fully accept that it is essential that all IDB panel members are suitably qualified, experienced and trained for the role: this applies to both lay and barrister members. Under the current system, robust

recruitment procedures are in place and these have allowed us to recruit high calibre lay and barrister members for the PCC as well as other Committees and the Board. Such robust recruitment processes will continue under the new system with prospective panel members being required to meet specific competences and experience levels applicable to the new roles.

37. **Overlapping powers of the Executive and the IDB:** we note the concerns raised regarding the division in decision-making powers between the Executive and the IDB as well as the potentially extensive decision-making powers that will be given directly to the Executive. However, we do not consider there is a need to amend the current proposals. In effect, they merely reflect the current division in decision-making expect that powers will in future be given direct to the Executive to take decisions as opposed to such powers being derived from authorisations given by the independent decision-makers (i.e. the PCC).
38. As is currently the case, our publicly available policy documents will set out the criteria we will use to determine whether a matter needs to be referred to the IDB.
39. With regards to the concerns about overlapping powers, the Executive has a series of powers under the current system and these have now been codified into the new regulations. The most significant source of overlap in the regulations is with regards to referrals to Disciplinary Tribunal. In these cases, whilst the Executive does have some powers to refer to a Tribunal, they are explicitly set out in the regulations with all other referrals requiring a decision by an IDB panel. The situations where the Executive has powers to refer to a Tribunal are ones where the decision is so clear that there is no need for additional input (one such example would be criminal convictions). Where there is overlap in other powers these will, as is currently the case, be separated by policy. The existence of these clear policies on when the IDB should be used also responds to Lincoln's Inn's concern about the definition of serious/complex matters and matters requiring independent input. In effect, we are replicating the existing divide in powers between the PCC and Executive whilst setting this out in clear, publicly available policy to allow for flexibility and evolution in light of experience.
40. The new arrangements will not create any significant difference in the level of Executive decision making that is present in the current system, albeit that those decisions are currently taken under standing authorities from the PCC. Currently approximately 70% of decisions are taken by the Executive without recourse to the PCC. The difference is that, in the future system, the Executive will have direct powers to take such decisions rather than via authorisations given by the PCC.
41. **Time limit:** Inner Temple were also concerned about the removal of the one-year time limit for making complaints to the BSB as it focusses the minds of those who wish to bring information to the BSB on doing so with a reasonable period of time. However, we are concerned that it also creates a barrier to the public bringing issues to our attention. As a regulator acting in the public interest it is important

that we act in partnership with the public in maintaining standards at the Bar. We therefore want to encourage, rather than discourage, people from raising issues with us. However, we also recognise that the profession needs to have safeguards against being subject to old allegations which they are unable to properly meet. Our view is that such safeguards are available without the need for an arbitrary time limit which is rarely, if ever, used as the sole reason for not progressing a matter.

42. As is the case with the current regulations, the new regulations require that if a matter cannot be properly and fairly investigated, no action will be taken on it. In making such an assessment, we will take into account the age of the information and whether evidence would still be available to allow for a fair and proper investigation. Our view is that where there is sufficient evidence of a breach of the Handbook, the date on which the conduct occurred should not be a pivotal factor in taking regulatory action. Nevertheless, we are aware of the concerns regarding this change and will be monitoring the situation after an 18-month period, if there are unforeseen consequences we will take any necessary action.
43. **Role of APEX and duplication of decision making:** Lincoln's Inn were concerned that there would be a duplication of decision making between APEX members and IDB members, as well as a similar duplication between IDB and the Executive/Case Examiners. This concern stems from a misunderstanding of the proposals we are making. It is not part of the proposal that APEX will have any decision-making power at all, they are instead an advisory body of experts that can answer specific questions in order to inform Executive and IDB decision making, on this basis there is, in our view, no duplication. The overlap in IDB and Executive decision making is discussed at paragraphs 37 to 40.
44. **Lay member involvement:** Lincoln's Inn's suggestion that lay members are not required for all panel decisions is, in our view, incompatible with the principles of regulation which the BSB follows. Lay involvement has been embedded in BSB decision making for many years and it is public interest principle that we consider essential to all independent decision making, all committees and decision-making bodies at the BSB have lay majorities, including the current PCC, and we are of the view that this is in line with our governance principles.
45. Lincoln's Inn also provided a number of suggested improvements to the IBD system if it were to be pursued. All of Lincoln's Inn's suggestions, save for where they relate to the role of lay members (i.e. (f) within Lincoln's Inn's response), are already, or will be, part of the IDB proposal. We are grateful to Lincoln's Inn for taking the time to provide those suggestions.

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?

Overview of responses

46. Those who responded to this question provided detailed thoughts and proposed amendments, we appreciate respondents taking the time to consider the detail of the regulations.

47. Middle Temple raised three concerns in relation to the proposed regulations:

- a. It is not clear whether rE19.5 is an unfettered power to send any allegation to the IDB.
- b. That the right to reconsider any allegation previously disposed of under rE58 could allow for injustices against barristers (Inner Temple and Gray's Inn also raised this concern).

48. Inner Temple raised an additional concern:

- a. That there has not been enough information given regarding quality assurance for that part of the proposal to be evaluated (Gray's Inn and the Bar Council also raised this concern, see paragraph 9 regarding this point).

49. Gray's Inn raised the following additional concerns:

- a. That there is no need to create the role of the 'Commissioner' and instead this power should be vested in the Director General as it runs contrary to the principle of 'light touch regulation'.
- b. With regards to the removal of the mandatory requirement that the PCC dismiss complaints at the outset if they consider that the complaint lacks substance, cannot be properly or fairly investigated, its consequences are insufficiently serious to justify further action; or for any other reason that the complaint is not apt for further consideration. That it would create a less certain test and that it will increase the prospect of information being treated as an allegation.

50. Lincoln's Inn raised the following additional concerns:

- a. That rE10 does not allow for information to be considered by the Commissioner and referred to another body.
- b. That rE12 does not specify when the Commissioner may choose not to exercise the discretion not to treat information as an allegation.

- c. That rE13 should include a consideration of locus standi, credibility and integrity of the information.

51. The Bar Council raised the following further concerns:

- a. That the regulations do not ensure that *“the permissible extent of staff decision-making depends on i) clear delineation of the categories of different complaints, and precise criteria for decision-making; ii) availability of expertise where needed (discussed above); iii) the absence of operational imperatives influencing decision-making; and iv) a high degree of quality assurance and audit of decisions”*
- b. That the rules, rather than policy, do not dictate the circumstances when a member of the Executive may exercise each of their disposal powers.

BSB Response

52. Where concerns noted above have been addressed elsewhere in this paper they are not responded to again here. The remaining responses are detailed below.

53. rE19.5 is indeed intended to be a power to send any allegation to the IDB if the Commissioner so chooses. This is because the circumstances of cases can vary significantly, and it is essential that the Commissioner has the ability to access independent decision making where a case requires it. An example of a case where this approach might be used is where an otherwise straightforward allegation has attracted public concern in the media. It may be that for reasons of complexity or wider public interest we may choose to send such a case to the IDB for a decision in order to maintain public confidence.

54. The right to reconsider any allegation previously disposed of currently exists under the present model at rE90 of The Complaints Regulations⁵. rE90 differs from the proposed rE58 in that it specifies that reconsideration of decisions should be based on two criteria: whether new evidence has been provided; and/or there is any other good reason to reconsider the decision. The new regulations remove these two criteria and leave the decision to be entirely discretionary. A concern was raised in the responses about the new provision being so open ended. On reflection, we agree that the current criteria included for reconsideration of decisions should also be included in the new regulations as they provide clarity and focus for both the Executive and the public alike.

55. The creation of the role of the ‘Commissioner’ is, in our view, a useful vehicle by which we can establish these regulations. It allows for a symbolic distinction to be established between the two roles and allows for flexibility into the future. The fact that this vehicle is not essential was acknowledged in the Consultation paper. It is possible to set up the new arrangements by vesting all Executive decision-making powers in the Director General. However, we remain of the view that

⁵ rE90 of ‘The Complaints Regulations’, BSB Handbook, Part 5, Section A7, accessible at: https://www.barstandardsboard.org.uk/media/1933294/bsb_handbook_version_3.3.pdf

creating a role of Commissioner is an effective means by which to demarcate regulatory decision-making powers from any other role that may be held alongside the Commissioner role (i.e. the Director General). This vehicle will also provide the flexibility in the future for the Commissioner role to be performed separately without the need to change the regulations.

56. rE10 is drafted to apply to circumstances where we believe information can be more appropriately dealt with by another body, it does not cover situations where we simply wish to inform another person or body of the information. We do not see this as being a significant issue: if the BSB is seized of a matter, then it could potentially be confusing if at the same time we formally asked another body to deal with it. Information sharing arrangements are already in place with several stakeholders and the intention is to ensure that such arrangements are agreed with all relevant stakeholders. Under such arrangements, the BSB is free to inform other bodies/agencies of concerns without making a formal referral to them to address a matter. The view is that this is the most effective approach to handling overlapping issues. The regulations allow for matters to be formally referred to other bodies for consideration where this is appropriate. In such circumstances, the matter will be recorded as “closed” by the BSB. Nevertheless, the BSB will still be able to reconsider the issue if the outcome of the formal referral is not satisfactory: we will keep a watching brief on the outcome to determine this and react to legitimate concerns raised by the person who originally provided the information.

57. rE12 does not state when the Commissioner may choose not to treat information as an allegation, we are of the view that this is not necessary. The new regulation gives the Commissioner discretion to treat any information as an allegation but does not make it mandatory that any information that passes the threshold tests must be considered as an allegation. A concern was raised about this, but we are of the view that the terms of the regulation are appropriate as they create flexibility to consider issues, that would normally warrant investigation, not to be treated as allegations. This allows for exceptional circumstances to be considered and is line with our risk-based approach to regulatory decision making.

58. With regards to the considerations of locus standi, credibility and integrity of the information raised by Lincoln’s Inn, we are of the view that expressly including these issues in the regulations is not necessary. All decisions will be subject to an assessment model that covers these issues and no referrals will be made without the information being subject to such assessment. Further, the factors outlined are not expressly included in the current Complaints Regulations but nevertheless, by policy, they are still taken into account. Therefore, there does not appear to be a compelling reason why these issues should be expressly included in the new regulations.

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

Overview of responses

59. The responses to this question mainly focused on the issue of anonymisation, the Inns of Court and the Bar Council appear to be split on this point. Both the Bar Council and Middle Temple support the proposed approach to anonymisation, that being the anonymisation of barristers only, whilst Inner Temple and Gray's Inn are of the view that both the barrister and the person providing the information should be anonymised.
60. We accept that anonymisation of both the barrister and the person bringing the information to the BSB, would be ideal. However, we need to balance this against effective decision making. While such anonymisation is possible under the current system, our research indicates that anonymising the "information provider" under the new system would lead to significant problems in the panels being able to understand the evidence presented to them. This is because, in contrast to the current system, all members will be provided with the full file and therefore all cases papers (rather than just the covering report) would need to be anonymised.
61. Inner Temple also raised the concern that the proposals could significantly water down the E&D expertise currently found in the PCC. Middle Temple's response to this question has been covered during the consideration of their other responses and all other respondents to this question found there to be no adverse impacts under the Equality Act 2010.

BSB Response

62. We have considered carefully the responses in relation to this point and are of the view that any adverse impacts under the Equality Act 2010 can be mitigated.
63. For practical reasons it will no longer be possible to anonymise both the identity of the regulated person subject to an allegation as well as the person who provided the information on which the allegation is based (complainant). This is because the current system of anonymisation only applies to the reports prepared by staff or members of the PCC – it does not extend to anonymising the full cases papers. Under the proposed new arrangements, all relevant cases papers will be made available to the IDB panel members as well as a covering report.
64. Several respondents had concerns about our proposed future approach to anonymisation and indicated that they would like the BSB to continue anonymising the identity of both parties. In an ideal world we would want to do so but our research shows that anonymising the "complainant" would make the full file documents very difficult to understand.

65. We remain of the view that the efficacy and integrity of the decision-making process must be paramount. While mitigating risks of unconscious bias is very important, it cannot override the need to ensure that decision makers fully understand the issues and documentation they are tasked with considering. Further, we do not consider that this decision will have an adverse impact on the provider of the information and have no statistical evidence to suggest it will. We do however have evidence that the presence of a barrister's name, ethnicity and gender can impact decisions made by the PCC and we are therefore going to preserve the anonymisation of barristers when information is sent to the IDB.
66. With regards to E&D expertise, we do not see this as being an issue and indeed the new arrangements are likely to provide greater access to such expertise. Under the current system, such advice is provided via the membership of the PCC and is dependent on the composition of the PCC to provide such expertise. Therefore, access to specialist advice in this area is patchy and not reliable and currently the Executive has to seek expertise outside the PCC in this area because it is not adequately covered by the PCC membership. Indeed, we have sought advice on several occasions recently from members of APEX. The view therefore is that the new arrangements will provide more coherent and reliable access to equality and diversity advice rather than "watering it down".