

# **A Review of the Bar Standards Board's Enforcement Decision Making**

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## Executive Summary

1. This report was commissioned primarily to assist the Board in its current governance review and, in particular to set out options for how decisions might be made within the enforcement process.
2. 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.
3. However, there are 'structural' issues with the current arrangements. Firstly, there is a confusion of policy making and decision making roles, which does not necessarily conform to best regulatory practice. Secondly, 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. Comparing the BSB to other professional regulators, it is something of an outlier in the way it handles decision making at PCC.
4. I have identified a number of options for the Board. All of these involve a separation of policy making and oversight functions from the decision making function. Beyond that, the Board may choose to: largely retain the current PCC in its current form; or introduce smaller PCC panels drawn from a pool of PCC panellists; or introduce a form of decision making which involves lay and barrister 'case examiners' working in pairs to make decisions on cases.
5. If radical change is envisaged, the Board will need to put in place a number of accompanying measures to ensure that the current excellent quality of decision making is maintained. These will involve allowing the decision makers easy access to expert advice and the implementation of effective and comprehensive quality assurance measures.
6. The Board may also wish to consider an expansion in the scope of staff decision making and a break with the current pro bono arrangements with barristers who assist the enforcement decision making process.
7. In considering these options, the Board will need to bear in mind that the organisation should not be assumed to currently possess the skills, experience or expertise required to make any new system work effectively. The Board may wish to commission – from the BSB's own Human Resources team or from outside the organisation – a skills audit to identify any potential gaps in the expertise and experience required by the PCD staff group. It may also then be necessary, in order to support any new process effectively, to ensure that the required recruitment, training and development of staff and decision makers is undertaken.

## Section 1 Requirements, Scope and Methodology

### Requirements

1.1 The Bar Standards Board (BSB) is currently undertaking a review of its governance arrangements. As a part of that process, it wishes to consider the range of options available for its enforcement decision making regime. At present, such decisions (up to and including the point of referral to a disciplinary tribunal) are made by the Professional Conduct Committee (PCC) or, in clearly defined circumstances, by members of the executive on delegated authority from the PCC.

1.2 The primary aims of this Report are:

- to assess the current decision making regime;
- to rehearse best practice for delivering fair and transparent decision making;
- to assess the decision making regimes of other professional regulators;
- to assess the advantages and disadvantages of these other regimes;
- to provide an analysis of the cost implications of implementing alternative options; and
- to identify any equality or diversity issues in relation to these options.

### Scope

1.3 This review will not cover the decision making of the Disciplinary Tribunal system. Nor will it be concerned with the operational procedures underpinning the current decision making regime, except in so far as it is necessary to assess the effectiveness of alternative options and the costs associated with them.

1.4 I am instructed that any options explored in this review should include both lay and professional involvement in the decision making process and some form of arm's length / independent decision making separate to the executive. I am also asked to ensure that the options have decisions being made at the lowest appropriate level commensurate with sound, fair and transparent decision-making. I also note the governance principle recently agreed by the Board that committee structures should be the minimum size possible to maintain quality.

1.5 It is not the intention of the review to provide the Board with a series of recommendations. The aim is to set out the various options for the Board's consideration and to give an assessment of the advantages and disadvantages of each.

### Methodology

1.6 All relevant BSB process documentation and guidance has been reviewed. Managers within the Professional Conduct Department (PCD) have been on hand to answer any queries and to clarify the work undertaken by their teams. The assistance provided by the PCD management team has been exemplary.

1.7 Research into the decision making processes employed by other professional regulators has been based on publicly available information and process documentation, backed up as necessary by enquiries made with those (very few) bodies whose published material does not fully set out how

their decision making processes work. That research has covered the majority of professional regulators who operate in England & Wales, as well as (for comparative purposes) a number of service or industry regulators. The list of organisations considered follows at the end of this section.

1.8 Interviews were carried out with: Simon Lofthouse (Chair of PCC); Andrew Mitchell (Board member); Rob Behrens (Board member); Tim Robinson (Board member); Malcolm Cohen (Board member); and Isobel Leaviss (Independent Observer). I also attended the PCC meeting on 15 July 2015 to see the Committee in action first hand.

1.9 It is necessary to sound a note of caution at this point. There were constraints on the review, not least in terms of resource - the review plan allowed for around 12 days' work from Capsticks Consultancy Services) - and timing - work began in mid-July 2015, with the first draft of the final report due on 20 August 2015.

1.10 It has been necessary to maintain confidentiality around the review. Board members, the Independent Observer and key managers in the PCD have been aware of the review, but for very good reasons PCC members and other staff members have not been informed as yet.

1.11 A further constraint arises from the fact that the BSB's current accounting and budgeting procedures do not necessarily delineate all costs according to specific functions, processes and/or teams. In assessing the costs of the current system, then, some working assumptions have had to be made.

1.12 This means that the review cannot be taken as an in-depth root and branch analysis of the BSB's relevant processes and procedures. It has not been possible, for example, to conduct wide-ranging surveys of staff views, PSS members' views and/or the levels of satisfaction experienced by either complainants or those barristers subject to investigation.

1.13 Whilst these limitations should be borne in mind, the Board should nonetheless expect that the main strengths and weaknesses of the current system have been identified and that the alternative decision making mechanisms are comprehensively set out and analysed.

1.14 Research for this review covered the following regulatory bodies:

#### ***Legal Professional Regulation***

Solicitors Regulation Authority (SRA)

Chartered Institute of Legal Executives Regulation (CILEx Regulation)

Cost Lawyers Standards Board (CLSB)

Intellectual Property Regulation Board (IPRB)

#### ***Health & Social Care Professional Regulation***

General Medical Council (GMC)

Nursing & Midwifery Council (NMC)

General Dental Council (GDC)

General Pharmaceutical Council (GPhC)

General Optical Council (GOC)

General Osteopathic Council (GOsC)

General Chiropractic Council (GCC)

Health & Care Professions Council (HCPC)

***Financial Professional Regulation***

Association of Chartered Certified Accountants (ACCA)

Institute of Chartered Accountants in England & Wales (ICAEW)

***Service and Industry Regulation***

Financial Ombudsman Service (FOS)

Legal Ombudsman (LeO)

Ombudsman Services Energy (OSE)

Office of Communications (OFCOM)

Advertising Standards Authority (ASA)

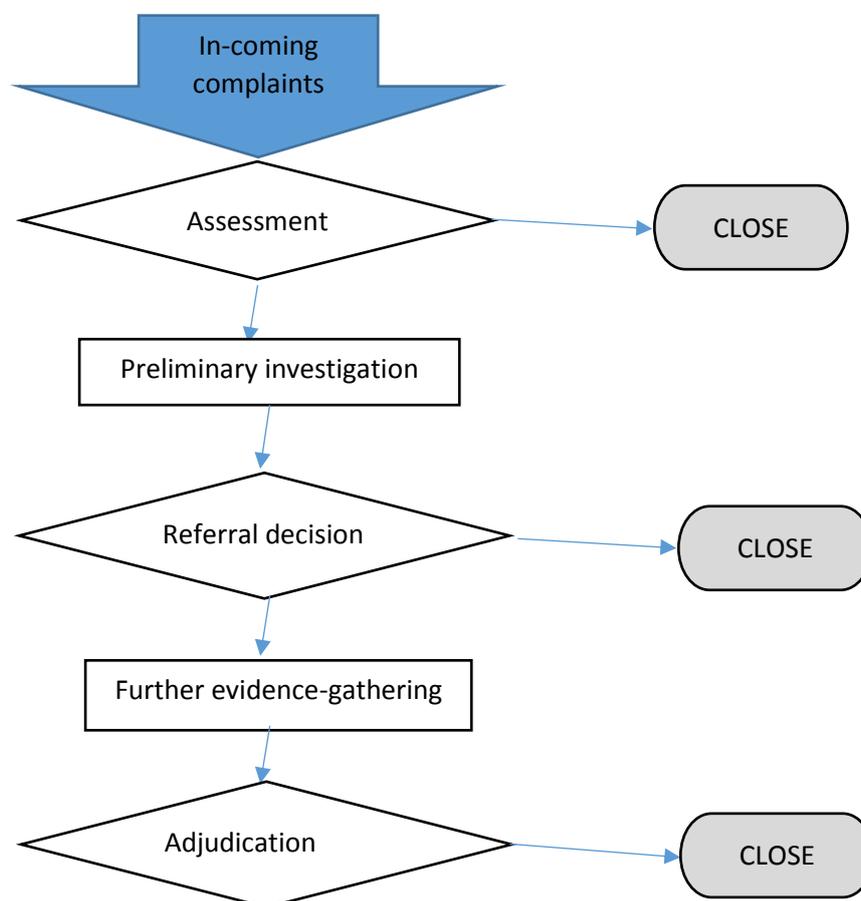
Independent Press Standards Organisation (IPSO)

## Section 2 Regulatory case handling models

### The common structure of professional regulatory case handling processes

2.1 Most case-handling processes currently employed by professional regulators share a common structure. When a complaint or other information is received, an initial assessment is undertaken to identify whether the issues raised are appropriate for the regulator to investigate. If so, some form of preliminary investigation follows, which will always include obtaining the views of the professional who is subject to the complaint (the respondent). Other information may be collected at this stage and then a decision is made about the further disposal of the case (whether it should be referred for some form of adjudication, closed with no further action, or concluded with a lesser sanction – e.g. a warning or fine – or with advice). Where a case is referred for adjudication, further evidence will be gathered and the case prepared for presentation to the relevant tribunal, committee or panel

2.2 The extent to which cases are closed on initial assessment varies. Some regulators will close only those complaints which are clearly misplaced (not about a regulated professional), whilst others will apply criteria to ‘filter out’ complaints which are less serious and unlikely to result in regulatory action. The extent of the preliminary investigation undertaken in this process also differs. Some regulators will do little more than seek the views of the respondent before moving to a decision. Others will gather other documentary evidence and/or take witness statements and/or seek an expert view. Of course, this affects the extent of the further evidence gathering which might follow *after* a referral for adjudication. However, the underlying shared process can be set out as below:



2.3 Amongst the regulators considered as part of this review, the exceptions are the various Ombudsman services, the ASA and IPSO. None of these regulate professions, as such. In each case, after an initial assessment of complaints, an investigation is carried out which will – unless the case is withdrawn or, in some cases, a mediated outcome is reached – result in consideration (either on paper or in a meeting) by a panel, committee or individual who will determine the final outcome of the case. In contrast, all professional regulators considered as a part of this review have processes which conform to the basic process set out above, with a decision about onward referral made after a preliminary investigation is completed.

2.4 Given that the final adjudication decision – in the BSB’s case made by a Disciplinary Tribunal – is beyond the scope of this review, our focus is on the two earlier decisions – the one made at the outset of a case to determine whether an investigation is appropriate (for the sake of brevity, I will refer to this as the ‘assessment decision’) and the one made after the preliminary investigation which determines whether a case is referred for adjudication or disposed of in some other way (to be referred to in the rest of this report as the ‘referral decision’). The key difference between the professional regulators lies in who makes those decisions. Whether the various processes can then be said to be effective may depend on what guidance or criteria the designated decision makers have to inform their decision making and how their decision making is monitored and overseen.

## Current regulatory decision making models

2.5 The assessment and referral decisions (as defined above) currently made by regulators are made by either: operational staff (usually managers); decision makers specifically appointed for that purpose and that purpose alone (working either singly, in pairs or as a panel); or those who are also responsible for the strategic direction and/or policies of the organisation in question (often Board or Council members, but also on occasion those involved in sub-committees which have some form of policy-making role).

2.6 For the purposes of brevity, in the rest of this report I will refer to these groups as: staff; independent decision makers; and policy-makers. The latter term in particular is very much a shorthand means of referring to a category which contains a number of different types of decision maker, but the thing that they have in common – the fact that they contribute to policy-making and/or to the strategic direction of the organisation – is important.

2.7 Almost all regulators have decisions made by more than one of these categories of decision maker. And even where regulators use the same categories of decision-maker, the proportion of decisions made by each category will vary enormously. This makes it difficult to construct very straightforward models, but there is some value in identifying broad groups of regulators who use similar processes.

2.8 Very broadly, there are four basic decision making models in operation within the group of regulatory bodies cover in this report. One model has all assessment and referral decisions made by staff. At the other extreme, there is a model which has no decisions made by staff (decisions being made by a combination of independent decision makers and policy makers). In between, there are two models in which staff make some decisions (the proportion varies widely) – either in combination with independent decision makers or with policy makers. The vast majority of regulators fall into these latter two categories.

## **Model One – Staff decisions only**

2.9 The Costs Lawyers Standards Board (CLSB) - which deals with a relatively small amount of complaints - is the one regulator which definitively operates this model at present. Cases which fall within remit are investigated and a report and recommendation provided to the Chief Executive Officer, who makes the referral decision.

2.10 This is not to say that other organisations will not – or could not – adopt the CLSB model. The direction of travel in regulation at present is certainly to empower staff to make more decisions. The potential weaknesses in this model – and the steps which could be taken to mitigate them – are discussed later in this report.

2.11 It is arguable that the Ombudsman services – including the Legal Ombudsman – fall into this category. The Ombudsmen, who make the decisions, are members of staff. However, their involvement in the actual operational management of the organisation in question is usually limited, if not non-existent. On this basis, they might be better considered to be independent decision makers, for the purposes of this modelling exercise at least.

## **Model Two – No staff decisions**

2.12 There is only one regulator which currently operates a decision making model which does not involve staff members in assessment or referral decisions – the General Osteopathic Council (GOsC). Again, this is a relatively small regulator, at least in terms of the numbers of complaints handled (around 100 incoming complaints per year up until 2013-14, which is the last reported period). At the initial assessment stage, cases are ‘screened’ by an osteopath member of the GOsC’s Investigating Committee and any closures must be agreed by a lay member of the GOsC’s Council. After investigation, the referral decision is made at an Investigating Committee (IC) meeting. The IC has in total up to 15 independent appointees (lay and professional) and most often considers cases in groups of 5 or 7 members.

## **Model Three – staff and independent decisions**

2.13 This is by far and away the most used model in current regulatory case handling. In almost all cases, the initial assessment is carried out by operational staff members (although in some cases, they can call on advice from the independent decision makers where it is unclear whether an investigation should be undertaken). The referral decision, made after investigation, is usually made by the independent decision makers, though in some regulators, staff are empowered to make decisions in certain types of case (usually where the outcome is obvious – e.g. referral for a disciplinary hearing in cases where there is a conviction for a serious crime).

2.14 There are two variants of this model. For some regulators – CILEx Regulation, HCPC, GPhC, GCC, GDC and ICAEW – the independent decision makers meet in panels to consider cases. Typically, these are panels of three, with lay and professional representation, drawn from a wider panel of independent members. Exceptions are GPhC - which has a quorum of three but tends to meet in fours so that both regulated professions (Pharmacists and Pharmacy Technicians) are represented – and ICAEW, which meets in panels of at least 14 members (at least 25% of which must be ‘lay’).

2.15 For others, the independent decision makers (usually called Case Examiners or Case Adjudicators) work alone or in pairs (sequentially). This model is employed by GMC, NMC, GOC, ACCA and – arguably – SRA (whose systems are something of a hybrid of the two variants of this model).

2.16 It is worth noting that in healthcare regulation in particular, the current direction of travel is towards the Case Examiner variant of this model and away from Panels. Until around 2006, when the GMC implemented wholesale reform of its case handling processes, all healthcare regulators had referral decisions made by panels or committees in one form or another. The GOC and NMC have adopted the Case Examiner variant of the model in more recent times and the GDC is in the process of moving away from its current (Investigating Committee) model to introduce Case Examiners. This reflects a body of opinion in healthcare regulation that the Case Examiner model is both more efficient and produces more robust and consistent outcomes (although it should be said that this is not a universally held view in that sector).

#### **Model Four – staff and policy maker decisions**

2.17 In this model, staff will typically make initial assessment decisions (as with Model Three above). In some of these regulators, staff may also make some referral decisions (again, in straightforward cases and against clear criteria). In most cases though, the majority (if not all) of these decisions are made: by sub-committees of Boards or Councils; or by panels which are at least in part populated by Board or Council members; or by panels which are populated by individuals who play some role in dictating the strategy or policy of the organisation concerned.

2.18 This is not a common model in regulation at present, although it was much more prevalent – particularly in healthcare regulation – up until the early part of this century. Its decreasing popularity in healthcare regulation can be attributed in some measure to the scrutiny applied to that sector after the high profile scandals in medical regulation in the late 20<sup>th</sup> century (Shipman, Alder Hey Bristol Royal Infirmary etc.). Amongst other things, this scrutiny led to a focus on the appropriate role for Board / Council members, with the conclusion of many observers being that these should provide oversight of the activities of executives – in case handling as elsewhere – rather than get involved with the operational functions themselves. I shall return to this theme later in the report.

2.19 The IPRB's processes conform to this model, with the referral decisions being made by a Complaints Review Committee comprised of one professional and two lay members of the organisation's Board. It should also be said that although these organisations do not make referral decisions as such, both IPSO and ASA have final adjudication panels or committees that are not independent of their Council / Board. In ASA's case, the more serious cases are determined by Council members (the less serious cases being dealt with by staff). In IPSO's case, final decisions are the responsibility of a Complaints Committee chaired by the Chair of their Board.

2.20 The BSB's own decision making process also arguably fits best into this model, but I shall return to this question later in the report.

## Section 3 Best practice in decision making

### Regulatory Best Practice

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

3.2 This guidance should be borne in mind when we consider best practice in decision making in regulatory case handling. It certainly suggests that decisions should be made which are based on an assessment of risk and which focus on the likely outcomes of the case. This should mean that scarce resources are targeted at those practices, individuals or organisations which present a risk to the public.

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

3.4 Whilst there is no definitive guidance here on how and by whom case handling decisions should be made, taken together these principles and standards give us a framework against which to judge any current or proposed model for case decision making.

### Best Practice in decision making specifically

3.5 If we bear in mind what any decision making process is trying to deliver in terms of good regulation (see the section directly above) and if we turn back to the four models of current practice set out in Section Two, it is possible to identify three important questions about best practice in decision making:

1. Should operational staff be involved in decision making on cases and, if so, to what extent?
2. Assuming that there are decisions that operational staff should not make, to what extent should the decision maker be independent from: (a) operational staff; and/or (b) the Board or others involved in determining policy / strategy?

3. What is the appropriate organisational arrangement for the (non-staff) decision makers (singleton, paired, or panel)?

3.6 There are then a series of subsequent questions which need to be addressed, depending to an extent on what decision making process and structure is then envisaged. These relate primarily to the extent and nature of the oversight of decision making. What guidance and/or criteria should be set down for the decision makers? How are their decisions audited and/or quality assured? And what information about decision making is made available – and to whom?

### Staff involvement in decision making

3.7 In terms of efficiency and the appropriate use of resources, it seems clear that operational staff (at the appropriate level) should make some case handling decisions. The only current professional regulator who seemingly does not have staff making decisions (other than presumably to re-direct misdirected correspondence) – the GOsC – is likely to be able to operate its process only on the basis that it deals with a relatively small number of complaints.

3.8 There can be no sensible objection, for example, to the idea that a member of operational staff could, on initial assessment, close a complaint that a regulated professional had arrived 2 minutes late for a meeting, or that he or she parks their car too close to the entrance to a neighbour's drive (unfortunately, these are real examples). Similarly, it is difficult to see any objection to a member of staff making a decision to refer a case for a disciplinary hearing where the professional in question had been convicted of committing a serious crime against a client or patient (although surprisingly few regulators actually facilitate this kind of 'direct' referral).

3.9 Of course, these examples are at the extreme ends of the spectrum of possible complaints and the right decision is abundantly clear to all concerned. The extent to which the range of staff decision making can be extended (at either or both ends of that spectrum) will depend primarily on two things. One, the extent to which the types of complaint received are predictable and easily categorised. If you can delineate a number of types of complaint – particularly where the complaints within that type do not differ very much from each other in terms of any potential exacerbating or mitigating features – then it should be relatively easy to establish how that type of case should proceed. Two, and leading on from this, the extent to which the regulator has clear guidance and criteria which both enable decision makers to make decisions with confidence and certainty and also allow relatively easy checking of those decisions as part of a quality assurance or audit process.

3.10 The arguments against going too far with staff decision making are equally persuasive. Most often, staff are not members of the profession being regulated and so – particularly with complaints that are complex or technical in nature and/or relate in some way to the duties of a professional in a specific or specialist context – they would need detailed expert advice to be able to make a reliable decision on the case in hand. This is to say nothing of the political difficulties that a regulator might encounter if it were to introduce a system which has little or no professional input to the majority of cases.

3.11 It is also true to say that whilst operational managers might be expected to make decisions about process, resource allocation etc., the skills required of an excellent operational manager are not the precise equivalent of those required in a decision maker dealing with often complex and/or difficult and/or high profile cases.

3.12 Operational managers may also be influenced in their decision making – at least subconsciously – by operational imperatives which should not intrude in the decision making process at all. At the very least, there might be a perception on the part of some complainants that a manager aware of a serious backlog of work in the subsequent part of the case handling process might be tempted to conclude cases that might otherwise have been investigated / referred on.

3.13 Again, there is only one regulator that has staff making all assessment and referral decisions – the Costs Lawyers Standards Board (CLSB). That may be a consequence of the size of the regulator in question and the number of complaints that it handles – constructing an elaborate decision making scheme and structure in those circumstances might not be sensible, or indeed, practically possible.

3.14 Whilst there may then be very good reasons for the CLSB to be an outlier in terms of its case decision making, there are very good reasons why all other current regulators do not have staff members making all assessment and referral decisions.

3.15 To summarise, the evidence would suggest that current best practice in regulation involves staff in making some but not all assessment and referral decisions. Allowing staff to make decisions in cases where the outcome is more or less obvious or clear fits with the best practice imperatives to use resources efficiently, to make decisions at the lowest possible level commensurate with effective decision making and to aim resources at cases which are higher risk. Using other decision makers in more complex, novel or difficult cases then gives an assurance that appropriately expert resources are being applied so as to guarantee high quality and effective decision making in those cases.

3.16 Of course, this still begs the question as to the extent to which staff should be empowered to make decisions. This will depend to a great extent on the risk appetite of the regulator and on the measures put in place to mitigate the risks associated with a greater degree of staff decision making. Where there is a high degree of quality assurance and audit of decisions – where clear and comprehensive criteria can be set out to guide the decision makers – and where the relevant staff members are selected against criteria that include a high degree of competence in analytical thinking and/or are trained and developed to enhance those skills - it should be possible to allow a greater degree of staff decision making.

3.17 In considering its own position on these matters, the BSB will no doubt wish to take into account the Legal Services Board's view (as expressed in its 2012/13 report) that, "more should be done to empower executive staff to make decisions and to use the committee and other experts only for more complex matters...".

### Decision makers' independence

3.18 Assuming that best practice suggests that staff will not make all assessment or referral decisions, the question arises 'who does?'. In particular, it is important for any regulator to be clear about the status of any non-staff decision maker and the line of management and accountability that sits over them.

3.19 If we accept the argument that there may be a perception (adversely affecting confidence in the system as a whole) that operational staff may, on occasion, be at least tempted to make case decisions on the basis of operational imperatives, then it follows that the non-staff decision makers should not be subject to control by – or undue influence from – operational staff. To follow this

argument to its logical conclusion, there should be a separate line of management and accountability for these decision makers.

3.20 Of course, if the non-staff decision makers are Council or Board members, or otherwise sit in the governance structures of the Board or Council – on statutory sub-committees for example – then this ‘problem’ disappears to a great extent. Indeed, it might be argued that it is then the decision maker who is in a position of power that might enable him or her to ‘dictate’ to operational staff. This then creates another problem, if those decision makers feel inclined to interfere in – or make ‘suggestions’ about - how the operational processes should be organised. If operational managers are appointed on the basis of their competence in managing operations (which clearly they should be), then they should be left to do exactly that. Not only are they best-placed to carry out that role, but any actual or perceived ‘interference’ in that function may not only lead to adverse consequences in terms of organisational performance, but will also de-motivate and/or de-skill executive staff – and presumably make their recruitment and retention more difficult.

3.21 There is much academic research to suggest that the role of a Board or governing Council should be to provide strategic direction for the organisation in question and energetic oversight of the performance of the executive (towards those strategic goals). This was referenced in the PSA’s 2011 Report *Board Size and Effectiveness*, which has since been quoted by the LSB in that section of their 2012/13 Report which addressed the governance structures of the BSB.

3.22 Working from that premise – and as set out by the BSB’s own governance review working group – the role of a Board or Council (and its sub-committees) should be to set the strategic direction of the organisation and agree the policies that support it. As the working group’s recent paper put it, the ideal is a Board that is “eyes on but hands off”.

3.23 In summary, best practice would suggest that the decision makers (for those decisions which cannot be made by staff) should be independent from the staff group (at least in so far as any potential undue influence over their decisions is concerned) and should not be in any way involved in the work of the Board (or its sub-committees) in setting the strategy or policy of the organisation.

### **The best arrangement of the independent decision makers**

3.24 Of the four models set out in Section Two of this report, it would seem that the preferred best practice option - for the LSB and the PSA at least - is Model Three, which involves a combination of staff and independent decision makers. Unsurprisingly perhaps, that is the model adopted by the majority of the regulators covered by this review. If we leave aside the Ombudsman services (as more difficult to categorise), then of 16 regulators in total, 11 have adopted some variant of Model Three. In many cases, especially amongst the health and social care regulators (which fall under the ambit of the PSA), these organisations have moved to Model Three within the last 12 years or so, from some form of Model Two (with its combination of staff and policy-maker decisions).

3.25 As set out in Section Two, six of the 11 regulators who adopt Model Three have their independent decision makers working in panels. These typically meet face-to-face to make a number of case decisions on a particular day. The panels go under different names, but for the sake of brevity, I will refer to them as Investigating Committees (ICs). The alternative adopted by the other five regulators is to have decisions made by individuals who consider the cases on the papers in isolation (they do not meet to make decisions). Again, terminology differs, but I will refer to these as Case Examiner (CE) systems.

3.26 The norm is for CEs to work in pairs, although there is at least one regulator (ACCA) which allows singleton decisions. In most cases, the ‘political’ imperative to have both a professional and a lay individual involved in every decision is persuasive. There is also the argument that having two decision makers on each case at the very least allows for some form of cross-checking that one decision maker has not missed something in their consideration of the case.

3.27 It is difficult to make an argument that either the IC or CE model is definitively better than the other and constitutes best practice. At present, the ‘Model Three’ regulators are evenly split between the two variants, although there is a direction of travel towards CEs (as mentioned above, the GOC and NMC have recently moved to CEs and the GDC is about to do so). Certainly the oversight bodies (LSB and PSA) have been silent on this issue. Much may depend on factors specific to the organisations in question – size of caseload, pre-existing models and cultures, impact of high profile cases etc.

3.28 Assuming that regulators can recruit and retain high calibre individuals into both IC member roles and CE roles, there are two main advantages of the CE model. First, greater efficiency and timeliness in case handling. Even with the best scheduling systems and regular meetings, any IC system will involve a period where a case ‘sits’ awaiting the next IC meeting. These can sometimes become protracted, particularly in periods where the IC may find it difficult to meet as frequently as it might otherwise wish to do (e.g. holiday periods). Although it can be minimised, the arrangement of an IC meeting does involve a degree of effort on the part of the executive (empanelment, scheduling, room booking, bundle preparation etc.) most of which might be unnecessary with the CE model where cases will usually be propelled through the system to a CE for decision as and when the case is ready. Second, CEs can take their time to deliberate over – and finesse – their decision reasoning. In IC meetings, drafting the reasons for the outcome can often take considerable time, results in ‘drafting by Committee’ and be pressurised (if not rushed) by the need to get through all of the cases before the IC on a particular day. None of this is insurmountable, but it does require more effort and energy to avoid these issues in an IC system than it does with CEs.

3.29 On the other hand, the IC model may encourage the perception that greater consideration is being given to a case – by a greater number of decision makers – and that the case is therefore being taken more seriously. ICs will usually involve at least one extra pair of eyes over CEs working in pairs – which may be considered a ‘safer’ arrangement. There may also be, in perception if not reality, a greater independence in the decision making. Although ICs do not generally meet in public, complainants and/or respondents might perceive it as being somewhat easier for undue influence to be brought to bear on CEs than on an IC simply by virtue of the ways in which they carry out their business.

3.30 Where regulators adopt the IC model, the remaining question is what form the IC will take – and in particular how many members it should have. There are eight regulators (other than the BSB) which currently run committees to make referral decisions. As set out above, six of these (CILEx R, HCPC, GPhC, GDC, GCC, ICAEW) have independent panellists. The other two (GOsC and IPRB) run ICs populated by Board or Council members. Of these eight, six run ICs with panels of three (though the GPhC often tends to go with four for the reasons described above). The GOsC usually runs ICs with 5 or 7 members. The ICAEW has ICs with ‘at least 14’ members. It is worth noting here that the BSB’s PCC is therefore an extreme outlier in terms of Committee size (the two ‘halves’ of PCC meeting in groups of 20+), but I will come back to this later in the report.

3.31 It is difficult to make an argument, in terms of best practice, for the larger ICs. Decision making in a large group can become unfocussed and ‘cumbersome’. It can also give rise to

dominance by particular individuals or ‘groupings’ within the larger committee and the possibility that ‘minority’ voices will get lost. It is also relatively easy in a larger group for members to ‘hide’, either choosing to go along with the group thinking or, indeed, preparing poorly (for all or some cases) on the basis that this will not be exposed during the discussion. Larger groups will inevitably find it even more difficult to draft reasons or charges, for example – at least with any semblance of speed. It is also more costly, in terms of resources, to run larger committees – not only in terms of member time, but also in terms of more practical things like the numbers of copies of papers to be provided. Training and appraisal of the membership also becomes more expensive – and indeed, 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).

3.32 Arguments in favour of larger ICs tend to revolve around the fact that they can incorporate a larger range of expertise and/or that more eyes on a case allow a greater chance that nothing of significance can be missed.

3.33 Expertise, of course, can be provided in different ways and fed into a committee’s deliberations. Indeed, many regulators take the view that relying on a committee member to provide expertise about the profession or specialisms within it, for example, can be dangerous. There can be a tendency for other members to defer to the supposed ‘expert’ in these circumstances and there is a danger that some members – in trying to be helpful – might be inclined to offer an ‘expert’ view in areas in which they may be less experienced in fact and/or out-of-date.

3.34 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 with the interpretations of those standards in practice) and having access to all relevant case information and documents – and the time to consider them in full – 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 14<sup>th</sup> pair of eyes.

## Summary of Best Practice

3.35 Drawing all of this together, it may be possible to conclude that best practice in regulatory case decision making (at the assessment and referral decision stages) might be summarised as follows:

- Staff can and should take some assessment and referral decisions;
- The extent of staff decision making will depend on the circumstances, but might be pushed as far as is possible based on clear guidance, and as long as strong quality assurance measures and lines of accountability are in place;
- Complex and novel decisions might be best made by non-staff decision makers;
- Where decisions are made by non-staff decision makers, they should be made by individuals who do not play any role in setting the strategy or policy of the regulator in question;
- Those decision makers should not be accountable to staff members;
- The best arrangements for those decision makers are that they should work in pairs or as members of small panels.



## Section 4 The BSB's current enforcement decision making regime

### Assessment of the current regime

4.1 The current BSB regime might best conform to Model Four, as set out in the analysis in Section 2 of this report, with case assessment and referral decisions made by a combination of staff and policy makers. In terms of the summary of best practice set out at the foot of Section 3 above, the current arrangements deliver best practice in that: staff have clear delegated authority to make (some) assessment and referral decisions; this delegated has been pushed to cover the majority of cases (although it might be argued that this could go further still); complex and novel cases are decided by non-staff decision makers; and those decision makers are not accountable to staff members. The BSB's arrangements may not conform to best practice (although there may be perfectly valid reasons for this) in that: non-staff decision makers have a role in determining the strategy and policy of the organisation (which goes beyond simply providing information about the workings of the system to the Board or others); and the non-staff decision makers meet in numbers that might be argued to be too large for effective or efficient decision making.

### Strengths of the current arrangements

#### *Quality decisions*

4.2 It is clear that the decisions made by both staff and the PCC are robust, rigorous, well-reasoned and credible. The BSB, parties to cases and other stakeholders can be confident that reasonable and proportionate decision are being made which reflect the statutory purpose of the organisation and which protect the public interest.

4.3 The scheme of delegation which sets out who can make which decisions is detailed, comprehensive and clear. Guidance on decision making – and on the factors to be taken into account – is also set out very clearly and leaves no stone unturned nor any cause for doubt on the part of the decision maker. The PCD is to be congratulated for the excellence of this guidance, which compares very favourably to similar documentation issued by other professional regulators.

4.4 In terms of staff decisions, the evidence to support this assertion comes from the PCC's Quality Review Sub-Committee (QRSC) and from the reports of the Independent Observer. The QRSC has been in operation for around two and a half years and (in effect) audits 10% of staff decisions to conclude cases. It is worth bearing in mind that staff make around 66% of the assessment and referral decisions made by the BSB. In two and a half years, that would amount to in excess of 1000 decisions. We can assume then that since its inception QRSC has audited more than 100 cases. In that period, it has disagreed with a total of 3 staff decisions and has found only one staff decision which was fundamentally flawed in terms of the outcome.

4.5 The Independent Observer's recent report (covering the period July 2014-December 2014) concluded that both the PCC and PCD had made clear progress to embed risk-based practices in case handling and raised no issues about any other aspect of either staff or PCC decision making.

4.6 All assessment and referral decisions are also open to Judicial Review (JR). It might be expected, given the nature of the profession being regulated, that the BSB would find itself challenged in court more often than most other regulators. In the last reporting year, however, only

six new JR applications were received (in one case permission was refused and another was discontinued). This seems to suggest that the decisions being made by both staff and the PCC are robust and defensible.

4.7 It is also clear that the BSB's 'comebacks' process is not overworked. Of the 242 external complaints concluded without enforcement action in the last reporting year (April 2014 to March 15), complainants asked the BSB to review the decision in only 31 cases (13%). This led to the original decision being overturned in only two cases (one of which was subsequently closed at the same stage after additional evidence had been taken into account).

4.8 Whilst many other regulators do not publish information about appeals, JRs and reviews and/or about whether any of these are successful – which makes comparison difficult - the BSB would certainly not appear to be an outlier in terms of the amount of challenge it receives to its decisions.

4.9 Those interviewed as part of this review all suggested that the quality of PCC decision making was excellent and that this was in part attributable to the thoroughness of the debate about the cases put before the PCC.

4.10 It was also suggested by some of the interviewees that the standard of the reasons and/or charges emanating from the PCC was due to the fullness of the debate at Committee meetings. This is no doubt true –and certainly seemed to be from my observation of the July PCC meeting. The only note of caution to sound here is that, whilst the draft charges agreed by PCC are no doubt thorough, there is no requirement at this stage of the process for charges as such to be drafted (as long as the alleged 'mischief' which the PCC intends to refer to the Disciplinary Tribunal is clear). It might be prudent to consider whether charges should usually be drafted at this stage given that size of the Committee and the danger that it might lose itself in the unnecessary detail here.

#### *Strong key personnel and pro bono service*

4.11 It is beyond doubt that the PCC has members of extraordinary quality (compared with many other regulators). The PCC is also chaired with great skill and energy – an opinion formed both from first hand observation and from the accounts of others who are or have been involved with the Committee. It is also the opinion of all those interviewed that the Committee membership demonstrates great engagement and considerable commitment to fairness and to the regulatory aims of the BSB. There is also a strong feeling that the current make up and structure of the PCC is based on a very positive ethos of public duty and, on the part of the barrister members, service to the profession.

4.12 The strength of the PCC in this respect is partly driven by the nature of the regulated profession. To put it bluntly, if a Committee populated in part by experienced and high quality barristers cannot get enforcement decisions right then who can? Of course, that the PCC is so populated is primarily a result of the fact that a significant number of high quality professionals are willing to give their time to the PCC on a *pro bono* basis. Whatever the other strengths and weaknesses of the system, this is of huge benefit to the BSB as a regulator. Whilst these skills can be bought in the open market, they are beyond the financial reach of most regulators – at least as a resource to be employed routinely in the consideration of cases. There is a strong argument to say that if the BSB opts, as part of its governance review, to replace the current decision making regime with an alternative model, it should take care not to throw the baby out with the bathwater.

4.13 Of course, other models can be constructed which might encourage the same levels of engagement from the profession (and on a continued *pro bono* basis). It should also be recognised that there are potential downsides to running these systems on the basis of voluntary service. For instance, it may be more difficult for staff to make demands (about work to be completed, timings etc.) of those who are ‘volunteers’ (although whether the participants are paid or not, the BSB could ensure that the relationship between those providing their time and BSB staff is placed on a more contractual basis, with standards of delivery, for example, set out clearly and regarded as a condition of continued involvement).

4.14 Perhaps more significantly, there might be an unforeseen equality and diversity issue here. If the BSB essentially finds itself running a system in which only financially successful and established barristers can afford to become involved (since there is no payment for service) then other groups will not participate (for example those who carry out mainly work funded by legal aid). Those groups may have a disproportionate amount of professionals with certain characteristics. This probably merits further research to establish the likely impact on equality and diversity of the PCC of the *pro bono* arrangements. At present, I am told that the BSB does not have up-to-date equality and diversity profiles of the PCC membership, but this would be worth collecting at the earliest opportunity. In terms of dates of call, it is perhaps worth noting that four of the 20 barristers on PCC were called to the Bar after 1999. This again might indicate a predominance of experience – which is not in itself a bad thing, but might have indirect equality and diversity impacts.

4.15 There is also an argument that there is a risk that the public perception of the *pro bono* arrangements currently in place might be that this leads to a loss of independence on the part of the regulator. If the regulator depends entirely on voluntary service from the regulated profession in order to maintain its current operational systems, then would that regulator be able – or inclined – to take decisions in the wider public interest that might risk the good will of the profession?

#### *Specialist expertise*

4.16 The PCC benefits from a wide range of expertise, not only from the barrister members’ experience in different fields of professional practice, but also through its lay members, who have great experience in areas such as human resources and equality and diversity. This enables the Committee to take a view on a number of cases which might otherwise require some form of external expert input before being considered.

4.17 Whilst this a boon to the PCC under the current process, it is – as discussed in section 3 above – not necessarily always seen as appropriate for Committee members to be, or to be regarded as, the source of expert input to the system. The extent to which the PCC needs expert input on most cases might also be questioned, given that this is a process for considering questions of professional conduct.

#### *Shared learning and development*

4.18 Most of those interviewed as part of this review were keen to stress that the current PCC process provides an environment in which members can learn from each other and so develop their own skills, knowledge and experience. There is no doubt that there is a sense of ‘corporate identity’ amongst the PCC members. From my, albeit limited, observations their discussions and debates are open and honest whilst being polite and respectful. This does help to create the conditions for the sharing of viewpoints and experience, which can only be to members’ mutual benefit. There is a sense in which, then, the BSB cultivates ‘better’ and more capable decision makers through their

exposure to a wide range of colleagues from different professions and with different skills and experiences.

4.19 This environment might be less easy to develop or maintain if the decision makers are less exposed to each other's thinking by working in smaller 'pods' (either as twinned CE-type decision makers or in smaller panels of, say, three members). If the BSB does opt for an alternative to the larger PCC, it might be well advised to ensure that there are other means by which the group of decision makers can learn from each other, discuss issues and/or difficult or complex cases as a wider group and develop a sense of 'corporate' identity and loyalty.

#### *Quality assurance and accountability*

4.20 The implementation of the Quality Review Sub-Committee (QRSC) around two and a half years ago has been of great benefit to the process as a whole. It provides a level of scrutiny over staff decision making that gives clear assurance about the quality of those decisions. It is also clear that, at this time and given the current arrangements, the PCC provides a line of accountability through to the Board and can ensure that the Board are fully informed about the operation of the case handling process. The importance of these functions should not be underestimated. Any change to the case handling process or the structures supporting it would have to take into account the need to replicate these functions in one form or another.

4.21 It is worth noting here that there is an argument that the PCC – being itself a part of the process – should not be the route of accountability back to the Board. And that the Board should not rely on this reporting but should be more active itself in holding the executive (and the PCC or equivalent) to account.

#### **Weaknesses of the current arrangements**

4.22 It is clear from a discussion of the strengths of the current system, that there is rarely such a thing as a 'free lunch'. Most of those features which are taken to be a strength of the current system have some form of downside. The same, in reverse, might be said for many of the potential weaknesses in the system. Unalloyed weaknesses do not often persist in such systems if there is not some form of advantage connected with them.

#### *Independence?*

4.23 The accepted principle in modern professional regulation is that the profession being regulated should not – and should not be seen to – 'dictate' the actions of the regulator. On the face of it, the PCC conforms to that principle, The Chair may be a barrister or lay. There are an equal number of lay and barrister vice chairs and roughly equal numbers of members. There is also the 'lay veto', which means that a case cannot be dismissed unless that is agreed by a majority of the lay members present at PCC. In terms of attendance at the last six PCC meetings (between March and July 2015), lay members have outnumbered barrister members on five occasions (equal numbers attended the other meeting). In any case, it would appear – from my direct observation and from the reports of the interviewees – that the PCC does not 'split' on lay versus professional lines. Some barrister members appear to be more hawkish in their views, whilst some lay members sit towards the more lenient end of the spectrum.

4.24 However, this may not be the whole story. At those same six PCC meetings, for example, 45 cases were presented by barristers whilst 13 were presented by lay members. It is beyond

reasonable doubt that the case presenter (referred to as the 'case examiner' – not to be confused with Case Examiners as employed by the GMC, GOC and NMC) either is in fact – or would be perceived by most observers as – the most influential member during the discussion of that particular case. This may be particularly so for those cases where there is little discussion of the case examiner's recommendation, which was more or less accepted without question (admittedly often for perfectly good reason given that the 'right' outcome may have been more or less obvious). This imbalance in the numbers of lay and barristers presenters may not be entirely surprising, given that almost half of the lay members of PCC have informed PCD that they will not accept allocations of cases as case examiner.

4.25 The 'lay veto' may also not be quite as powerful as it first appears. It can only be exercised where cases would otherwise be dismissed entirely. In theory then, a PCC with all but one lay member opposed to the outcome might choose to conclude a case with a lesser sanction rather than refer it to a disciplinary panel.

4.26 There are, of course, other reasons why observers might perceive the PCC not to be 'independent', or not to have sufficient safeguards against barrister-led decisions, which may revolve around the nature of the profession and the skills that barristers exercise every day in their working lives. It would not be odd for an external observer to conclude that the barristers on PCC were well equipped to persuade lay colleagues that a particular outcome was the right one, or indeed to 'win' any argument about the correct disposal of a case. Whilst this may be more a matter of perception than reality, given the nature and calibre of the individuals who serve PCC as lay members, it nonetheless should be taken into account. See also my comments above on the potential downsides of the *pro bono* system in terms of the public perception of the regulator's independence.

#### *Efficiency?*

4.27 It is true, as stated above, that the current system produces reliable, quality outcomes. There is a question though about how much resource is used to achieve that standard and whether the same or similar quality outcomes might not be produced by a system that is less resource intensive. Gathering 20-25 high achieving professionals together in a room for several hours (not to mention pre-reading time and the time spent by the case examiner for each case) might not be the shortest route to high standard (or even, dare I say it acceptable or 'good enough') results.

4.28 There is also a perception on the part of some of those involved with the system that the PCC may spend too much of its time debating small issues that have no real impact on the outcome and/or are not important to the parties to the case. Some also felt that the PCC might have a tendency to be 'too thorough' in other ways – over-focusing perhaps on the precise language to be used in the committee's determinations or the charges to be laid in cases that were being referred onwards.

4.29 In a nutshell, given that this is a committee that decides whether to refer a case to a Tribunal rather than itself the final stage in the process (at least for the most serious cases), there is a degree to which the gold-plated service is not required. This is presumably what the LSB were driving at in their 2012/13 report when they described the PCC as "overly complex and bureaucratic" considering that the majority of decisions were "whether to prosecute".

### *Guidance and training*

4.30 With such a large Committee, it is difficult to establish and maintain a training and development regime and/or appraisal systems which will support all members of the Committee to perform their role in line with the expectations of the organisation. In particular, it may not be possible to ensure that all members are fully aware of the standards that the BSB sets for the profession or the degree of seriousness with which different types of departure from the Code are to be seen.

4.31 In practice, it would appear that the current extent and standard of training could be improved and that the extent to which PCC members receive guidance on the thresholds to be applied and/or precedent cases is limited.

4.32 Observation of the PCC in session as part of this review was limited to one meeting and it is dangerous to draw conclusions from such a small sample. However, although that meeting was chaired expertly and contributions from members were largely to the point and well-reasoned – all of which led to robust and reliable outcomes – there were occasions when some members appeared not to be entirely aware of the rules which governed their activity and/or the broader regulatory purpose. In one case, there was a lengthy discussion about a case where a barrister had been sanctioned in another country, with that sanction then appearing on the public register. During the discussion, at least one member of PCC suggested that putting a similar sanction / restriction on record in this country might be unfair and/or constitute ‘double jeopardy’ and/or involve ‘punishing the barrister twice’. Although this argument did not win the day, it was alarming that at least one member of PCC seemed to miss the point that the recording of the sanction was the means by which the BSB could protect the public. It was also clear at one point that several members of the committee had not understood their role in considering a case which had been dealt with (thus far) under the determination by consent route. This led to another lengthy discussion which essentially revolved around whether the admitted behaviour in fact constituted professional misconduct – and issue that had, in fact, been properly decided at a previous meeting of PCC.

4.33 It might be said then that, although the outcomes were the right ones in the end, the input of some members was variable. It was also noticeable that some members were involved in almost every discussion, whereas others contributed very little throughout the meeting.

4.34 Training and guidance for decision makers –and ensuring through appraisal and feedback that they have understood it and are applying the learning – would be considerably easier if the number of people involved were to be reduced.

### *Delay?*

4.35 As suggested above, the ‘queueing’ of cases for the next PCC meeting can cause some delays. There are usually three weeks between meetings – and no current backlog of cases – so the very worst that could happen most of the time is that a case might be completely ready for consideration but have to wait for just under three weeks for the next PCC. This issue is exacerbated at times simply because it is not possible to hold a PCC meeting when too many members are away or on leave. For example, there was no PCC meeting in August, so the maximum delay in a case increases to around six weeks. That length of time can have a significant impact in terms of meeting the BSB’s relevant service targets.

## *Governance issues*

4.36 Perhaps the most fundamental weakness in the current system, when judged against the best practice set out above (at the end of Section 3), is that the PCC performs two roles – (a) decision making on individual cases; and (b) policy making and reporting back to the Board on the efficacy of the system in general.

4.37 I note that the governance working group’s proposals, as they currently stand, would put policy making in the hands of the executive, assisted by a Policy & Regulatory Risk Oversight Committee, and subject to agreement by the Board itself in the final analysis. This would seem to offer a clearer governance structure and to remove the confusion of roles for the PCC. It would also arguably be better if the oversight function and reporting to the Board were put in the hands of the proposed Audit & Corporate Risk Committee.

4.38 Whilst I suggest above that one of the strengths of the current PCC is that it does provide strong oversight on the work of the executive –and report back to Council – it is clear that those mechanisms, necessary as they are and well performed as they are at present, might be best operated by individuals who are not involved in case decision making.

4.39 Of course, if these changes are to be implemented, the risk is that the various Committees now charged with policy making for - and oversight of - the case handling process become too ‘detached’ from the practicalities of day-to-day operations. The current PCC could not be accused of this and indeed are extraordinarily well-placed to advise on best policy and on the current state of operational effectiveness. The key would be for the two new Committees to consult closely with those involved in the operation and to ensure that information from the ‘shop floor’ was readily available to them in their deliberations.

## **Costs associated with the current decision making regime**

4.40 I am advised that the numbers of internal and external complaints being handled by the PCD are relatively stable (at around 300 external complaints per annum and 150 internal). PCD are forecasting similar numbers of complaints in 2015/16 for budgeting purposes. Total staff costs in PCD were around £1.14m for 2014/15. I have tried to delineate (below) the proportion of those costs which might be said to be attributable to support for PCC (since this is the important factor when we consider alternative models). I have also included costs associated with the current oversight regime – QRSC costs (which are negligible) and costs associated with the Independent Observer (though staff time spent in support of the IO is not included as this data is not available at present). In both cases, I have done so because these functions may change significantly in some of the alternative models. Calculations of staff costs associated with PCC are based on staff time recording systems. I am told that the data should be regarded as approximate. It should also be noted that this does not include any proportion of the time spent by senior managers on PCC matters. Postage and printing costs are a reasonably reliable estimate, although expenditure on these activities is not recorded by the BSB’s finance systems in such a way that the function or activity involved is identifiable. Senior managers in PCD advise me that there are no further (hidden) costs associated with the running of PCC. All figures below are per annum.

Staff costs associated with PCC support:

£39,334

|                                                                      |                         |
|----------------------------------------------------------------------|-------------------------|
| PCC lay members fees and expenses:                                   | £40,910                 |
| Barrister members expenses and fees                                  | NIL ( <i>pro bono</i> ) |
| Postage and printing (for case examiners and PCC)                    | £10,562                 |
| Independent Observer (46 days at £308 per day)                       | £14,168                 |
| QRSC (no fees or expenses, files <i>usually</i> sent electronically) | £300                    |
| PCC Away Day                                                         | £4,500                  |

Total costs here are around £110k per annum, or around £95k per annum if we exclude the 'oversight' costs (IO and QRSC).

## Section 5 Alternative models for BSB enforcement decision making

### Overview

5.1 In theory, there are an almost infinite number of ways in which regulatory organisations could organise themselves to make enforcement decisions. There are certainly ‘gradations’ of any decision making model and it would be entirely reasonable for a regulator to put together a ‘hybrid’ system in an attempt to utilise the best of aspects of any number of ‘pure’ models. However, it is useful – if only as a guide to further consideration – to set out a number of potential options for the BSB in determining what its own decision making processes should be. I attempt to do this below, looking at three main options. Of course, the final decision of the Board may be to adopt a system that falls somewhere between these models or employs different features of each.

5.2 In setting out these options, I have assumed that the Board would not be attracted to Model One (staff make all assessment and referral decisions) or Model Two (staff make no assessment or referral decisions) as set out in Section 2 of this report.

5.3 Whilst Model One has some attractions and may indeed be regarded by some as the possible end destination for regulation at some point in the future, it would be an extremely radical option to adopt at present. As mentioned above, only one current regulator runs a system which might approximate to this model – the CLSB - and that is almost certainly simply because of the size and scale of that regulator’s operations (610 registrants; total staff salary budget, including Chair, is £54k p.a.). If the possible future shape of professional regulation is the Ombudsman model, as some might suggest, then we need to bear in mind that although the Ombudsmen are ‘staff’ in one sense, they are – in most cases- purely decision makers rather than operational staff or managers. In essence, the separation between operational management and decision making is maintained.

5.4 Model Two might be argued to be completely unworkable in a regulator of any size. At present, the GOsC is the outlier which maintains this kind of system – that organisation (at the end of 2013/14) had around 4800 registrants and had received 35 complaints in total in the preceding 12 months. It would be inefficient to the point of perversity to adopt a system in which staff did not make assessment or referral decisions in any regulator that received many more complaints per year than this.

5.5 I have also made an assumption, on the basis of the work currently being carried out by the BSB’s governance working group (and in accordance with the best practice identified in Section 3 of this report), that the Board will be keen to ensure that any non-staff assessment and referral decision makers in the future model do not also carry out a role in either the policy making of the organisation or the oversight of the case handling system as a whole (since, for one thing, they are part of the system and, for another, that is the role of the Board).

### Options for decision making

5.6 All of that being said, it appears that there are three main options in terms of future assessment and referral decision making at the BSB:

#### **OPTION ONE: Large PCC**

This option would involve removing PCC’s policy making and oversight functions, but otherwise leaving the process and structure – including PCC meetings - broadly as it is.

## **OPTION TWO: Smaller PCC Panels**

Again, PCC would no longer have a role in policy making or oversight, but in this model the Committee would meet in groups of three (or more) members to consider cases. This would mean that the current PCC membership might be retained, effectively as a panellist pool from which members would be drawn to make up each individual panel.

## **OPTION THREE: Case Examiners**

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.

5.7 I will examine the potential advantages and disadvantages of each of these three options in more detail below, bearing in mind: (a) the best practice in decision making set out at Section 3 above; (b) the cost implications (in so far as they can be identified at present); and (c) the potential impact in terms of equality and diversity. Before doing so, it may be worthwhile to add one or two caveats.

### **Further considerations**

5.8 The three options above set out alternative organisational structures for decision making. Whatever structure is adopted, there are three further questions which the Board needs to address. First, is there any merit in making changes (at the same time as the new structures are introduced) to the extent and scope of staff decision making? Second, will the barristers involved in the new decision making structure be expected to give their time on a *pro bono* basis or will they be remunerated? Third, assuming that the PCC's policy and oversight role is removed, how will this be replaced in any new system / structure? Whilst these issues are, to a great extent, independent of the consideration about the organisational structure for decision making, they are important – and I will return to them later in this report (after consideration of the three structural options).

### **Risk appetite**

5.9 It is highly unlikely that Board members need any reminder that where any change in process and/or structure is to be implemented, the more radical the 'shift' from current processes, the more risk is involved.

5.10 If Option One above is adopted, then there will be little further change for the Board and PCD to manage than is already envisaged as part of the governance review. And, accordingly, very little risk – though one might argue that where there is no risk, there is usually no reward. Option Three, which represents a more radical shift, brings with it a number of risks around the implied change programme as a whole, but particularly around the ability of the organisation to recruit successfully to new roles and to get in place all of the support – training, guidance, administrative support etc. – that the Case Examiners might require. If the organisation is equipped to manage

change effectively, then this may not be a problem. If it is not – or does not allow the necessary resources to follow this work – then this major change will no doubt run into difficulties.

## The three options – pros and cons

5.11 It may be worth re-stating here the best practice principles put forward at the end of Section 3, which were:

- Staff can and should take some assessment and referral decisions;
- The extent of staff decision making will depend on the circumstances, but might be pushed as far as is possible based on clear guidance, and as long as strong quality assurance measures and lines of accountability are in place;
- Complex and novel decisions might be best made by non-staff decision makers;
- Where decisions are made by non-staff decision makers, they should be made by individuals who do not play any role in setting the strategy or policy of the regulator in question;
- Those decision makers should not be accountable to staff members;
- The best arrangements for those decision makers are that they should work in pairs or as members of small panels.

5.12 All three proposed options involve staff decision making, the extent of which will be considered later. All three options have complex and novel decisions made by non-staff decision makers. And all three options have the decision making role separated out from any policy or oversight role. In none of the models are the non-staff decision makers accountable to staff members (although if the Case Examiner model is adopted, there is a question of how this role would, in fact, be managed).

## OPTION ONE – Large PCC

5.13 The main advantage of this option is that it represents a very small change – and so a very small risk.

5.14 We can assume that most, if not all, PCC members would be content with the change in the PCC's role. It should be mentioned here that PCC members who are not office holders (chair, vice chair) and do not participate in the QRSC (which has three members) have, in practice, little engagement in the policy and oversight activities of PCC in any case. It is unlikely, then, that they would miss it – and even less likely that they would decide not to offer their services to PCC in future on the basis that they did not like the change.

5.15 The operational change would be minimal to non-existent. Support for –and meetings of – the PCC would continue in exactly the same way. PCC would require the same inputs from staff in PCD and their outputs in terms of case disposal and next steps would be as they are now. Again, there will be little or no risk involved in adopting this option.

5.16 It is also likely that this option would retain many of the strengths of the current system set out at Section 4 above – mainly around: the quality of decisions; the fact that strong key personnel carry out PCC roles; the corporate learning and development that PCC engenders; and the fact that any required specialist expertise is likely to be found within the PCC's members.

5.17 The downside is that the issues around having such a large decision making Committee would not be addressed. As mentioned above, the LSB's 2012/13 review found the PCC "overly complex and bureaucratic". The current size of PCC also offends the principle of good practice set out above, that decision makers should work in pairs or small panels (the reasons for which are also set out in Section 3 above). The BSB, in running such a large decision making Committee is also a massive outlier in term of current regulatory practice. As set out above, of those regulators who run committees making referral decisions, five run with panels of 3, one with panels 3 or 4, one with panels of 5 or 7 and one with panels of 14 plus. The BSB's PCC, with meetings of 20 plus members is at the extreme.

5.18 If we look at some of the wider principles of good regulation – that processes should be efficient and deliver timely outcomes, that resource should be applied in a targeted way, and that the 'regulatory effort' should be proportionate to the decision in question – then it could be argued that the larger PCC model is found lacking. It is also true to say that the weaknesses in the current system (as set out in Section 4 above) – about the independence of the PCC, guidance and training and possible delays – will be manifest in this option just as the strengths would be.

#### *Effect on costs*

5.19 The only real effect on costs as a result of adopting this option would be in connection with the changes to policy making and oversight. The governance working group's review assumes that the policy function would be taken on by staff – working, where appropriate, to the proposed Policy & Regulatory Risk Committee. I assume that the costs associated with this change are being identified as a part of that broader governance work.

5.20 In terms of the oversight function, this will need to be addressed whichever option is taken for decision making structures and systems. This will be addressed later in this report.

5.21 The same applies to any consideration of increasing the scope of staff decision making – which is also considered later in this report.

5.22 All other costs (with the exception only of those associated with the oversight provided by the Independent Observer and QRSC) would remain in line with spending under the current process.

#### *Effect on Equality and Diversity*

5.23 Similarly, there would be little or no impact on equality and diversity – as compared to the status quo – if this option were adopted. Indeed, the only significant impacts in this area connected with any of the proposed changes might be related to the decision whether and how all decision makers should be remunerated. This is a question that needs to be asked separately to consideration of the three 'structural' options given that it applies equally to all of them.

### **OPTION TWO – Smaller PCC panels**

5.24 The advantages associated with this option are that it resolves many of the issues associated with Option 1. It satisfies the assumed principles of good practice in regulation decision making set out above. It ensures that resources are targeted proportionately at risk and that the regulatory effort involved in this stage of the process is commensurate with the types of decision being made. It would also satisfy to an extent the LSB's requirement that the PCC stage should become less complex and bureaucratic.

5.25 This option presents a greater degree of risk than Option 1, simply because the changes envisaged are greater. Nonetheless, the operational impact is, to a great degree, contained. The operational staff would still be aiming to put cases, in the same form, to a decision making committee that performs that function in the same way as the current PCC. The only real changes would be in the way the PCC itself is organised and supported.

5.26 The Board might take a view on whether the panels should consist of 3 or 5 members – or indeed whether there should be a gradual reduction in members in each panel over a period of time. The operational staff would then need to adapt the ways in which the panel members are invited to meetings and supported pre-meeting. The current system involves a reasonably straightforward task of scheduling PCC dates and then inviting each half of PCC to alternate dates. If the new option were to be adopted, then there would have to be a means of scheduling PCC dates and empanelling the requisite number of members for specific meetings (presumably based on availability). This adds an administrative burden, but it is a task that only need be carried once or twice per year (depending on the length of the period being scheduled in advance).

5.27 In terms of the effect on PCC members, there is a slightly greater risk here that some members will not relish the new way of working and may choose to withdraw themselves from the panel pool. As long as this does not affect a majority of members, it should be possible to cope with this eventuality – either by greater empanelment of other existing members or by recruitment into the pool.

5.28 As an indication, the current PCC (with around 50 members) appears to make around 100 new case decisions per year (at c.16 meetings). Meetings on average appear to be attended by around 20 members (which equates to 320 member attendances). The number of cases considered at each meeting appears to fluctuate between around 5 and 12 (with case numbers greater than this being exceptional). Meetings last for two hours.

5.29 Assuming, conservatively, that a panel of three or five members could always cover at least five new cases per half-day meeting (leaving some time for other business), it would seem that 20 half day sessions per year would be sufficient to conduct current levels of business. That would equate to 60 member attendances if panels of three are employed and 100 for panels of five. Compared to approximately 320 attendances under the current system.

5.30 In short, there is some room for manoeuvre here if some PCC members chose not to continue to participate. The reduction in the number of attendances required from each member would not only cut costs (see below) but also presumably open up the opportunity of sitting on PCC to some barristers and/or others who cannot dedicate the amount of time currently expected of PCC members. Conversely, of course, there is a risk that some members might choose to resign given that the smaller number of meetings might not engage them sufficiently for their taste.

5.31 Steps would also need to be taken to ensure that the corporate 'identity' and mutual development and learning that takes place within the current PCC – almost exclusively through the actual business meetings of PCC themselves - were replicated in some other way – for example, by a greater emphasis on training or 'away day' events for panel pool members.

5.32 Similarly, there would need to be some form of new arrangement that would allow the smaller PCCs to have access to expertise of one kind or another (whether it be professional expertise concerning the particular fields of barristers' practice or expertise in, for example, HR matters or equality and diversity issues). I understand that the BSB's governance review has already identified the need for the BSB to have access to a pool of experts to support its performance of other

functions. If such a pool is to be created then it would seemingly be a simple and straightforward – as well as consistent – way to also satisfy the PCC’s needs. The Board and or the governance working group may wish to bear this in mind as the wider governance work is continued.

5.33 The problem of delay – or, more accurately ‘lag time’ – experienced in the current system when a case is ready to go to PCC but the next meeting is up to 6 weeks away might not be completely resolved under this option. There would now be 20 meetings per year, as opposed to 16, which would cut down the average time between meetings. It would also presumably be possible to schedule PCCs with 3 or 5 members at any time of the year (including August) so the larger breaks experienced currently would not happen under the proposed option.

#### *Effect on costs*

5.34 For many of the cost associated with PCC, the reduction in numbers of members considering each case would have a proportionate effect in reducing expenditure. Assuming that barrister members would still do the work on a pro bono basis, there would be no effect on that cost. On the basis of the numbers of panel meetings estimated above – and assuming that one half of all member attendances at a PCC panel would be by lay members – under the new scheme, there would be a need for between 30 and 50 lay member attendances per year. There are currently around 160. Assuming that the same fee would be paid (and there is no reason to vary it as far as I can see), that would mean a reduction in lay members fees and expenses by somewhere between around 70% and 80%. The same percentage reduction would be experienced in relation to postage and printing. It might be expected that any extra staff support costs associated with empanelment and scheduling might be absorbed within the current staff numbers, particularly given that less time might now be spent in dealing with members’ enquiries and other requirements for each meeting. The cost of training and away days for members might be expected to rise, if measures are taken to ensure that learning and ‘corporate identity’ would need more attention under the new scheme (as mentioned above). We might assume that an event once per quarter might be reasonable .Costs under the current scheme and the new scheme (Option 2) are set out below (these assume 3 person PCC panels):

|                                     | <i>Current PCC</i>      | <i>New scheme</i> | <i>Change</i> |
|-------------------------------------|-------------------------|-------------------|---------------|
| Staff costs                         | £39,334                 | £39,334           | NIL           |
| PCC lay members fees and expenses:  | £40,910                 | £8,180            | -£32,730      |
| Barrister members expenses and fees | NIL ( <i>pro bono</i> ) | NIL               | NIL           |
| Postage and printing                | £10,562                 | £2,112            | -£8,450       |
| PCC Away Day(s)                     | £4,500                  | £18,000           | +£13,500      |

This represents a net saving of around £27,000 per annum.

#### *Effect on Equality & Diversity*

5.35 The main effect might be in the decision about remuneration for barrister members of PCC (to be considered later). However, there might be a positive effect as a result of this proposed change, as mentioned above, in that the reduction in the time required to commit to PCC might

open up the possibility that more individuals might be able to offer their services without adverse impact on their 'day job'.

### **OPTION THREE – Case Examiners**

5.36 The option of having Case Examiners on hand to make decisions as and when required is appealing. This would solve any issues of delay or lag time whilst cases await a decision (assuming that the resourcing was right and that there was no backlog of cases awaiting a Case Examiner's attention). It is also, almost by definition, the most efficient way (of those under consideration) to arrive at a decision. This option also meets the various criteria for best practice set out in Section 3 and again at the head of this Section.

5.37 This option also possibly makes it easier for the BSB to create a situation in which the decision makers feel that they belong within the BSB (rather than being 'outsiders' who provide it with assistance) and that they have a responsibility for – and shared ownership of – the organisation's aims and standards. Case examiners interact with staff on a more natural and informal level than PCC members might do. They should become a part of the organisational culture, if supported with guidance, training and opportunities for development. Case Examiners – who would have access to BSB IT systems and should be able to go direct to the case records and files – would also arguably need far less administrative support than PCC members.

5.38 Of course, this option represents the biggest shift away from current structures and processes and so is undoubtedly the option which presents most risk. There would need to be a careful analysis of resourcing to ensure that the number of case examiners was able to cope – quickly and efficiently - with caseloads. Recruitment and retention of case examiners would also need to be meticulously planned to ensure continuity of service.

5.39 It would also be necessary to ensure that audit and quality assurance of decisions was enhanced given that the decisions would now be being made by only two individuals (albeit with the scrutiny of the relevant staff involved in the case). As a matter of interest, Board members may wish to note that the current 'case examiners' (those members of PCC who take responsibility for the analysis of a case - and for making a recommendation as to outcome – prior to the full PCC meeting) seem to make recommendations which accord with the final decision of the CC on the vast majority of occasions. In the course of the last six PCC meetings, for example, 81 cases were considered by the Committee. In only three of those cases did the PCC depart from the recommendation made by the case examiner. This would seem to suggest that decision makers working in pairs (as opposed to singly) might be capable of making reliable and well-reasoned decisions.

5.40 Again, training and away days would need to be provided in greater measure with the Case Examiner group, given that - unlike the current PCC – they would not be working together as a group. Furthermore, although for the purposes of the costs calculation below I have assumed that barrister Case Examiners would work on a pro bono basis, this is the option that perhaps most brings into relief the question of whether payment should be made in return for the service provided.

5.41 In common with the smaller PCC panels envisaged as part of Option 2 above, Case Examiners would need access to expertise in cases which demanded it. Presumably, there is no reason why this should not be provided via the same route.

5.42 One issue which would need to be resolved is the reporting / management line for the CEs. As mentioned above, the CEs should not in theory be accountable for their decisions to members of

staff within PCD, although the management of their training and development, leave arrangements and other administrative matters might be best assigned to a manager within the Department. Accountability for decisions might be via whatever mechanism is established for oversight of the system as a whole (see later section dealing with this issue). As to the vexed question of who might deal with underperformance or other issues with the CEs, this might be the responsibility of either the Board directly or the proposed Audit & Corporate Risk Committee.

5.43 In terms of numbers of Case Examiners, there is obviously a critical mass below which the system would struggle to function (due to illness, other absence, leavers etc.). If we look at the amount of decisions that would need to be made – as above, about 100 new cases to be considered per annum, each requiring both a lay and barrister Case Examiner – then the requirement is effectively for 200 CE case considerations per year. In other regulatory bodies which employ Case Examiners, assumptions are made that it is reasonable to expect two or three decisions (with reasons) per day. Given the relative complexity of the cases handled by the BSB, it might be as well to assume two per day (the level used by, for example, the GMC). The assumption above was that a smaller PCC could deal with five new cases per half day meeting. However, that assumes pre-reading of the case papers (which is currently carried out by PCC members without a fee being paid).

5.44 Assuming two decisions per day per CE – and a requirement for 200 decisions per year (2 per case) – there would be a need for 100 days of CE time per annum. Engaging four CEs – two lay, two barrister – would therefore imply 25 days each per year – or approximately one per fortnight. Whilst this might be the best configuration in an ideal world, it would only need one CE to be out of action for whatever reason to reduce the capacity of the process by 50%. This is not a comfortable position to be in. Engaging six CEs – at approximately 17 days per year each, plus say 4 days for training / away days – might give more flexibility to cope with unexpected absences etc.

5.45 If that were the case, costs – compared to current PCC costs – might be expected to be as set out in the table below. I have assumed a 33% reduction in staff support required for the decision makers given that the PCC ‘bureaucracy’ disappears. Greater cuts to these costs are unlikely – CE training and away days would need to be organised, cases would need to be allocated etc. I have also assumed that lay CEs will be paid the same half day fee as current lay PCC members.

5.46 For the sake of clarity – the fees calculation is for the current PCC lay members’ daily rate (£308) multiplied by 50 days (the lay half of the total 100 CE days required).

|                                     | <i>Current PCC</i>      | <i>New scheme</i> | <i>Change</i> |
|-------------------------------------|-------------------------|-------------------|---------------|
| Staff costs                         | £39,334                 | £26,223           | -£13,111      |
| PCC lay members fees                | £40,910                 | £15,400           | -£25,410      |
| Barrister members expenses and fees | NIL ( <i>pro bono</i> ) | NIL               | NIL           |
| Postage and printing                | £10,562                 | NIL               | -£10,562      |
| Training / Away Day(s)              | £4,500                  | £18,000           | +£13,500      |

This represents a saving of around £35,500 compared to the current PCC scheme –and a saving of £8,500 compared to Option 2 above.

## *Effect on equality & diversity*

5.47 Again, the primary effect here might be related to any decision to introduce payment for barrister CEs (see below). The requirement, in terms of days given over to BSB business, under the CE model is higher than for Option Two above (smaller PCC panels). However, the timing of the work might be more flexible – given that there is no requirement to meet with colleagues to make decisions. There may be a marginal effect again here, then, in opening up the possibility for a wider range of members of the profession to become involved in the decision making process.

## Additional considerations

### **The oversight function currently performed by PCC**

5.48 As set out above, the PCC currently reports to the Board on the functioning of the enforcement system as a whole. It also carries out quite an extensive audit of staff decisions through the QRSC. The other source of oversight in the system at present is, of course, the Independent Observer – whose scope covers the whole of the process including PCC itself.

5.49 Assuming that the Board agrees that good governance would suggest that the PCC does not carry out this function under any new regime, then the obvious place for these activities to sit is with the Independent Observer, who I assume will be reporting to the Audit & Corporate Risk Committee under the proposed new governance arrangements.

5.50 In order to carry out audit activity equivalent to that currently undertaken by the QRSC, more resource will be required by the Independent Observer. There may also be a desire to develop a process of auditing decisions made by the PCC or the Case Examiners under any new scheme. Being able to give assurance to the Board, via the Audit & Corporate Risk Committee – and thereby to the outside world – that the decisions made in the enforcement process are sound and serve the purpose of protecting the public interest is absolutely vital.

5.51 Whichever decision making model is adopted in future, this quality assurance function will need to be effective and demonstrably so. Carrying out something like the 10% audit of staff decisions currently undertaken by QRSC – and adding a similar audit of other decisions – would likely give rise to the need for a new full-time post (particularly if other areas of activity are also to be subjected to routine and effective audit). This should be factored in as an additional cost associated with each of the options set out above. My understanding is that skilled audit staff who carry out this kind of work within other regulatory bodies are paid (in London) around £30k per annum (NI, pension costs etc. to be added). The Board may also consider whether the current part-time arrangement with the Independent Observer needs to be re-visited. The Board may wish to consider commissioning further research and advice – from an expert in this particular area – in order to assure itself that the right steps are being taken with regard to quality assurance as the broader change programme is implemented.

### **Potential expansion in staff decision making**

5.52 As mentioned above, any of the proposed options for decision making might be introduced in tandem with an expansion in the scope of staff decision making. In each case, the costs associated with PCC or Case Examiners would reduce accordingly, although staff costs would presumably increase to some extent.

5.53 The documentation surrounding the delegation of decision making from the PCC to staff members is extremely detailed and extremely clear. As is the guidance used by staff when making these decisions. If an effective audit and quality assurance system can also be put in place, to replace QRSC etc., then there may be very good grounds for expanding the categories of case in which staff are permitted to make the decision about disposal.

5.54 It has not been possible as part of this review to undertake an analysis to identify all possible additional categories of case that might lend themselves to staff decision making. However, one particular area which might bear fruit – subject to further analysis – is around decisions made in the Determination by Consent (DBC) route. The relevant guidance delineates very clearly the types of case that may be dealt with in this manner and sets out very clear criteria for the decisions to be made. It would not be impossible to propose a scheme whereby some or all of these decisions were delegated to senior staff within PCD, subject to the appropriate safeguards being put in place (audit, prior checking of early decisions by a current member of PCC (?), double checking of decisions by two senior managers (?) etc.).

5.55 The Board may wish to consider (at some stage) commissioning a further analysis to comprehensively identify those areas where further decision making might be delegated to staff.

5.56 Of course, as with the implementation of any change, the more moving parts there are, the more risks are involved. On the one hand, the Board may take the view that any change programme to implement a new decision making regime should aim for the ideal state and take on all issues at the one time (the ‘Big Bang’ route). On the other, if the decision making regime is to change with the implementation of one of the options set out above, the Board may consider it best to allow all of those involved to concentrate their efforts towards the successful implementation of that change before any further changes are contemplated (the ‘Step by Step’ approach). Which approach is right will depend to a very great extent on the resources available within the organisation to manage change successfully and the extent to which, culturally, the organisation is comfortable with change and confident that it can be brought about effectively.

### **Paying the decision makers?**

5.57 At present, the BSB benefits from the profession’s willingness to provide service to the organisation free of charge. This public service ethos is a great credit to the profession. It is also a significant boon for the BSB, given that neither they nor any other regulator could afford to pay the market rate for the time provided by the profession.

5.58 There is a question for the Board about whether it is willing to contemplate foregoing that contribution in favour of developing a system of payments for contributing professionals. This would, of course, have a significant financial impact. There might however be benefits. First, putting the relationship between the BSB and those barristers who might work with it as PCC members and/or Case Examiners on amore contractual footing (possible without payment but less easy to make stick?) might enable staff within the organisation to more readily drive performance within the process. Second, and as discussed above, it might have an effect on the diversity profile of those working with the BSB. Also as discussed above, this change might alter, for the better, the public perception of the extent to which the BSB as a regulator is independent from the profession that it regulates.

5.59 This is an issue which reaches far beyond the scope of this review and it will be for the Board to determine the direction of travel. The answer to that question, however, might have an impact in terms of the options for decision making set out in this report. It is perfectly reasonable to suggest

that Option One (Large PCC), as described above is entirely deliverable, without significant risk, under the pro bono arrangements that currently persist with respect to barrister members of PCC. The risks – around not being able to find barristers willing to do the work on a *pro bono* basis – might be said to increase with Option Two (smaller PCC panels) and increase again with Option Three (Case Examiners). In my view, these risks remain relatively small, given the goodwill towards the BSB which appears to be felt by many in the profession, and given the kudos which attaches to working with the organisation. Nonetheless, this issue should be taken into account by the Board as it decides how to proceed with any rearrangement of the decision making machinery in the enforcement process.

## Section Six Summary and concluding remarks

6.1 The aim of this Report was to set out options for the Board in terms of how enforcement decision making might be structured as and when the planned new governance arrangements are implemented. My brief was very clear that a recommendation was not required as to which option might be preferable. That said, the Board may find some concluding remarks useful, if only as a starting point for their further deliberations.

6.2 Currently, the BSB has a well-documented process which serves to deliver good quality enforcement decisions. A reasonably large proportion of decisions are made by staff, by comparison to most other regulatory bodies. These decisions appear to be robust and defensible. This is largely due to sound management and to the comprehensive, well-structured guidance currently in place. This sets out very clearly the process itself, the extent of delegated authority and the criteria against which decisions are to be made.

6.3 Cases which proceed to the Professional Conduct Committee (PCC) have decisions and decision reasoning which are, again, robust and high quality. This is testament to the calibre of the PCC's membership and to the support provided to the PCC by the case presenters and Professional Conduct Department (PCD) staff.

6.4 That said, it might be considered odd, in light of the direction of travel of the current governance review, if the status quo were to be maintained. The BSB is a significant outlier in terms of the numbers of individuals involved in making each decision at this stage in the process. This can lead to inefficiencies in the way the PCC operates. It also seems to offend the principle agreed as part of the governance review that committee structures should be the minimum size possible to maintain quality. The Board will also wish to take into account the views of the Legal Services Board (LSB) and, in particular, their concerns about the number of committee members – and specifically barrister members – involved in the current governance structure.

6.5 Unless the BSB has an appetite to increase the level of staff decision-making in the near future (and, as stated above, staff already take a greater proportion of decisions than in most regulators), this seems to leave two broad options (options two and three in Section 5 of this Report) – smaller PCC panels, drawn from a pool of appointed panellists, or the 'case examiner' model.

6.6 With both of these options, the Board may wish to ensure that the decision makers are exactly that and have no other role in the governance structure of the BSB (whether in terms of policy making or in the lines of accountability back to the Board itself or to its sub-committees). This will presumably deal with the LSB's concerns, but does also represent best practice across the regulatory sector.

6.7 The Case Examiner model would represent the biggest change from the current arrangements and perhaps therefore entails the most risk. The Board may consider the risk worth taking if it is attracted to the model and if it can be sure that effective mitigation of the risk - and, more broadly, strong management of the change as a whole - will be in place.

6.8 Reducing the size of PCC – and drawing panels of three (or more) from a standing pool of panellists – presents less risk. Very broadly, the rest of the process stays the same, it simply 'feeds' a smaller committee. The pool of panellists might be drawn from the current PCC membership, if continuity is felt to be a good thing.

6.9 The only other significant changes to the structure would require: (a) the creation of a pool of experts to provide advice to staff and/or the committee on specific cases, as and when required (which may fit well with the BSB's broader plans in any case); and (b) the implementation of a slightly revised process around the presentation of papers to the PCC, given that the current 'case presenter' system would no longer be operable. Of course, these changes would need careful planning and monitoring – and no little effort on the part of senior PCD staff to bring them into effect – but there is not the same degree of change as would be required by the introduction of the case examiner model.

6.10 The decision as to which path to take is for the Board. I would only say in conclusion that my experience in putting together this Report would suggest that the BSB is well-equipped – in terms of the experience and skills of Board member and senior staff - to deliver effective new processes for enforcement decision making.