

BAR STANDARDS BOARD

REGULATING BARRISTERS

Consultation Paper – Amendment to Bar Standards Board’s Powers

Decision document

Executive Summary

1. This paper sets out the responses to the Amendment to Bar Standards Board’s Powers consultation paper and the BSB’s response.
2. The LSB has recently approved an application from the BSB to become a regulator of entities. Whilst considering its new regulatory arrangements, the Bar Standards Board (BSB) identified a number of areas where additional powers were needed in order for the Bar Council to exercise the role of approved regulator, acting through the BSB, more effectively and efficiently. These included identifying areas where it would be useful to extend, or place on a statutory footing, the Bar Council’s powers and functions via an order under section 69 of the Legal Services Act 2007 (LSA). In approving these new arrangements, the LSB said that consideration should be given to amending the Bar Council’s statutory powers.
3. The proposed changes will affect not just new entities authorised by the BSB but potentially all persons regulated by the BSB. The key changes proposed are:
 - a. seek an order to give the Bar Council an express power to discipline persons other than barristers (including entities, their owners and managers).
 - b. give the Bar Council a statutory power of intervention equivalent to Schedule 14 of the LSA in respect of non-ABS persons.
 - c. place on a statutory footing the power to disqualify an individual from being employed by a BSB regulated person (with the BSB maintaining a list of such disqualified people).
 - d. give the Bar Council statutory information gathering powers.
 - e. create a jurisdiction for appeals relating to entity authorisation to be heard by the General Regulatory Chamber of the First Tier Tribunal; and
 - f. give the Bar Council a *power* to establish, maintain and require contributions to a compensation fund or similar compensation arrangements.
4. This paper discusses the views the BSB received in response to the consultation and the decision reached by the BSB after taking account of those responses. The BSB has decided to proceed with all elements of the order. Subsequent discussions with the Ministry of Justice over drafting have led to some changes in the scope of the order, discussed below. The LSB will undertake a further consultation on the draft

order, which will give interested parties an opportunity to comment on these changes in addition to the draft order itself.

Overview

5. An online consultation was launched in May 2015. The consultation document proposed a range of new powers for the General Council of the Bar (Bar Council) which would be delegated to the BSB, to enable it to exercise its functions as an approved regulator more effectively and efficiently. These powers would be obtained via a statutory order under section 69 of the LSA. The consultation sought views on whether respondents agreed with the proposed new powers. Six questions were posed in the consultation document. The six questions posed were:

Question 1: Do you have any comments on the proposal to place disciplinary powers over non-barristers on a statutory footing?

Question 2: Do you have any comments on the proposal to acquire statutory powers of intervention?

Question 3: Do you have any comments on the proposal to place the disqualification power on a statutory footing?

Question 4: Do you have any comments on the proposed information-gathering powers?

Question 5: Do you have any comments on the proposal to have entity authorisation appeals heard by the First Tier Tribunal?

Question 6: Do you have any comments in relation to the proposed power to establish compensation arrangements?

6. The BSB received eight responses to the consultation.

- Six provided an answer to question 1.
- Six provided an answer to question 2.
- Six provided an answer to question 3.
- Five provided an answer to question 4.
- Three provided an answer to question 5.
- Seven provided an answer to question 6.

7. The consultation was available for comment on the BSB website throughout the consultation period. Of the eight responses received, six were from members of the Bar or their representative bodies. The remaining responses were received from the Legal Ombudsman and the Legal Services Consumer Panel. The BSB also held a presentation on the consultation for the Legal Practice Management Association, to seek their views on the proposed amendments. As they did not submit a formal consultation response they have not been included in the analysis below.

Summary of responses to consultation

Q1: Do you have any comments on the proposal to place disciplinary powers over non-barristers on a statutory footing?

Summary of responses

8. Of the eight responses to the consultation received, six directly answered this question. Four of the responses were supportive of the proposal, while two were not. One respondent did not respond directly to this question but expressed general opposition to all of the proposals included in the consultation, while one other expressed general support for the proposals.
9. The Legal Ombudsman encouraged the BSB's development of clear, consistent and suitably robust powers, and the Legal Services Consumer Panel also welcomed the proposal. The South Eastern Circuit and the Lincoln's Inn Bar Representation Committee acknowledged that the BSB ought to be able to effectively regulate all BSB regulated persons, and that this power would help the BSB to do so.
10. Blackstone Chambers believed that the BSB already has the necessary powers to discipline non-barristers on a contractual basis, and that a strong enough case had not been made for why these powers should be placed on a statutory footing. The Bar Council also opposed this proposal, and stated that it did not agree that regulation under statutory authority was inherently preferable to the current situation. It also believed that it would cause difficulties if barristers have to look partly to the Handbook and partly to statute to understand their obligations. The Bar Council believes that an extension of powers should only be made if it enables the BSB to exercise its regulatory functions more effectively and efficiently. It does not believe this is the case in relation to this proposal.

BSB decision

11. The BSB decided to proceed with this proposal because relying on a consent-based regime was not sufficient to ensure that the regulator was able to respond appropriately to all situations.
12. In subsequent discussions with the Ministry of Justice over drafting of the order, it was agreed that the scope of the order must be broader than originally consulted on in order to meet the BSB's policy objectives. The order will put the BSB's existing disciplinary powers (including those relating to barristers) on a statutory basis. This is because the BSB was advised that for the order to be effective it must apply to all those regulated by the BSB. The scope of any power to disqualify people (discussed below) is determined by the scope of the BSB's disciplinary powers. So in order for disqualification arrangements to apply to barristers and their employees, those individuals must be included in the general power to discipline. Therefore the power to make disciplinary arrangements will apply to barristers, entities, their managers and their employees.

Q2: Do you have any comments on the proposal to acquire statutory powers of intervention?

Summary of responses

13. Of the eight responses to the consultation received, six directly answered this question. Two of the responses were supportive of the proposal, while four were not. One respondent did not respond directly to this question but expressed general

opposition to all of the proposals included in the consultation, while one other expressed general support for the proposals.

14. The Legal Ombudsman supported the proposal and noted that in a changing legal landscape, the need for intervention becomes more apparent. They supported the proposals as they are keen to see relevant bodies being able to take quick and efficient action in the interests of consumer protection. The Legal Services Consumer Panel also saw the proposal as being positive for consumers, as they hoped that putting this power on a statutory footing would improve the ability of the BSB to intervene more swiftly in situations where there is evidence of consumer detriment.
15. Barrister A was opposed to the proposal and commented that there was no compelling justification for the proposed powers of intervention. They do not believe that the BSB should be able to intervene in a barrister's practice because they have personal financial difficulties. They are also of the view that it is unnecessary to be able to secure client papers, as client files are retained by solicitors or clients themselves in public access cases.
16. Blackstone Chambers commented that intervention powers over barristers or chambers – who must not handle client money – would be intrusive, costly, illogical and incompatible with risk-based regulation. If any such power was acquired, they believe it should be limited to a power only over those who handle client money in breach of the BSB Handbook. They do not believe that the BSB should have intervention powers over barristers just because other regulators have intervention powers over other kinds of professionals. Their view is that no clear need has been established for granting the BSB this additional intrusive power.
17. The Bar Council commented that no risk to the public has been established that warrants the extension of intervention powers, as barristers must not handle client money. They believe that the current regulatory tools are sufficient to meet the risks identified by the BSB, and that the use of intervention powers would be difficult to fund in a fair manner.
18. The South Eastern Circuit was of the view that it is not necessary to acquire a statutory power of intervention over non-ABS entities and individual barristers at this stage.

BSB decision

19. The BSB considered the responses received. It noted that if the Bar Council is designated as a Licensing Authority for ABS it will receive these powers anyway. It is therefore consistent to seek the same powers in relation to non-ABS entities and barristers. These powers would only be used in exceptional circumstances. For example, there may be circumstances where client money or client information is at risk despite existing provisions in the Handbook (such as the prohibition on holding client money and the duty to co-operate with the regulator). In these very rare instances, the BSB needs to be able to act decisively in the public interest. The same principle applies to individuals who experience insolvency events – insolvency proceedings in relation to an individual barrister should not normally trigger an intervention, but the BSB needs to be able to take action if necessary. The power would be exercised under guidance to the BSB executive which makes clear the circumstances in which the use of intervention powers would be appropriate and the process by which such action would be authorised. Intervention powers would only be used when necessary in the light of the regulatory objectives. The BSB therefore decided to proceed with this proposal.

Q3: Do you have any comments on the proposal to place the disqualification power on a statutory footing?

Summary of responses

20. Of the eight responses to the consultation received, six directly answered this question. Four of the responses were supportive of the proposal, while two were not. One respondent did not respond directly to this question but expressed general opposition to all of the proposals included in the consultation, while one other expressed general support for the proposals.
21. The Legal Ombudsman supported this proposal and commented that in the past they have received complaints about chambers employees who were not barristers, and thus have not been able to investigate them. These cases dealt with immigration matters where consumers were particularly vulnerable, and in these situations they would encourage the BSB to disqualify both regulated and non-regulated individuals. Both the Lincoln's Inn Bar Representation Committee and Barrister A agreed that the BSB should be able to disqualify an individual from employment in a regulated entity.
22. Blackstone Chambers felt that the consultation had not identified any case in which the current regulatory arrangements failed to operate efficiently or effectively, and which would have been avoided had the basis of the powers been statutory rather than contractual. They did not believe a case had been made for the proposed change.
23. The Bar Council commented that it was not clear whether this proposal constituted an extension of the BSB's powers or not. They felt it was unclear how the power would operate and why a power was needed that encompassed anyone employed by a company or person who provides services to a BSB authorised person. They do not see how this will improve the BSB's effectiveness or efficiency. They commented that if this proposal did constitute an extension of the BSB's powers, more cogent and evidence-based reasons for requiring the extension should be given.

BSB decision

24. The BSB decided to proceed with this proposal because it would not be appropriate to rely on a consent-based regime for disqualification powers, as this could be subject to challenge and there may not be express agreement of all employees/managers of BSB authorised persons to be bound by these rules. The new power is intended to place on a statutory basis rules already included in the BSB Handbook (which permits disqualification of people other than authorised persons already) but in order to be effective as an enforcement tool, the BSB believes they need to have statutory force. However, the Legal Services Act does not give the BSB the scope to extend its powers beyond those persons captured by s176 (i.e. authorised persons plus their employees and managers). Further primary legislation would be required to gain the full power that was consulted on. Powers of disqualification will therefore only apply to "regulated persons" as defined in the Act.

Question 4: Do you have any comments on the proposed information-gathering powers?

Summary of responses

25. Of the eight responses to the consultation received, five directly answered this question. One of the responses was supportive of the proposal, while four were not.

One respondent did not respond directly to this question but expressed general opposition to all of the proposals included in the consultation, while one other expressed general support for the proposals.

26. While agreeing the provision of information is a fundamental requirement of any regulatory regime, the South Eastern Circuit and the Bar Council opposed the proposal on the basis that the BSB already has the powers it needs. The Bar Council's view was that the existing power – whereby it is a breach of the BSB Handbook to fail to comply with requests for information by the BSB – is easily understood. They also stated the consultation provided no evidence that the existing power is functioning inefficiently or ineffectively, a view which was shared by Blackstone Chambers and the Lincoln's Inn Bar Representation Committee.
27. The Bar Council also stated the BSB Handbook has significant advantages over statute; first, that it is consensual rather than imposed, and secondly that it is more flexible. Their view was that consistency across all persons regulated by the BSB – individuals and entities – is not an end in itself, which was shared by Blackstone Chambers.
28. However, the Legal Ombudsman supported the proposal on the basis that clear, strong and consistent powers would be a positive development, bringing the BSB in line with other regulators and lessening consumer confusion.

BSB decision

29. The BSB noted that if the Bar Council is designated as a Licensing Authority for ABS, then it would acquire these powers in relation to ABS entities anyway. The BSB decided to proceed with this proposal because it was in the interests of consumers for the regulator to have clear and consistent powers with effective remedies if requests for information are not complied with. It is necessary for the regulator to have an effective method of enforcing any request for information and the BSB believes that simply taking disciplinary action after the event is not sufficient, particularly if information is needed urgently in cases where the public or consumer interest may be at risk.

Question 5: Do you have any comments on the proposal to have entity authorisation appeals heard by the First Tier Tribunal?

Summary of responses

30. Of the eight responses to the consultation received, three directly answered this question. All of the responses were supportive of the proposal. One respondent did not respond directly to this question but expressed general opposition to all of the proposals included in the consultation, while one other expressed general support for the proposals.
31. The Bar Council did not object to appeals in relation to entity authorisation being heard by the First Tier Tribunal. However, it commented that in the initial stages of entity authorisation, it may be helpful to have some High Court decisions in this area which could then serve as precedents. Blackstone Chambers supported the proposal, on the basis that changing the jurisdiction from the High Court to the First Tier Tribunal would be likely to lead to faster and more economical determination of appeals.

BSB decision

32. The BSB noted that this proposal was generally supported and decided to proceed because current arrangements with the High Court were only intended to be temporary. After discussions with the Ministry of Justice, it was agreed that the order should have a broader scope than that proposed in the consultation. It would give the BSB a general power to determine in its rules which decisions could be subject to appeal to the FTT (this would be subject to approval by the LSB). This approach would achieve the desired policy and give greater flexibility to make further changes in the longer term.

Question 6: Do you have any comments in relation to the proposed power to establish compensation arrangements?

Summary of responses

33. Of the eight responses to the consultation received, seven directly answered this question. Two of the responses were supportive of the proposal, while five were not. One respondent did not respond directly to this question but expressed general opposition to all of the proposals included in the consultation.
34. All persons regulated by the BSB – individuals and entities – are prohibited from holding client money. The Bar Council agreed with the BSB’s conclusions in the consultation that any breach of the ban would be exceptional – and any loss of client money incurred more so – and that the risks within its current regulatory regime are insufficient to justify the establishment of a compensation fund. The Bar Council also stated the establishment of a fund would be expensive, and that the burden would fall heavily on those with conventional advocacy practices. Its view was that this would be unfair and contrary to the BSB policy objective that its regulatory regime should be proportionate to the risks posed, which was shared by Blackstone Chambers. They stated that a compensation fund would, in addition to being costly and unfair for those whose activities create no risk, be unduly favourable to those whose activities may create a risk.
35. Regarding the proposal for a power to establish a compensation fund or similar compensation arrangements, Blackstone Chambers also stated that it can rarely, if ever, be justified to grant a power because it may come in useful in the future. This view was shared by the Lincoln’s Inn Bar Representation Committee. The Bar Council doubted additional regulatory powers could be justified on the basis that they “future proof” a regime. Its view was that it is unclear whether the LSB could recommend that the Lord Chancellor make an order under section 69 of the LSA to “future proof” an approved regulator. This is because it would not be for the purpose of enabling an approved regulator to carry out its existing role more effectively or efficiently, but would be to enable an approved regulator to perform better in the future. It also commented more generally that “future proofing” should be approached with caution, as there might be unintended consequences of an approved regulator acquiring powers that it does not need. The South Eastern Circuit strongly opposed any power to impose contributions to a compensation scheme, especially given the BSB’s own view that it is not currently necessary.
36. However, the Legal Ombudsman supported the proposed power to establish compensation arrangements, on the basis that “future proofing” would mean the BSB could react more quickly in the future to counter consumer detriment. The Legal Services Consumer Panel also supported the proposal, stating it is essential that flexibility is built into the BSB’s regulatory regime at this stage. They also commented

that it is a forward thinking development, reflecting a pragmatic approach to regulation of the ever evolving legal services market.

BSB decision

37. The BSB agreed that powers to establish compensation arrangements may be needed in the future, as the business and practising arrangements of barristers and entities evolve over time. It is important that the regulator can move quickly in such circumstances. The BSB agreed to proceed with the proposal, noting that the profession would have to be fully consulted on any proposals to move towards a compensation fund, prior to seeking LSB approval in the normal way.