



Bar Council response to the 'Section 69 Order to modify the functions of the Bar council' consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board consultation paper entitled 'Section 69 Order to modify the functions of the Bar Council' consultation paper¹.
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. We are conscious that many of the powers that are sought in this consultation will be conferred upon the Bar Standards Board (BSB) at the point that it becomes a Licensing Authority and that they will be available for Alternative Business Structures (ABS). As we will go on to explain in this response, no justification has been provided for extending these same powers to BSB-authorized bodies and individual barristers in addition. The risk profiles of the latter are very different and the powers requested here are disproportionate to the regulatory risk posed and are, therefore, unjustified. Our concerns are exacerbated by the fact that the powers that are now being proposed and consulted upon in this consultation paper are further reaching than those that the BSB originally requested and consulted upon in its consultation paper. We note that the BSB do not intend to use many of these powers and, as matter of principle, it is our view that powers should not be sought or granted if they are not required.

¹ Available here:

http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/2016/2016_08_30_BSB_s6_9_order_consultation_FINAL.pdf

There does not appear to have been any serious consideration of the effectiveness of the existing powers available to the BSB and whether those are sufficient for its regulatory purposes, including by way of further consideration in the light of discussions with the Ministry of Justice that have led to wider powers being sought than are needed. Whilst we do not object to these powers being conferred upon the BSB as a Licensing Authority for ABS, they are completely unjustified for BSB-authorized bodies and persons.

Question 1: Do you have any representations on either the draft recommendation or the draft order?

5. We will take each of the proposed policies in turn and to provide comments on each area:

Appeals

6. As we set out in our responses to the Bar Standards Board² and Legal Service Board consultations³ on BSB-authorized bodies and ABS respectively, we do not have any objections to the First Tier Tribunal (FTT) being used for appeals with respect to authorisation decisions made in relation to entities and ABS and that remains our view.

7. We do not see any justification, however, for extending the use of the FTT to other types of appeal, particularly in relation to appeals against disciplinary decisions concerning individual barristers. This is unrelated to the powers that the BSB needs to regulate entities, and it formed no part of the BSB's original consultation. We do not consider that this point forms a proper part of this consultation, given its background and context; and indeed, this consultation paper contains no proper or principled justification for seeking such a power, and admits that this is the case. It is also clear that the BSB has neither no need nor any desire to exercise a power to alter the route of appeal other than in relation to those appeals summarised in paragraph 20 of the consultation paper.

8. More broadly, it is wrong, in principle, for statutory powers to be sought or given which are not required by the body to whom they will be given, and which that body has no intention to exercise. This applies generally, but even more so where those powers would involve an extension, by delegated legislation, to powers already given expressly by primary legislation, or an extension of powers in primary legislation into new situations.

9. For the same reasons, the Regulatory Triage Assessment is misleading. It states "each proposal is ... desirable and necessary on its own." It is quite clear that a power as extensive as that sought in Article 3 of the draft order is *not* necessary, and there is no explanation in the consultation paper of why it is seen as desirable. Indeed, the supporting text accepts that some of the proposals are seen as simply "useful"; and in relation to the appeals proposal, there is *no* supporting text which justifies a proposal wider than those summarise in

²http://www.barcouncil.org.uk/media/382111/bar_council_response_to_amendment_to_bar_standard_board_powers_consultation.pdf

³http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/2016/20160323_Bar_Council_Response_To_LSB_Consultation_On_S80_March_2016.pdf

paragraph 20. The supporting text explains that no assessment has been made of the impact of the wider power, because there is no intention to use it; but as the assessment must in principle support the taking of *all* of the powers sought in the s.69 order. This serves to emphasise the inappropriateness of the wider power that is proposed in draft Article 3. A power should not be sought on the basis of an inaccurate and misleading Regulatory Triage Assessment; nor should it be taken if the full extent of the proposed power is not properly supported by such an assessment.

10. Moreover, appeals in relation to decisions made by disciplinary tribunals are of a fundamentally different nature. As a consequence, any proposal to give a power to alter the route of appeal from disciplinary tribunal decisions would require separate consideration, consultation and justification. This consultation, and the context of this s.69 draft order, do not satisfy these requirements.

11. The extension of this proposal beyond the BSB's original proposal is without any proper justification and should not be included in the s.69 order. It should be limited to giving the BSB the power that it needs and wishes to be able to exercise, which is to alter the route of appeal to the FTT as summarised in paragraph 20 of the consultation paper.

Intervention

12. We object to the inclusion of the powers of intervention proposed at Article 4 and we object to the terms on which it is being proposed.

13. As a general point, the intended intervention powers are clearly more onerous than is justified by the nature and level of regulatory risk posed by a BSB authorised body or person. The BSB's approach to the types of entity that it will authorise is such that this will remain the case. Although the BSB will have powers of intervention in relation to ABS, this is only because those powers are given by statute to all Licensing Authorities, in circumstances in which ABSs could have much riskier profiles. The BSB's own approach removes the justification for intervention powers for other types of individual and organisation, so the fact that it will inevitably have such powers in relation to ABSs automatically on becoming a Licensing Authority provides no justification for taking such powers in other contexts.

14. The low risk profile of BSB-authorized bodies and persons arises because no such body or person handles or is permitted to handle client money or receives or is permitted to pay or receive a referral fee. This is the BSB's own view: in their Amendments to the new BSB Handbook: Entity Regulation document⁴, they said that there is no evidence to suggest any need for powers to intervene in relation to individual barristers. If there is no need for a power of intervention in relation to individual barristers, then this should not be sought or given, as we have already explained.

⁴http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2014/20140626_1_BSB_Change_Of_Regulatory_Arrangements_Under_Schedule_4_Entity_Regulation_Application.pdf
(para 133)

15. So far as non-ABS entities are concerned, the most that the BSB could say in that same document about an intervention power was that it would be a “desirable addition to the BSB’s powers in the longer term, not least in order to ensure consistency in the powers available”. This is a wholly insufficient justification for seeking intervention powers, particularly given the serious consequences of an intervention, and the very limited protections given by the statutory scheme for those who are the subject of an intervention.

16. Interventions lead to serious financial and reputational consequences for those whose businesses are the subject of interventions. In practice, they lead inevitably to the closure of the business in question. That is serious enough for an entity; it is even more serious for an individual, whose livelihood is thereby taken away summarily, without compensation and with little protection. No such powers should be sought or given without very strong justification and there is no justification provided in this consultation paper.

17. Moreover, even if there *were* a justification for seeking intervention powers, the application of the powers set out in Schedule 14 of the Legal Service Act 2007 (LSA07) is far too draconian; those powers are not suited or fit for use in relation to self-employed barristers; and they are also far wider than those on which the BSB consulted. For example, a barrister should not be holding (nor should anyone be holding on the barrister’s behalf) any monies which are related to his or her practice other than his or her own fees. As a result, the use of Schedule 14 intervention powers could – and, indeed, would seem inevitably to – result in the freezing or seizure of monies received through chambers or held in a bank account by way of barristers’ own fees (i.e. their personal income), and the transfer of rights to recover their fees. If a barrister does not maintain a separate business bank account, then this could lead to the freezing or seizure of personal savings as well. This problem arises because the powers concerning monies are concerned primarily with securing monies belonging to others (i.e. client monies), which barristers are not permitted to hold, with the result that it is difficult to see what these powers could cover (when applied both to barristers and to authorised entities) apart from barristers’ (or entities’) own professional fees. Schedule 14 was just not designed to apply to self-employed barristers.

18. The lack of suitability of the Schedule 14 powers for individual barristers can also be seen in other circumstances. For example, a barrister may be a trustee of a trust. This will necessarily have nothing to do with her or her practice, because barristers do not undertake professional work of this nature (by way of contrast with solicitors). Typical examples for individual barristers would be charitable trusts or trusts established under the will of a relative. Various powers under Schedule 14 would appear to catch monies and documents relating to such trusts, and the intervention conditions would appear to refer to such trusts. This has nothing to do with the regulation of practising barristers, and cannot be right.

19. It also cannot be right for a power to be granted that could lead to the redirection of barristers’ personal communications as well as their professional communications; but because barristers are sole traders, trading under their own names, this would seem to be inevitable if the Schedule 14 powers are to be applied.

20. Even if Schedule 14 powers or similar powers were to be granted, their intrusive nature would (particularly in the case of individuals) require the creation of a more effective

process for challenge and appeal. Such a process is vital to ensure that the powers are used in an accountable and responsible manner, to ensure that they are being exercised in accordance with the policy objectives set, and to ensure that the rights of individuals are properly protected. The current proposal falls well short in this regard. The existence of a proper challenge and appeal process would also be a deterrent to an intervention other than in circumstances, which truly justify the use of such a draconian power, at significant financial cost to the BSB (and, thus, to the profession).

21. This is even more important when the circumstances that may trigger an intervention (provided for in LSA07 Schedule 14) are very broad indeed.

22. If and to the extent that intervention powers are to exist, we would be supportive of the BSB producing an intervention strategy which details a two-stage test that must be satisfied before intervention is decided as a course of action, but only where the existence of such a strategy can be justified in the first place. This would have the benefit of narrowing down the circumstances under which an intervention would be employed and would create greater certainty for the profession. We would not regard this as sufficient protection, however: the powers themselves should provide for proper and effective routes of challenge and appeal.

Misconception about 'parity' of intervention powers

23. As we highlighted earlier in our response, the Bar Standards Board will obtain a power of intervention in relation to ABS at the point that it becomes a Licensing Authority. The case for extended powers in relation to other types of organisation such as BSB authorised bodies and individual barristers has not been made out. It appears that these powers are proposed for all types of BSB-regulated individual and organisation only (or primarily) because it would be illogical for the powers to be available for certain bodies such as ABS and not others, but we are unconvinced by this reasoning. Parity with the powers the BSB will have for ABS is not a reason to acquire these powers for authorised bodies, not least because the risk they pose is different due to the non-lawyer ownership and management of them, as the BSB itself recognises.

24. The regulatory requirements applicable to ABS were originally included in the Legal Services Act to allay fears that ABS, as new and unknown business structures, could present higher levels of regulatory risk, and to take account of the fact that an ABS might operate in a similar way to a solicitors' firm (not least, in handling transactional work involving the handling of client money), which might require powers similar to those given in the Solicitors Act 1974 in relation to solicitors' firms. The LSB's own research⁵ has concluded that many of the fears have not been borne out and it has suggested that some of the regulation that pertains to ABSs ought to be rolled back because they are too onerous for the level of regulatory risk posed.

25. Moreover, the risk profile of BSB-regulated individuals and bodies is low as we have highlighted. They will not generate the sort of risks which led to Parliament giving powers

⁵ <https://research.legalservicesboard.org.uk/wp-content/media/Innovation-Report.pdf>

modelled on those in the Solicitors Act 1974. In practice, when considering how these powers have been used by other regulators, the need to intervene and seize client files and money arises primarily when there has been mishandling of client funds. Given the prohibition on such activities and the existing powers in the BSB Handbook, powers of intervention are simply not required in relation to individuals or non-ABS entities.

Information gathering

26. It is not necessary for the BSB to have statutory powers for information gathering. By its own admission, the BSB's existing powers are sufficient, and no case has been made out (and none is included in the Regulatory Triage Assessment) for these powers being necessary. For the same reasons as we have already explained, powers should not be sought or given which are unnecessary.

27. The only suggested concern in this respect is a supposed risk of challenge to the BSB's existing arrangements. There is no evidence of any material degree of risk in this regard. No problem has occurred, and none is realistic.

Disciplinary arrangements

28. Neither the BSB nor LSB have raised any issues with the current contractual basis of regulation that need to be remedied. The only basis for putting these arrangements on a 'statutory footing' under draft Article 6 is that this is said to be necessary for the purposes of being able to disqualify barristers. That is not a proper basis for seeking or granting statutory powers that are otherwise (and admittedly) unnecessary. No real need for this is disclosed in the Regulatory Triage Assessment either.

29. In any event, as we explain below, there is no justification for powers of 'disqualification' in relation to individual barristers. Accordingly, even this suggested justification for Article 6(1)(a) or (b) cannot apply to individuals who are already regulated by the BSB. The same applies to any attempt to justify Article 6(1)(a) or (b) in relation to such individuals in order to support a power of intervention, or any of the other powers: such powers are not needed, and so cannot provide any justification for this, and are certainly not needed to the extent that would be required to justify granting wide disciplinary powers.

30. Furthermore, there is no basis for including employees in Article 6(1)(c) if, as the consultation paper states at paragraph 41, the BSB does not intend to discipline or disqualify any person whom it does not currently regulate (and, indeed, it has undertaken no consultation in that regard). The BSB does not currently regulate employees. If the BSB does not intend to do this, then it neither needs nor should be given new powers to do so.

31. The consultation paper might be said to be internally inconsistent in this regard, in that it refers to employees in paragraph 35 in the context of disqualification, but if we have understood the BSB's intention correctly, the BSB wishes to have statutory disqualification powers even though it does not wish to have statutory disciplinary powers. We find this difficult to follow. If, as a matter of *vires*, the granting of statutory disqualification powers depends on the existence of statutory disciplinary powers, we are not at all clear how the

former could properly be exercised in the absence of the exercise of the latter. Similarly, it is not at all clear how disqualification powers will be exercised in practice, or could properly be exercised in practice, without some form of disciplinary process being taken against the person who is to be disqualified, given the effect of disqualification on that person. None of this has been the subject of consultation or, it would seem, consideration.

32. Even if the BSB were to seek, and to be able to justify the granting of, powers to make disciplinary arrangements in relation to employees, that would *not* justify taking statutory powers in relation to those whom it currently regulates. In this situation, the powers should, and could, be limited only to employees.

33. There are also some more specific points on draft Article 6(2):

- a. There is no justification for a power to fine individuals up to £50 million. The levying of such a fine is inconceivable and impractical to implement. If an individual's conduct were sufficiently serious, it would justify a tribunal disbarring that individual. 'Future proofing' is not a proper basis for taking a power, but this could, in any event, not justify a maximum fine on an individual of £50 million.
- b. The BSB should not have a power to make arrangements for ordering disbarment. That may only be done by a disciplinary tribunal; and, indeed, in view of the definition of barrister under the Act, the powers under the Act are not sufficient for the BSB to be given such a power. Any power such as that in Article 6(2)(c) must be limited to arrangements that may empower a disciplinary tribunal to order disbarment of a barrister by an Inn, subject to that tribunal otherwise having such a power (as disciplinary tribunals do currently).
- c. A similar point arises in relation to draft Article 6(2)(a) in particular, as the revocation or suspension of a barrister's authorisation on disciplinary grounds may only properly be done by a disciplinary tribunal. Articles 6(2)(b) and (c) also give rise to concerns as to the circumstances in which the sanctions to which they refer may be imposed other than by a disciplinary tribunal.

34. So far as draft Article 7 is concerned, the consultation paper contains no justification for a power of disqualification in relation to individual barristers. A barrister may be disbarred, a barrister's right to practise may be revoked or suspended, and any serious misconduct that might satisfy the 'disqualification condition' would be a matter of public record as a result of disciplinary findings. There is simply no need for any power to disqualify a barrister, separate from or in addition to existing powers. This is not needed for the purposes of Article 8, as it is already perfectly straightforward to identify barristers against whom there have been findings of breach of their professional obligations.

35. Moreover, as the BSB explained in its original consultation, there is no *need* for statutory disqualification powers in relation to 'regulated persons', as defined in LSA07 s.176, as the BSB already has such powers.

36. It is also apparent from the draft order that part of the BSB's justification for seeking statutory disqualification powers will not be achieved, because there will be no power to disqualify persons who are *not* already within the definition of 'regulated persons' in LSA07 s.176. The exclusion of this part of the rationale should have led to a reconsideration of whether a statutory power of disqualification is necessary at all, but it appears not to have done so.

37. If there were truly a need for a statutory disqualification power in relation to individuals not currently regulated by the BSB, or to entities, but who will now be caught by the new powers, then that has not been elucidated in this consultation, and the Regulatory Triage Assessment does not identify this as being necessary. Even if there were, there would be no need for Article 7 (or, indeed, Article 6) to extend beyond the discipline and disqualification of those who are not currently regulated by the BSB.

Practice rules on engaging disqualified individuals

38. We consider Article 8 to be unnecessary. The BSB already prohibits chambers from employing non-authorised individuals that are not competent to carry out their duties (rC89.6.a of the BSB's Handbook). Similarly, rC89.3 prevents chambers from employing persons disqualified by other approved regulators and rC91.3 (subject to rC92) ensures that BSB authorised bodies do not appoint any individual to act as a HOLP or a HOFA, or to be a manager or employee of that BSB authorised body, in circumstances where that individual has been disqualified from being appointed to act as a HOLP or a HOFA or from being a manager or employed by an authorised person (as appropriate) by the Bar Standards Board or another Approved Regulator pursuant to its or their powers as such and such disqualification is continuing in force. These existing powers could readily be extended, without the need for Article 8, to any other categories of person to whom the BSB considers that they should apply. If disqualification powers were to be taken in relation to individuals not currently regulated by the BSB, then Article 8 would still not be needed, as the same effect could be achieved by amendments to those existing rules.

Compensation arrangements

39. The consultation paper says explicitly that a compensation scheme is not currently necessary and that the BSB has no intention of setting up such a scheme. For the reasons we have already given above, it is wrong in principle to seek and be granted powers that are not necessary and that the BSB has no intention to use. As the BSB stated in its application⁶ to the LSB to become a licensing authority, the prohibition on barristers handling client money minimises the risk that a client will suffer losses as a result of misconduct. There is no material risk of a situation arising where losses would need to be mitigated by a compensation fund, or in which the setting up of a compensation fund would be justified. We consider it to be premature and disproportionate to put a legislative framework in place for a power that is not currently required. Equivalence with the powers in relation to ABSs is no justification for this,

⁶http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2015/20150508_Licensing_Authority_Application.pdf

for the reasons we have already explained in relation to other proposals, not least the fact that there is no need to set up a compensation fund in relation to ABSs.

Question 2: Does the drafting of the order meet the policy intentions set out above?

40. No comments.

Question 3: Do you have any comments on the draft regulatory triage assessment, in particular the costs/benefits estimates and whether any additional costs/benefits should also be identified?

41. We have included comments on this above. In addition, we do not consider that this consultation has given proper consideration of alternatives, particularly the alternative of taking disciplinary powers and related powers only in relation to those who are not currently subject to BSB regulation, and the alternative of limiting the scope or risks of entity regulation so as to mitigate any limited residual risks.

42. Furthermore, we disagree with the approach to assessing the cost of compensation arrangements. It is inappropriate to include a cost of insurance when the BSB has no intention to set up any compensation scheme, and in the absence of any justification for such a scheme. The 'do nothing' option should be assessed at nil cost, and the assessment should not include any 'net benefit' of the supposed 'saving' of this cost. In any event, however, in the absence of any risk that would justify incurring any cost, the assessment ought to lead to the conclusion that the draft power to set up a compensation fund is unjustified and contrary to better regulation principles.

Bar Council

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