



**Amendment to the Professional Conduct
Committee's power to take "no further action"**

For approval by the Legal Services Board

July 2015

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This application is made in accordance with the requirements set out in the Legal Services Board’s (LSB) Rules for Rule Change applications. The Bar Standards Board (BSB) wishes to provide the information below to support its application.

Any queries about this application should be made to:

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The Bar Standards Board (BSB) wishes to provide the information below in support of the application.

Summary

1. This application seeks the approval of the Legal Services Board (LSB) of amendments to the Complaints Regulations, which feature at Part 5 Section A of the ‘BSB Handbook’ (the Handbook) and consequential changes to the definition of professional misconduct (see definition 166 at Part 6 of the BSB Handbook).
2. The changes are designed to address anomalies in the Handbook regarding the powers of the Professional Conduct Committee (PCC) to impose “no further action” (NFA) in relation to breaches of the Handbook. These anomalies have made the use of the power almost redundant and entirely incompatible with the new definition of professional misconduct.

Background

3. Under the Code of Conduct 8th Edition (the Code), the power of the PCC to take NFA was reserved for cases in which the PCC was satisfied that a breach of the Code had

occurred that warranted disciplinary action for professional misconduct but, for exceptional reasons such as ill health, it was not appropriate to refer the matter to disciplinary action. By policy, the PCC could only take a NFA decision where it was satisfied:

- a) that there was a real prospect of proving misconduct in front of a Disciplinary Tribunal to the criminal standard; and
 - b) prosecuting the barrister would serve the Regulatory Objectives, set out in section 1 of the Legal Services Act 2007; but
 - c) in the individual circumstances of the complaint, a NFA disposal could also satisfy the Regulatory Objectives.
4. A decision to impose NFA was therefore a final disposal of a complaint, but was neither a formal dismissal nor a formal finding of professional misconduct¹. NFA decisions were disclosed for the purposes of certificates of good standing and in relation to enquires made by the relevant bodies considering applications for silk (Queens Counsel Appointments) and judicial office (Judicial Appointments Commission).
 5. There was no right of appeal against a decision to take NFA however, the barrister had the ability to object to NFA decisions. If this happened, the matter would then be referred to a Disciplinary Tribunal to make a determination. Therefore, the application of NFA under the old Code was only appropriate in circumstances where it would have been equally appropriate to have charged the barrister with professional misconduct. The power was very rarely used: the PCC took only three NFA decisions between January 2011 and January 2014.
 6. The new Handbook (introduced in 2014), to a large extent, mirrors the powers contained in Annex J to the old Code² and reflects the policy approach previously adopted. However, there are some notable differences which have affected how the PCC can apply the power to take NFA decisions. In summary these differences are:
 - i) Professional misconduct is now defined as “*a breach of [the] Handbook by a BSB regulated person which is not appropriate for disposal by way of **no further action** or the imposition of administrative sanctions*” (emphasis added) – the Handbook, Part 6, Definition 166;
 - ii) The power to impose administrative sanctions has been extended to all breaches of the Handbook – not just the limited number referred to in the old Code at paragraph 901.1;

¹ Under the Code, professional misconduct was defined at a paragraph 901.7 as “*any failure by a barrister to comply with any provision of this Code other than those referred to in paragraph 901.1...*”

² See Regulations E46-E49 of the current Complaints Regulations.

- iii) Decisions to impose administrative sanctions and take NFA are based on an assessment of the evidence on the balance of probabilities and are applied in relation to “breaches of the Handbook” as opposed to professional misconduct;
- iv) The previous policy approach in relation to NFA decisions, as outlined at paragraphs 4-6 above, has, in part, been enshrined in the Regulations; and
- v) The Handbook currently restricts the power to dismiss complaints, following an investigation, to circumstances where the conduct does not constitute a breach of the Handbook (the old rules allowed for dismissal of complaints where a breach of the Code had occurred but no action was warranted).

Issues with taking NFA Regulation decisions under the current regime

7. The impact of the differences set out at paragraph 7 have inadvertently created significant, but unintended, complex practical problems with the application of the power to take NFA decisions. These problems have made using the power very difficult and in effect rendered it redundant in its revised form. It is for this reason that the BSB consulted on the proposal to remove the power from the Regulations. Set out below is a rehearsal of the main issues that have arisen when attempting to apply the current Handbook Regulations on NFA.
 - i) The change in the definition of professional misconduct has significantly affected the fundamental nature of NFA decisions. They are now allied with decisions to impose administrative sanctions and are intended to be used for breaches of the Handbook proved on the balance of probabilities which do **not** amount to professional misconduct. However, the transfer of the policy approach under the old Code, combined with a “right” to object to a NFA decision and have the conduct referred to a Disciplinary Tribunal (current Regulation E49), renders an NFA decision a far more serious disposal. This is particularly so as the Regulations provide that NFA decisions are still disclosable to third parties (current Regulation E46.2);
 - ii) The current Regulations have created the anomalous situation whereby a breach of the Handbook that the PCC considers is suitable for disposal by way of NFA and thereby does not amount to professional misconduct, could be referred to a Disciplinary Tribunal solely because the regulated person objects to the NFA decision. Where such a situation arises, the PCC would effectively be forced to prove professional misconduct in front of a Tribunal in circumstances where it had originally determined that the conduct did not represent professional misconduct;
 - iii) Even though a “right” exists for a person subject to a NFA decision to have the matter referred to a Disciplinary Tribunal, the Regulation in relation to referrals to Tribunals (see E38) require that such referrals are made only where there is a realistic prospect of a finding of professional misconduct being made (on the criminal standard of proof) and it is in the public interest to pursue disciplinary

proceedings. The Regulations make no provision for a separate class of referrals arising from NFA decisions.

8. The issues above with the drafting of the Regulations, create an unsustainable, anomalous and circular decision-making process that makes the use of NFA in its current guise redundant.
9. There are also two other associated anomalies in the Regulations that have come to light:
 - i) There is no power, as was available under the old Code, to dismiss a complaint following investigation where there is evidence of a breach of the Handbook but it is in keeping with the enforcement strategy to dismiss the complaint because it does not justify any formal action. The power to take NFA cannot fulfil this role as such decisions are ultimately liable to referral to a Disciplinary Tribunal as professional misconduct matters.
 - ii) Reference in current Regulation E49 to “Section 5.A5” appears to be a mistake as that section refers to the Determination by Consent procedure, which is not relevant to NFA and includes no references to the NFA. This appears to be an example of an inadvertent mistake in the transfer of the old NFA powers in the Code to the new Handbook.

Addressing the current anomalies in the application of NFA

10. It is recognised that the problems identified above regarding the use of the PCC’s power to take NFA decisions arise from a lack of detailed consideration of the practical implications of combining the enforcement regime in the Handbook with the old policy on NFA decisions. As a result, a complex and unsatisfactory situation has emerged in relation to the application of the NFA provisions. Almost inevitably, no circumstances have arisen where it would have been possible, or appropriate, to take a NFA decision. Nevertheless, it is unsatisfactory to retain a power in the Handbook that cannot be used effectively.
11. In considering what action to take to address the current anomalies, various options were considered and the following issues noted:
 - i) Removing the provisions relating to a regulated person’s right to have a matter referred to a Disciplinary Tribunal would result in unfairness as regulated persons would still be exposed to NFA decisions being disclosed to third parties without the option to have the matters considered by an independent panel. Therefore, if this approach was taken, it would need to be combined with amending the Regulations relating to the disclosure of NFA decisions and/or providing for a route of appeal;
 - ii) The current provisions relating to the imposition of administrative sanctions, allow for any breach of the Handbook (proved on the balance of probabilities) to be dealt with by means of a formal warning, which is not currently disclosable. Such

a power would seem to cover the overwhelming majority of circumstances where there has been a breach of the Handbook that falls short of professional misconduct and where there are circumstances that would not warrant the imposition of the more serious administrative sanction of a fine on individuals of up to £1,000 (or £1,500 in relation to entities). If the circumstances are so exceptional as to warrant no action at all by the BSB, then a dismissal of the complaint would be appropriate (see recommendation at paragraph 13 below);

- iii) It would appear that the only hypothetical circumstances in which a decision to take NFA might play a role are where a complaint is serious enough to amount to professional misconduct (and so may not be suitable for an administrative sanction) but the PCC considers that there is no realistic prospect of the conduct being proved to the criminal standard (or, there is a realistic prospect of success in achieving a finding of professional misconduct but the facts surrounding the conduct do not warrant a referral to disciplinary action). The risks of such circumstances arising are considered to be sufficiently low that they do not warrant a substantial recasting of the Complaints Regulations in order to provide for an effective regime for taking NFA decisions. It is recognised that, in very rare cases, the proposed revisions could result in regulated persons who have committed professional misconduct having complaints against them dismissed. However, such dismissals would only occur in exceptional circumstances, for example, where a regulated person is suffering from a terminal illness.

12. In light of the considerations set out above, the consultation paper proposed three options for change³, with the BSB's preferred and formal proposal being to adopt **Option 1**, as follows:

“Remove the NFA power entirely from the Handbook but reinstate the power, previously available under the old Code of Conduct, to allow the PCC to dismiss complaints at the post-investigation stage where it considers there has been a breach of the Handbook but no form of sanction is warranted, taking into account the circumstances, the risk posed, and the enforcement strategy”.

13. The consultation paper also detailed two further, but less favoured, options as set out below. Both options would require substantial amendments to the Regulations for little gain as it is unlikely that many, if any cases, would fall to be considered under them.

- **Option 2:** The PCC's power to take NFA decisions is retained, but the right to have a matter referred to a Tribunal is removed. There is put in place a clear appeal process in relation to NFA decisions and the BSB's policy on disclosure of NFA decisions is revised to bring it in line with the current disclosure of administrative sanctions (ie, NFA decisions are not disclosed).
- **Option 3:** The PCC's power to take NFA is retained; the option for referral to a Disciplinary Tribunal is removed; a clear appeal process is established; but NFA decisions are still disclosed.

³ Full details can be found at paragraphs 31–33 of the consultation paper (available on request).

Consultation process undertaken

14. The proposed changes in relation to NFA decisions were subject to a public consultation over an 8 week period, which ran from February to April 2015. Consultees were asked whether they:

- i)** agreed there is a need to amend the Complaints Regulations in the Handbook in relation to the application of NFA decisions; and
- ii)** agreed with the BSB's proposal (Option 1) to address the anomalies in relation to the application of the PCC's power to take NFA decisions by removing the power.

15. Only one formal response was received to the consultation paper from the Bar Council. They agreed that the present system in relation to 'no further action' decisions was unsatisfactory and should be reformed in the way proposed by the BSB (ie, Option 1). The Bar Council also agreed that the power to dismiss a complaint in these circumstances would enable the BSB to ensure that it is regulating in a manner which is effective, efficient, transparent, fair and proportionate.

Proposal following consultation - amendments to the Handbook

16. In light of the outcome of the consultation, the BSB would like to move ahead with the changes necessary to implement Option 1 as outlined in paragraph 13 above. The LSB is therefore asked to approve the amendments to the Complaints Regulations and definitions section of the 2nd Edition of the Handbook. The changes are tracked at Annexes 1⁴ and 2, and amount to:

- i)** removing all references to NFA in the Regulations (see Regulations E8.2, E39, E65.2c, the subtitle at A6, and the deleted clauses at E46-49 of Annex 1);
- ii)** amending Regulation E37.2 to allow for conduct that constitutes a breach of the Handbook (on the balance of probabilities) to be dismissed where, in all the circumstances, it is considered that no enforcement action should be taken in respect of the breach;
- iii)** amending the definition of professional misconduct set out at definition 166 in Part 6 of the Handbook to remove the reference to NFA (see Annex 2); and
- iv)** changing cross references in the Regulations as a result of the removal of some Regulations.

17. The LSB should also note that a fundamental review of the Complaints Regulations is planned for 2016/17. At that time, the range of powers available to the PCC will be

⁴ Although the 3rd Edition of the Handbook has been submitted to the LSB for approval, these changes will be made to the 2nd Edition of the Handbook as an interim measure. The changes will be amalgamated with the 3rd Edition once it has been approved.

considered in more detail. The BSB will also consider revising the approach to disclosure of decisions to impose administrative sanctions.

Risk

- 18.** There are clearly practical risks associated with retaining the current terms of the Regulations in relation to NFA decisions in that they do not provide for effective and clear enforcement processes. In particular, there is an ongoing risk that retaining an enforcement power that cannot be exercised in practice is misleading to both the public and the profession. The changes are therefore necessary to ensure such risks are adequately addressed (although the BSB can sufficiently manage these risks until such time as the changes are approved).
- 19.** No significant risks have been identified in relation the proposed changes to the Regulations and definitions section since the purpose is to eliminate uncertainty in how the PCC's powers are applied rather than impose any new regulatory requirements. The power to impose NFA has only been exercised by the PCC three times between January 2011 and January 2014 and these instances were prior to the introduction of the Handbook. As such, the changes will be of limited effect and will have no impact at all on the BSB's capacity and capabilities to deal with the complaints under the Regulations.

Statement in respect of the LSA Regulatory Objectives

- 20.** The BSB must, so far as is reasonably practicable, act in a way that is compatible with the regulatory objectives set out in the Legal Services Act 2007, and in a way that it considers to be most appropriate for the purpose of meeting those objectives.
- 21.** The BSB has not identified any significant adverse impacts on any of the regulatory objectives as a result of making these changes to the Regulations.
 - i) Protecting and promoting the public interest:** The changes to the Regulations are designed to provide enhanced protection of the public interest by improving the clarity of the Regulations, and ensuring that they meet best practice.

The changes will have no effect on the BSB's ability to risk assess complaints and take decisions in the public interest.
 - ii) Supporting the constitutional principle of the rule of law:** In demonstrating fairness of process and in powers of enforcement, the changes support the constitutional principle of the rule of law.
 - iii) Improving access to justice:** The amendments are considered to have a neutral effect on this regulatory objective.
 - iv) Protecting and promoting the interests of consumers:** By having in place clear procedural arrangements, the BSB is able to further ensure compliance

with the Handbook. As such, the BSB is confident that consumers of legal services will continue to be protected from regulated individuals who have committed professional misconduct.

- v) **Promoting competition in the provision of services:** The amendments are considered to have a neutral effect on this regulatory objective.
- vi) **Encouraging an independent, strong, diverse and effective legal Profession:** The amendments are considered to have a neutral effect on this regulatory objective.
- vii) **Increasing public understanding of the citizen's legal rights and duties:** The amendments are considered to have a neutral effect on this regulatory objective.
- viii) **Promoting and maintaining adherence to the professional principles:** The amendments to the Regulations ensure that the BSB has in place effective processes to maintain standards of work and integrity within the profession by ensuring that proportionate action is taken against individuals who have breached the Handbook.

Statement in respect of the Better Regulation Principles

22. The BSB considers that the proposed amendments to the Regulations fulfil its obligation to have regard to the Better Regulation Principles.

- i) **Transparent:** The Complaints Regulations provide coherent and comprehensive details of the BSB's enforcement powers. The clarity and simplification that comes with the removal of anomalous and confusing provisions should only help to bolster the transparency of the Regulations for consumers and regulated persons.

The intention is for the changes to the Complaints Regulations and definition of professional misconduct to be publicised widely and for the revised Regulations to be published on the BSB's website. This will ensure access to an up-to-date version when amendments are made. The publication of the consultation paper in February 2015 has meant that consumers of legal services and regulated persons will have had the opportunity to consider these changes before they are introduced.

- ii) **Accountable:** Decisions made under the Handbook, including any decision to dismiss a complaint, will be supported by clear and transparent internal and external policy and guidance. In addition, detailed reasoning for decisions on complaints will continue to be provided to complainants and regulated persons, in accordance with the terms of the Handbook. These measures will ensure that the BSB remains accountable for any enforcement decisions and actions it takes in relation to regulated persons.

- iii) **Proportionate:** The proposed changes are proportionate in that they focus on and continue to allow decision-makers on complaints to arrive at an outcome that is proportionate to the presented risk. In particular, the proposed reinstatement of the power to dismiss a complaint in exceptional circumstances where there is evidence of a breach of the Handbook promotes proportionate, fair and risk based decision-making.
- iv) **Consistent:** The BSB is satisfied that the proposed changes and the removal of outmoded and confusing processes will encourage consistency of approach in individual cases.
- v) **Targeted:** The Regulations as a whole seek to ensure that the BSB's enforcement processes are only targeted at those who present the most risk to the public and consumers. The proposed changes do not detract from this.

Statement in relation to desired outcomes

- 23. The BSB continues to ensure that it has in place a regulatory framework which is aligned with risk-based, outcomes-focused regulation. Through these proposed changes, the BSB has sought to improve and provide for better regulatory practice which is in the public interest.
- 24. The proposed revisions to the BSB's enforcement processes are designed to achieve the following outcomes:
 - Improved clarity of process for complainants and members of the public, regulated persons, as well as members of the PCC, and BSB staff;
 - Consistency of approach in the application of enforcement processes; and
 - Fairness and transparency in dealing with breaches of the Handbook.

Statement in relation to impact on other Approved Regulators

- 25. The BSB does not believe this application will have any impact, positive or negative, on other Approved Regulators. All other Approved Regulators were consulted during the process and no issues or concerns were raised by them.

Implementation timetable and operational readiness

- 26. The amended Regulations and definitions section are intended to be applied once approval has been given.
- 27. As previously stated (at paragraph 20), the power to take NFA decisions is already effectively redundant and has not been applied by complaint decision-makers within the BSB for some time. The BSB is therefore already operationally ready to implement the revised Complaints Regulations and apply the new definition of professional misconduct, although some further work may need to be completed to update internal and external policies and guidance to bring them into line with the changes.

Equality and Diversity

28. The BSB has carried an Equality Screening of the changes. As the amendments relate to general enforcement powers, and not their application to individual cases, there are no equality issues arising from them. If applicable, a regulated person's personal circumstances (such as: whether they have a disability, whether they have been on maternity leave etc), will be considered by the appropriate decision-makers when determining what enforcement action to take, if any. Indeed, the reinstatement of the PCC's powers to dismiss complaints at the post-investigation stage should promote increasingly proportionate, fair and risk based decision-making.

Annexes

- **Annex 1** – The revised Complaints Regulations (with proposed changes tracked)
- **Annex 2** – The revised definition of professional misconduct (with proposed changes tracked)