

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

Application by the Bar Standards Board to the Legal Services Board under Part 3 of Schedule 4 to the Legal Services Act 2007 for the approval of draft Part 5.A Enforcement Decision Regulations of the BSB Handbook.

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Table of Contents

Section A - What are we proposing?	4
Background and rationale for the new Enforcement Decision Regulations framework	4
What changes are we proposing?	5
The centralised assessment function	5
APEX	6
Commissioner	7
Independent Reviewer	8
Terminology changes	9
The Independent Decision-Making Body	10
Figure 1: Current and proposed information handling system	19
Figure 2: Current and proposed enforcement decision making process	20
How do the new rules achieve these changes?	21
Standing Orders	21
The Enforcement Decision Regulations	21
The Enforcement Decision Regulations	22
Creation of the role of Commissioner and vesting in Executive of decision-making powers	22
Changes to terminology	22
Removing the regulations concerning the initial assessment process	22
Powers to refer information to other organisations	22
Test for deciding whether information should be treated as an allegation	23
Time limit for submission of information	23
Deferred sentences	23
Power to expedite	23
Attendance on Chair or other nominated person	24
Referrals to Fitness to Practise and Interim Suspension Panels	24
Consequential amendments	24
How will the new systems benefit various groups?	25
Section B – What do the current rules say?	25
Section C – How do the changes relate to the Regulatory Objectives?	26
Protecting and promoting the public interest	26
Supporting the constitutional principle of the rule of law	26
Improving access to justice	26
Protecting and promoting the interest of consumers	27
Promoting competition in the provision of legal services	27
Encouraging an independent, strong, diverse and effective legal profession	27

Increasing public understanding of the citizen’s legal rights and duties.....	27
Promoting and maintaining adherence (by authorised persons) to the professional principles.....	27
Section D – How do the proposed changes relate to the Better Regulation Principles?	28
Proportionality	28
Accountability	28
Consistency.....	28
Transparency	28
Targeting.....	29
Section E – How will we evaluate success?	29
Section F – How have we consulted on the proposed changes?.....	29
Section G – How will the proposed changes affect other Approved Regulators?.....	32
Section H – How are we implementing the proposed changes?	32

Annexes

Annex A - Enforcement Decision Regulations 2019

Annex B - Enforcement Decision Regulations 2019 - Consequential Amendments

Annex C - Modernising regulatory decision-making consultation paper

Annex D - modernising regulatory decision-making consultation paper response

Annex E - Mapping table

Annex F – Standing orders

Section A - What are we proposing?

1. This application asks the Legal Services Board (“LSB”) to approve new Part 5A Enforcement Decision Regulations: rE1 – rE63 of the BSB Handbook (Annex A) which replace the current Complaints Regulations in Part 5A.
2. This application refers to the Part 5A regulations (rE1 – rE63) of the BSB Handbook as “the Enforcement Decision Regulations”. The Enforcement Decision Regulations replace the current Complaints Regulations and establish the framework for the operation of the BSB’s enforcement decision making functions.
3. As part of the application, we attach at Annex B a list of consequential amendments to the BSB Handbook as a result of the new rules; these amendments include a number of changes to the definitions set out in Part 6.

Background and rationale for the new Enforcement Decision Regulations framework

4. As part of our ongoing work to modernise the way in which we regulate the Bar, the Bar Standards Board (BSB) is making significant changes in our approach to regulatory decision-making. We will be reshaping the way in which we handle unprompted information we receive (i.e. information that we have not specifically requested) about those we regulate and reshaping our approach to independent decision-making. The plans are designed to ensure our regulatory decision-making continues to reflect good practice, is consistently risk-based and where appropriate, independent of the profession and the Executive of the BSB. We are confident that the changes will allow us to regulate in a more efficient and modern manner, consistent with our governance principles.
5. The plans set out in this application reflect the programme of work outlined in our 2016-19 Strategic Plan in which we committed to: “*centralising work to assess incoming information and reports about activity in the profession and market as a whole*” and “*aligning regulatory decision-making to the Regulatory Objectives more consistently and clearly through improvements to the governance of independent decision-making*”. The changes in our regulatory approach therefore focus on:
 - Ensuring that incoming information is captured and assessed consistently by creating a centralised function, the Contact and Assessment Team (CAT), to act as the single point of contact for incoming information; and by reframing our relationship with the public by removing the distinction between “complaints” and other types of information received, to allow for a more holistic approach to addressing information we receive about those we regulate and the wider market; and
 - Modernising our approach to regulatory decision-making by creating a single body, the Independent Decision-Making Body (IDB), from which panels will be drawn, which will be responsible for taking regulatory decisions that require independent input.
6. The rationales for these changes are set out in the relevant parts of this application. They stem from our need to update our regulatory systems to ensure we continue to carry out our regulatory functions in accordance with the statutory regulatory objectives and the regulatory principles set out in the Legal Services Act 2007. Those principles include the requirement that our regulatory activities should be transparent,

accountable, proportionate, consistent, and targeted only at cases in which action is needed and also that they take account of best regulatory practice.

7. To ensure that we are regulating in line with the regulatory objectives and principles, we adopt a risk-based approach to our regulation which means that we identify the risks that could prevent the regulatory objectives from being met and then focus our attention on those risks we consider pose the greatest threats to the public interest.
8. Our approach to risk has matured in recent years and is set out in three published documents: our Risk Framework¹; our Risk Index²; and our Risk Outlook³. A consistent approach to risk is firmly embedded in our policy-making. We now need to take the next step by ensuring that risk is applied consistently to regulatory decision-making across the organisation and we take a joined-up approach to risk assessment. We believe we can achieve this by centralising our functions for handling incoming information and creating a CAT.
9. We have also, since 2014, been carrying out a review of our governance arrangements with a view to ensuring independence from the profession in our approach to regulation while maintaining appropriate and essential input from the profession in shaping our strategy, policies and carrying out our day to day work. Independence in our regulatory activities is not only good practice but required under the Internal Governance Rules set by the Legal Services Board.
10. So far, the outcomes of our Governance Review have resulted in substantial changes to the structure of our governance arrangements, which have included: separating policy making functions from decision-making functions; reducing the number of Committees involved in our regulatory regime from eight to three; and creating a better demarcation between Executive and non-Executive functions.
11. However, we need to go further. The next stage of our Governance Review has looked at our arrangements in relation to our regulatory decision-making functions as carried out previously by the Qualifications Committee and currently by the Professional Conduct Committee (PCC). These Committees have provided excellent, expert and high-quality decision-making for many years. However, their size and the way they operate is no longer in line with best regulatory practice.
12. We have already disbanded the Qualifications Committee and replaced it with three-person Authorisations Review Panels, drawn from a pool of reviewers recruited for the purpose. We now intend also to reform our enforcement decision-making by disbanning the PCC and creating a single body from which small panels will be formed to take regulatory decisions requiring independent input i.e. the IDB.

What changes are we proposing?

The centralised assessment function

13. Since 2014, the Professional Conduct Department (PCD) and the Supervision Department (now part of the Regulatory Assurance Department (RAD)), have applied formal risk-assessment methodologies to the cases/issues they deal with. However,

¹ Bar Standards Board Risk Framework,

https://www.barstandardsboard.org.uk/media/1751663/bsb_risk_framework_16pp_5.4.16_for_web.pdf

² Bar Standards Board Risk Index,

https://www.barstandardsboard.org.uk/media/1751667/bsb_risk_index_12pp_5.4.16_for_web.pdf

³ Bar Standards Board Risk Outlook,

https://www.barstandardsboard.org.uk/media/1982209/bsb_risk_outlook_2019.pdf

because each department's approach to assessing risk was developed independently, and before the BSB-wide risk approach had matured, each department uses similar but slightly different risk assessment methodologies. This can result in an inconsistent organisational view and application of risk.

14. Further, information about the activities of those whom we regulate can be received via multiple avenues and handled under a range of processes. For example, information submitted on a complaint form (an "external complaint") must be handled in accordance with the highly structured system set out in the Complaints Regulations. In contrast, the same information, if not set out on a complaint form, could be treated as a report and assessed as to whether it warrants the BSB raising an "internal" complaint of its own motion, or it could be treated as a supervisory matter and handled under the supervision processes.
15. Therefore, the way in which information is initially processed can be dependent on where and how it was received. In some cases, information may overlap functions and require that it is subject to initial assessment by more than one department. Although departments work closely together to ensure that information is directed to the right place and handled according to the most appropriate process, the current systems inevitably lead to duplication of work and inefficiencies. Most importantly, the different initial assessment processes we operate can cause confusion for both the profession and public.
16. As we set out in our 2016-19 Strategic Plan, we believe a better approach to handling incoming information is to centralise our current separate functions and apply one assessment process to all types of unprompted information we receive. This will allow us to take a more holistic approach to handling information by capturing and addressing it in an efficient and consistent manner using one risk assessment methodology. We are confident that a centralised approach will allow us to provide a more effective and coherent service for the public and the profession.
17. We will be creating a CAT. The Team will replace the current initial assessment functions performed by the PCD and the Supervision Team as well as taking on responsibility for handling all general enquiries about our services and regulatory remit. It will be the single point of contact for all unprompted information, including what we currently class as complaints. This change will also include the removal of decision-making by the PCC from the assessment and investigation stages of the process and the increased use of staff decision making.

APEX

18. Whilst the decision-making function of the PCC at the assessment and investigation stages of the process will no longer be necessary, the advisory role that PCC members carried in the front-end and investigatory stages of the process will be retained through the Advisory Pool of Experts (APEX). The advisory role is being retained, in this new form, to ensure that we have sufficient access to specialist legal knowledge when making decisions (see also paragraphs 55 and 56). We will also retain the ability to seek advice from legal specialists in the normal way.
19. APEX functions as a pool of external expert resources which we call upon to provide expertise to assist us in performing our regulatory functions. The initial appointments to APEX when it was first created were solely to provide support for our policy development activities. However, as we continue to implement our governance reforms, the need has arisen to appoint a slightly different type of APEX member who

can provide practitioner advice on issues to inform our regulatory decision-making. Such advice will be provided in the context of specific cases and factual situations as opposed to general policy or procedural matters. It is this second type of APEX member which will carry out the advisory role previously held by the PCC.

Commissioner

20. The current Complaints Regulations vest all powers to take decisions on “complaints” in the PCC and the Executive is only empowered to take decisions by virtue of delegated authority given by the PCC. This constitutional position is out of line with modern and efficient regulation. Executive decision-making is a feature of most professional regulatory regimes, but it is unusual for the Executive to derive its decision-making powers from the independent decision-makers.
21. Therefore, to allow for relevant enforcement decision-making powers to be vested directly in the Executive, we will mirror the construct employed by many other regulators by creating a senior Executive role from which all executive powers to take decisions on enforcement issues will be delegated. This will allow the Board itself to remain outside the enforcement decision-making regime.
22. Such a role is a statutory requirement for many regulators and is often titled “Registrar”. However, we do not consider such a title would be appropriate within the context of the BSB’s regulatory regime as although we operate a “register”, holding central records of the profession is currently managed by the Bar Council. While the BSB has joint responsibility with the Bar Council for issuing practising certificates, creating a role with the title “Registrar” could be misleading. Were this to change, we would be able to efficiently mirror good regulatory practice by renaming this role and vesting any additional powers that are deemed necessary in it.
23. We will therefore create the role of “Commissioner” which will be performed by the Director General of the BSB. This also mirrors the arrangements of other regulators whereby the role of “Registrar” is also performed by the Chief Executive or other senior member of the Executive. This approach will also allow, in the future and if necessary or desirable, for the functions of the Commissioner to be exercised by a separate post holder without the need to change our constitutional arrangements.
24. A similar construct was previously used by the Legal Ombudsman Service whereby the Chief Executive and the Chief Legal Ombudsman roles were distinct but held by the same post holder. The Legal Ombudsman separated these functions, in 2016, by creating two different post holders, but is now looking to combine them again into a single post holder. The new Independent Office for Police Conduct also uses a similar construct.
25. By vesting Executive powers to take enforcement decisions in one role, the powers can then be delegated to staff members through the usual scheme of delegations used for other Handbook decision-making powers. This will create a consistent governance regime, in contrast to the current position whereby the PCC’s decision-making powers sit outside the standard lines of delegation.

Independent Reviewer

26. The Independent Reviewer is a role which we will be establishing to carry out quality assurance for the BSB. This will mean the Independent Reviewer will be tasked with carrying out both “requests for reviews” and annual external file reviews with the support, if necessary, of APEX advice.
27. **Requests for review:** The PCD currently operates a system that allows for reviews of complaint decisions⁴. This is known as the “request for review” system and is underpinned by the current regulations that allow for all enforcement decisions to be reconsidered and cases reopened where there is new evidence or a good reason to do so. The system currently dictates that reviews are carried out by the next most senior decision maker which normally requires a Team Manager or the Director of PCD to carry out the review but where the decision was taken by the PCC, or was based on advice from a PCC member, then the review is carried out at PCC level and usually by an Office Holder of the PCC. Such reviews can provide invaluable insights into how cases have been handled and the lessons that can be learnt. In practice, the vast majority of “requests for review” are made in relation to initial assessment decisions.
28. The “request for review” system will remain enshrined in the regulations in the new regime but only in relation to post-investigation decisions: there will no longer be a “right” to have initial assessment decisions reviewed (those taken by CAT). However, such decisions will be subject by policy to a review mechanism. The reason for this distinction is that CAT will not just be considering information in relation to enforcement decisions, it will accept a wide variety of information such as supervision information. This less prescriptive approach to review at the assessment stage will allow us to be more flexible and holistic in our approach to unprompted information.
29. **File reviews:** The Independent Reviewer will also carry out a file review function. Currently the Quality Review Sub Committee (QRSC) of the PCC reviews a proportion of files. This review allows the PCC, with its current oversight of casework, to monitor the casework system and ensure that it is operating in line with agreed policies. Going forwards the PCC will no longer have that oversight of the system and, in order to mirror the function, the Independent Reviewer will instead carry out a similar review and report their findings back to the organisation.
30. The Independent Reviewer will be appointed and contracted much like the, now disestablished, Independent Observer role⁵ but for a longer period per week given the additional responsibilities i.e. one and half days a week throughout the year on a 46-week basis.

⁴ Please note, this process does not apply for decisions of the Tribunal, a separate process for appeals of those decisions is already detailed within the Disciplinary Tribunal Regulations of the BSB Handbook.

⁵ Between May 2011 and December 2016, the BSB's lay Independent Observer provided independent assurance that the BSB's enforcement system was operating in line with its aims and objectives.

In July 2007, the BSB published 'A Strategic Review of Complaints and Disciplinary Processes' (https://www.barstandardsboard.org.uk/media/1346882/bsb_strategic_review_of_complaints_and_disciplinary_processes_report_by_robert_behrens_complaints_commissioner_july_2007.pdf). One of the recommendations was that the Bar Standards Board should 'give serious consideration to appointing a "Lay Observer" with responsibility for checking all aspects of the system to ensure that it is operating in line with the agreed objectives and procedures. The BSB accepted this recommendation and the post of 'Independent Observer' was established in 2008. The Independent Observer was appointed by the BSB to observe and comment on the activities of its PCD and PCC. It was a part time role, contracted for 55 days/year.

31. The current level of total time spent on “requests for reviews” equates to somewhere between 30 – 60 hours per month. However, it is anticipated that there will be a reduction in the number of requests given the change in approach to handling “complaints”. Therefore, the expected time spent has been based on the lower end of that scale.
32. In terms of random file reviews, the QRSC currently reviews 10% of decisions and expends about 5 days per year per person in assessing cases. An equivalent function introduced across the BSB decision-making functions, for example authorisations decision making, would then increase this time commitment by a further 10 days per year of review time.

Terminology changes

33. To support this centralised and holistic approach, we also intend to remove the distinction between “complaints” and other types of information we receive. For example, reports from members of the profession in line with their reporting obligations, or referrals from within the organisation about non-compliance with regulatory requirements (e.g. failure to pay a practising certificate fee or to comply with CPD obligations).
34. Since 2010, when the Legal Ombudsman was created to deal with complaints about the service provided by the profession, we have been prohibited under the terms of the Legal Services Act 2007, from ordering any form of redress in response to complaints from the public. Our role as a regulator is to ensure, in the public interest, that the regulatory objectives are met, the standards of the profession are maintained, and the profession acts in accordance with the obligations set out in the BSB Handbook. However, our continued use of complaints terminology has proved confusing for the public and creates inaccurate expectations that our remit includes resolution of their personal concerns.
35. Further, the complaints process set out in the Complaints Regulations for handling what we term “external complaints” requires that having received a complaint, if we decide that it does not require regulatory action, we have to “dismiss” it. In doing so, complainants inevitably perceive that we are also dismissing the validity of their concerns. Given that over 70% of complaints are eventually “dismissed”, the current system can create dissatisfaction, misconceptions and a potentially negative relationship with the public.
36. We will therefore cease using the terminology of complaints but instead treat all incoming information about the profession as just that - “information” - which may or may not require regulatory action. This change in approach will allow the CAT to process all information received in the same way using the same assessment tests. In doing so we hope to create a more transparent and positive relationship with the public as well as manage expectations more effectively. The new approach will not change the types of information we will accept or the options we have to address any concerns that come to our attention. We will also continue to inform the public of what action, if any, we propose to take in relation to the information they have submitted.
37. For similar reasons, alongside the change in terminology around complaints, we will also cease to use the term “complaint” and will instead use the term “report” in the first instance and subsequently “allegation” once a matter is under investigation. This change will also be accompanied by a change in how we refer to people who provide us with information, we will no longer name them “complainants”, a term which suggest

ownership of a “complaint”, and we will instead use language appropriate to the context and medium on which we are explaining our processes.

38. The move away from complaints terminology is not intended to stop us from using clear language in the responses we provide to consumers or on our website to describe our remit. We will continue to make it clear what action we can take and our reasons for not taking forward issues presented to us. However, the advantage of ceasing to use the terminology of “complaints” is that it will help to manage expectations as to what action we can take as well as create a clear distinction between our role in maintaining professional standards and the role of complaints handling bodies such as the Legal Ombudsman in resolving complaints.

The Independent Decision-Making Body

39. Since 2014, the BSB has been carrying out an ongoing review of our governance arrangements. The aim of the review is to ensure that our arrangements reflect modern and best regulatory practice. In particular, we want to ensure that our arrangements are, as required by the Legal Services Act 2007, independent of the profession but still maintain appropriate and essential input from the profession in shaping our strategy, policies and carrying out our day to day work. In line with good practice, it is also important that we retain a function that allows for some relevant decisions to be taken independently of the Executive. This mitigates the risk that we become divorced as a regulator from the views of the public and the operation of the profession when taking decisions on serious issues.
40. The first phase of our governance review, which was implemented in January 2016, left in place the operational decision-making Committees (i.e. the Qualifications Committee and the PCC). The Qualifications Committee, which had 19 members, was responsible for taking decisions on waivers from the Handbook requirements; deciding appeals from Executive decisions not to authorise an entity; and, deciding appeals from the Inns of Court Conduct Committee on the discipline of students. The PCC, which has had in its history up to 65 members but currently has 32, is responsible for taking all decisions on complaints. This includes decisions to investigate and decisions following an investigation to impose administrative sanctions or refer cases of professional misconduct to an independent Disciplinary Tribunal. The PCC also has the power to determine charges of professional misconduct, with the consent of the barrister, under the Determination by Consent procedure.
41. As part of the first phase of the governance review, the Board made a commitment to review the operation of these Committees to ensure our regulatory decision-making functions were operating in line with best practice for a modern regulatory regime and reflecting our governance principles. Our governance principles include the principles that:
 - decisions should be delegated to the lowest level appropriate, whilst also ensuring an appropriate quality of decision-making and management of risk;
 - all Committee structures should be of the minimum size possible to maintain quality;
 - all structures and processes must protect our regulatory independence and comply with the Legal Services Board’s Internal Governance Rules; and

- having a lay majority in decision-making underlines the BSB's independence. Where decisions are taken at Board or Committee level, they should have both lay and barrister input.
42. The second phase of the governance review therefore focussed on our regulatory decision-making. To assess what changes might be necessary to our decision-making functions, the BSB commissioned an independent consultant to carry out two separate reviews: one review focused on the PCC and enforcement decision-making; and the other focussed on the Qualifications Committee and authorisation decision-making. Both reports are available on our website⁶.
43. The review of the enforcement decision-making was carried out against the background of comments made by the Legal Services Board (LSB) in its first report on the BSB's performance against the regulatory standards framework. The LSB said:
- “We [...] consider that the current approach of relying on a large professional conduct committee appears overly complex and bureaucratic. The committee currently has 56 members (reducing to 46 over the next three years) divided into two teams... We note that recent changes have given more decision-making powers to executive staff. However, the LSB considers that more should be done to empower the executive staff to make decisions and to use the committee and other experts only for more complex matters and, even then, perhaps primarily in an advisory rather than decision-making capacity. Such an approach would be appropriate considering the vast majority of decisions are whether to prosecute rather than reaching a determination by consent. It would also reflect best practice found in other regulators.”*
44. The outcomes of the two reviews were similar in that both concluded that independent input to regulatory decision-making remained essential and was in line with good regulatory practice. However, the BSB in operating such large decision-making Committees was an outlier when compared to other regulators. Both reports also included options for reshaping the Committees into pools of decision-makers from which small panels could be constituted to take decisions.
45. Further information about the review of enforcement decision-making is set out below. The Board has already implemented changes arising from the review of authorisation decision-making. In August 2017, the Qualifications Committee was disbanded. In its place Authorisation Review Panels were introduced. These are panels composed of three members (two lay and one barrister), drawn from a pool of panellists recruited to consider applications for review of decisions on authorisation to practise or waivers from requirements of the Handbook. Responsibility for providing expert advice to the Executive now lies with APEX and additional members were recruited for this purpose.

⁶ A Review of the Bar Standards Board's Enforcement Decision Making
http://www.barstandardsboard.org.uk/media/1924538/a_review_of_the_bar_standards_board_s_enforcement_decision_making.pdf

Appraisal of options for the Bar Standards Board's Authorisation Decision Making
http://www.barstandardsboard.org.uk/media/1924542/appraisal_of_options_for_the_bar_standards_board_s_authorisation_decision_making.pdf

Paragraph 7.3, Developing Regulatory Standards, May 2013, Legal Services Board,
http://www.legalservicesboard.org.uk/Projects/pdf/bsb_regulatory_standards_final.pdf

46. The report of the independent review of the enforcement decision-making functions of the PCC made a number of observations and conclusions. The report recognised the quality of the decision-making that the PCC provides but also identified concerns about its efficacy and independence from the profession as demonstrated by the following comments:

“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.

However, there are ‘structural’ issues with the current arrangements [...] 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.”

“It is worth noting that the BSB’s PCC is an extreme outlier [as compared to other professional regulators] in terms of Committee size....”

“... 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).”

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 having access to all relevant case information and documents... 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 14th pair of eyes.”

47. The report put forward three options for reform of the enforcement decision-making processes which were:

- retaining the PCC in its current format;
- transferring the PCC membership into a pool of decision-makers from which small groups of three (or more) members could be appointed to take decisions; or
- moving to a model of “Case Examiners” (one lay and one barrister) employed on a part time basis to take decisions, by agreement, on enforcement cases⁷.

48. We rejected the Option 3 Case Examiner model several years ago having considered the contents of the independent report and did not consider there to be a compelling reason to revisit the issue. While, it was accepted that the independent report did state that the Case Examiner model was considered good modern practice it also pointed out this option represents the biggest shift away from current structures and processes and so was undoubtedly the option which presented most risk. In principle, the Board considered exploring Option 2 was appropriate, particularly considering the decision to

⁷ The Case Examiner model is one increasingly in use by professional regulators and nearly all healthcare regulators have adopted the model in varying forms.

adopt such a model for authorisation decisions. To inform its final decision, the Board asked the Executive to carry out research into the viability of moving to this model. The research indicated that moving to Option 2 would be viable both operationally and financially and the expert advice that could be provided by APEX would be a suitable alternative to advice currently provided by members of the PCC. The Board was satisfied that any potential increases in staff costs would be counteracted to a large extent by the savings in no longer operating a large Committee.

49. The Board therefore took the decision to move ahead with developing a version of Option 2. Given its decision to set up Authorisations Review Panels on a similar model, the Board also took the view that it would be more effective to set up one central pool of independent decision-makers from which small panels can be drawn to take all types of regulatory decisions requiring independent input. This will allow decision-makers to have a broader understanding of the BSB's regulatory remit and avoid decision-makers taking decisions on the basis solely of knowledge of only one aspect of our regulation.
50. The Board's decision was then put to the public and profession via a public consultation from March to May 2018. The consultation process and findings are detailed in Section F of this paper and a copy of the consultation paper can be found at Annex C.
51. The BSB will therefore create a single IDB that will replace both the PCC and Authorisations Review Panels and, if necessary in the future, take any other decisions that require decision-making independent of the Executive.
52. **Remit of the IDB:** the IDB will take all regulatory decisions requiring independent input and therefore, at the point of its creation, it will be empowered to take the following regulatory decisions (i.e. relevant decisions currently taken by the PCC or Authorisation Review Panels):
 - Decisions on whether to refer allegations of professional misconduct to disciplinary action following a formal investigation and, where appropriate, decisions on whether to impose administrative sanctions (currently taken by the Executive and the PCC);
 - Final decisions under the Determination by Consent procedure (DBC) (currently taken only by the PCC);
 - Decisions on appeals against authorisation outcomes and reviews of decisions on waivers from the Handbook requirements (currently taken only by Authorisations Review Panels);
 - Appeals against decisions to authorise entities (currently taken only by Authorisations Review Panels); and
 - Appeals against Inns of Court Conduct Committee decisions (currently taken only by Authorisations Review Panels).
53. In the initial stages, the decision-making on authorisations will be kept separate from enforcement decisions with different IDB panels being convened to consider decisions in each area. However, in time it is intended that all IDB members will be trained to take decisions across the full breadth of the IDB functions and therefore it will be possible for one panel to consider both authorisation and enforcement decisions. There are already several current PCC and Authorisation Review Panel members who

are transferring over to the IDB and are experienced in taking both enforcement and authorisations decisions. However, we expect to begin considering training for other members at the end of 2020.

54. **Executive decision-making:** the Executive will take most regulatory decisions, but the IDB will be used to provide independent decisions in the more serious enforcement cases and in relation to reviews/appeals of authorisation decisions. This approach does not differ greatly from current practice. In 2016/17 staff in the PCD took 69% of all post-investigation enforcement decisions and in 2017/18 that rose to 76%. Staff in the Regulatory Assurance Department take all first instance decisions on authorisations. On the whole, only serious/complex cases or matters requiring a decision to be made independent from the Executive are now referred to the PCC. This position will be replicated in the system for referring cases to the IDB.
55. **Expert advice for the Executive:** we recognise that the Executive will require expert advice on cases from time to time. Such advice is currently provided to Authorisations Review Panels by APEX members. The intention is that all legal/practitioner advice, including that required for enforcement cases, will under the new arrangements be sourced via APEX. This will allow for the separation of advice and decision-making functions in line with good practice. New members of APEX will be recruited to provide advice on enforcement decisions and the intention is that the expertise of APEX membership will cover the main areas of law that commonly give rise to “complaints”.
56. We also recognise that it is not realistic for the APEX membership to cover all areas of law. Therefore, where advice is required on enforcement cases that falls outside the knowledge of both staff and APEX members, we intend to source advice from relevant specialists in the profession on an ad hoc basis. Our research indicates the need for such ad hoc advice will be limited. In any event, the ability to secure APEX, as well as ad hoc advice, is likely to afford the BSB a more robust system than relying on the changing membership of the PCC which at times has left us without members who can advise on some areas of law and practice that give rise to “complaints”
57. **Membership of the IDB:** The IDB will consist of a pool of members from which IDB panels will be convened. Our research indicates that about 30 members will be required initially to support the work of the IDB: 20 lay and 10 barrister members⁸. However, initially, to ensure continuity, provide a safeguard and allow for the maximum possible retention of PCC expertise, we will run the IDB system with more than 30 members. This will be a transitional arrangement that will be slowly phased out over the first three years of the IDB’s operation.
58. The rationale behind a relatively small pool is to ensure that members sit regularly on panels and thereby maintain and develop in-depth knowledge and experience. All members of IDB will be paid a meeting fee in line with the Board’s decision to commence payment of barrister members of our Committees from 1 April 2018. This should allow us to attract a broader and more diverse range of panel members and allow us to place greater expectations, in terms of time commitment, on barrister members of the IDB.
59. **Composition of IDB panels:** the size of the IDB panels will differ according to the decision being taken. The intention is that enforcement decisions will be taken by

⁸ These numbers were determined using caseloads over time, and our records on member attendance rates at meetings, to predict the number of members necessary to cover decision-making with sufficient flexibility in availability going forwards.

panels of five members: three lay and two barristers. The Authorisations Review Panels currently meet in panels of three with a lay majority and our view is that three-person panels should be retained for authorisations decisions.

60. The intention is that IDB panels will always have a lay majority in line with our governance principles. This retention of a lay majority is intended to ensure that any decisions taken have the support of at least one lay member of the panel.
61. **Chair of the IDB:** we will appoint a standing Chair of the IDB to act as the representative head of the IDB and provide guidance and mentoring to panel members. We will also appoint a Vice-Chair to support the Chair in carrying out the role. The office holders will not be given separate or additional powers and all decisions will be taken by IDB panels except in one respect: the Chair of the IDB and any person authorised by him/her will be given the express power, under the Interim Suspension and Disqualification Regulations, to order immediate interim suspensions. This reflects the current power of the Chair of the PCC and the need for prompt, independent decision making in the rare instances where the power is necessary.
62. The Chair of the IDB could be either a barrister or a lay member as is currently the case with the Chair of the PCC. While the Chair and Vice-Chair of the IDB will sit on panels, they will not necessarily be expected to chair individual meetings. Instead, we will train a number of members, both lay and barrister, to perform this role at meetings so that we can support the increased frequency of meetings. The role of the standing Chair of the IDB will therefore be separate to the role of chairing IDB panels.
63. **Presentation of evidence to IDB panels:** currently the PCC takes decisions at meetings based on summary case reports prepared by PCC members which include recommendations for disposal of cases. These summary reports are anonymised so that the name and gender of the barrister and the “complainant” are not evident unless these details are directly relevant to the consideration of the issues in the case. Decisions of the PCC are based on these summary reports but the full file on a case is available for PCC members to look at prior to the meeting in the BSB Office and is also available at meetings.
64. Under the proposed new arrangements, the intention is that the Executive will in most cases prepare summary reports required to support IDB panel decision-making. This will, in line with good practice, leave the IDB to be solely a decision-making body with no responsibility for case preparation. A pilot exercise has been ongoing for over a year to test the efficacy of this proposal whereby staff have been preparing and presenting reports to the PCC. The pilot has proved successful and feedback indicates that Executive reports are an effective means of presenting summary information to decision-makers on relatively straightforward cases.
65. However, it is recognised that in a minority of cases, the complexity of a case may fall outside the capabilities of the Executive to prepare an effective summary report. Our research indicates that this could occur in about 10% of cases. Where expert assistance is required to prepare reports, we intend to seek assistance from members of APEX.
66. **Provision of the full case file to IDB members:** the move to small panels has the significant advantage that IDB panel members can be provided with an electronic copy of the full case file in advance of the panel meeting and the file will be available via the same means at IDB meetings. We consider this will provide an improved basis for

decision-making compared to the current system under which, in practice, only one member of the PCC may have detailed knowledge of the file.

67. **Anonymised decision-making:** the current practice in cases presented to the PCC is that summary case reports are anonymised to remove the name and gender of both the barrister subject to consideration of enforcement action and the “complainant” in the case, unless the gender of either person is relevant to the decision in the case.
68. The BSB wants to retain the concept of anonymisation in the new system as it assists with ensuring decisions are not tainted by unconscious bias. However, this is more problematic if the full case file is provided to IDB panel members. We have carried out research with companies that provide redaction services and the results indicate that it is possible to anonymise a full file in relation to the barrister’s name and gender and for the contents of documents to remain comprehensible. Such external redaction services can be provided at a reasonable cost and can turn around files in a week.
69. However, the anonymisation of the name and gender of the person who reported the information to us (formerly the complainant) is much more problematic and creates significant difficulties with ensuring that the documentary evidence remains comprehensible. The BSB’s decision to anonymise the identity of “complainants” was not based on any clear evidence that there were disparities in the treatment of complainants with protected characteristics. Indeed, our data in this area is limited and not sufficiently reliable to draw firm conclusions. The decision to anonymise case reports in relation to the complainant was taken as a logical next step from anonymising the identity of the regulated person. However, it is essential that IDB panels can understand the evidence that is presented to them in order to take robust decisions.
70. The proposal to provide IDB panel members with the full file is a significant change. We are of the view that anonymising the identity of the person who made the report throughout the case papers (as opposed solely to doing so in the covering case report as is currently the case) would have a detrimental impact on panels’ ability to understand the case papers and take effective decisions. We therefore intend to continue anonymising the name and gender of the professional subject to an allegation, but we do not intend to anonymise the name and gender of the person who made the report. This use of personal data will be reflected in the Privacy Statement provided to people who make reports to us. There may be exceptional circumstances where the anonymisation of the person who made the report becomes necessary, either due to an appropriate request by the person themselves in line with our policy on anonymity or because of the circumstances of the case. In these situations, we will redact the name of the person who made the report from the file manually. This is an extreme time commitment and we do not foresee doing this often.
71. **Frequency of meetings of IDB panels:** the PCC is currently divided into two teams with a meeting of one of the teams scheduled every three weeks: the volume of cases does not warrant the cost or administrative resource required of bringing together a large number of members on a more frequent basis. However, this has the disadvantage that cases requiring a PCC decision may be unduly delayed awaiting the next meeting. Where a case is put back for further enquiries, but reserved to the original PCC team, it can therefore take six weeks or more for it to be reconsidered and longer over the summer period when there are no PCC meetings in August.

72. With the introduction of small panels to take decisions, we consider that it will be cost effective and efficient to hold IDB panel meetings once a week, or at least once every fortnight. Therefore, the number of cases considered by an IDB panel will be fewer than that considered by the PCC at its current, less frequent meetings. Further, the reduced volume of cases considered by IDB panels, will allow for more detailed and informed discussions as well as improving the recording of specific reasoned decisions on each case.
73. **Virtual meetings of IDB panels:** Currently meetings of the PCC are held at the BSB office in London. Members can attend remotely by telephone or by video conference but, given the size of the PCC, this is not an effective means to conduct discussions. The intention is that meetings of IDB panels will be supported by enhanced technology that will allow panel members to attend, if necessary, via video conference.
74. The use of remote meeting facilities, and small panels, will create more opportunities for those who live outside London, both lay and barrister, to be involved in the BSB's regulatory decision-making system. It will also make it easier for those with disabilities to participate. We consider these are significant benefits and will assist in promoting greater diversity in the range of people who are able to participate in the BSB's regulatory decision-making.
75. The increased frequency of meetings and the use of technology should also improve the flexibility in convening meetings and the timing of those meetings which may not need to be held at the end of the working day as is currently the case. This is likely to create efficiencies in case consideration and swifter progress of cases. Further, the ability to convene *ad hoc* meetings of IDB panels at short notice will be greatly enhanced. Such an option is not possible under the current system.
76. The pilot process is testing these technologies; this testing will continue. We are using feedback from the pilot to define and refine the parameters for how and when each type of technology will be used, this will ensure that we are able to mitigate any risks that are found with the system in a realistic pilot environment. We will also continue to monitor the use of these technologies after the system is in place to ensure we are constantly improving and modernising our facilities. We have also taken the time to speak informally to other regulators about their own technology provisions and have incorporated the learning from those discussions into our design.
77. **Recording decisions of IDB panels:** currently, decisions of the PCC and Authorisations Review Panels are recorded by a "secretary" drawn from the Executive. Authorisations Review Panels provide detailed reasons for their decisions. However, PCC decisions to refer cases to disciplinary action are recorded using a standard wording format that refers only to the relevant threshold criteria in the regulations for referring cases. This is because agreeing the wording of detailed reasons which reflect the consensus at a meeting is difficult given the large number of members present at PCC meetings. While the current approach of recording general reasons for decisions is considered adequate, it is better practice to record more detailed reasons for decisions to refer to disciplinary action. IDB panels will be small enough to allow for the wording of detailed reasons for decisions to be agreed and recorded at a meeting thus allowing for greater transparency in decision-making. We have been testing this at the pilot meetings and it has worked well.
78. **Pilot meetings:** Since September 2017, the BSB has been holding pilot three and five-person IDB meetings to test the proposals outlined above in relation to

enforcement decisions using old decided cases that have been anonymised and altered but still reflect the types of cases the IDB will deal with. The pilot has shown that the system we are proposing will be achievable. We have also used the pilot to identify areas for improvement to the system. The feedback from participants, who are current PCC or former Qualifications Committee members, indicates that, on the whole, they welcome discussion in smaller groups as well as the provision of the full file and they consider decision making remains robust. The pilot meetings will continue throughout 2019.

79. **Knowledge retention:** it is essential that the knowledge and experience of current PCC and Authorisation Review Panel members is retained and transferred to the new system to ensure continuity. To facilitate this, current members of the PCC, whose terms have not expired, will be eligible to transfer either to the IDB or to APEX, subject to meeting the required competencies and limitations on length of service. It is envisaged that members of the PCC will generally be able to meet the requirements for both groups given the similarity in the current functions and skills required for membership of the PCC and that required for IDB or APEX. Members of the Authorisations Review Panels will transfer automatically to the IDB, since their length of service allows for this and they have already been through a recruitment and selection process for their new roles. It may be necessary to recruit new members to the IDB and, if so, they will be recruited under the agreed procedures set out in the Standing Orders.
80. **Developing the depth and breadth of the knowledge of IDB members:** the BSB acknowledges that the use of small panels to take decisions will reduce the input from the profession in enforcement decision-making. However, the pilot exercise described above indicates that taking decisions in smaller panels will not diminish the quality of decisions. Also, the use of expert advice provided by APEX members will mitigate some of the risk associated with the reduction in barrister input. APEX members will also be able to provide impartial advice disassociated from any role in deciding the outcome of a case.
81. We also intend to use our access to enhanced technology to create an “extranet” providing comprehensive supporting information for IDB members. This will provide an accessible mechanism to keep members up to date and ensure they are aware of decisions taken by the IDB and developments in case law.
82. Regular training will also be scheduled, building on current practice. These sessions will be intended not only to develop knowledge but also to allow for exchange of views and learning from others’ experience

Figure 1: Current and proposed information handling system

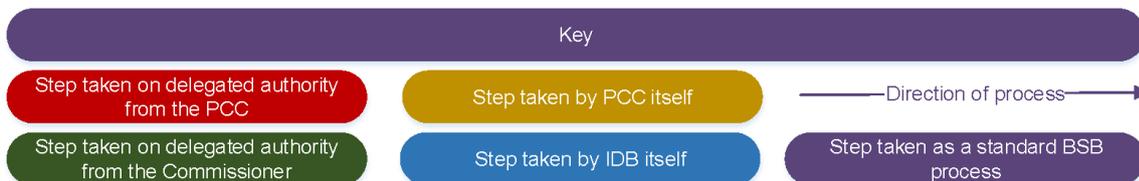
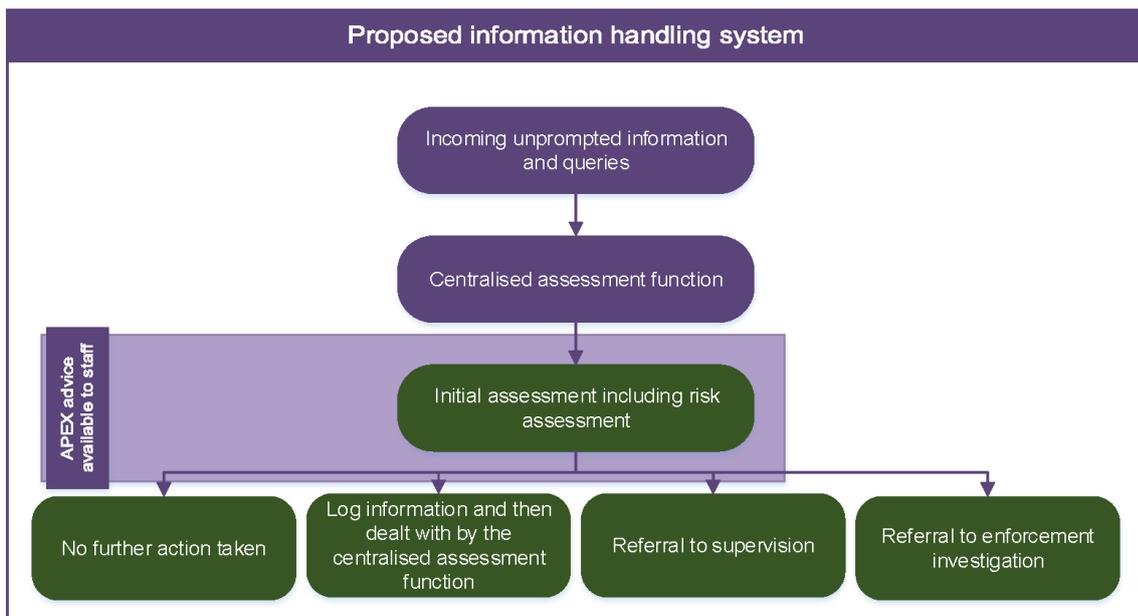
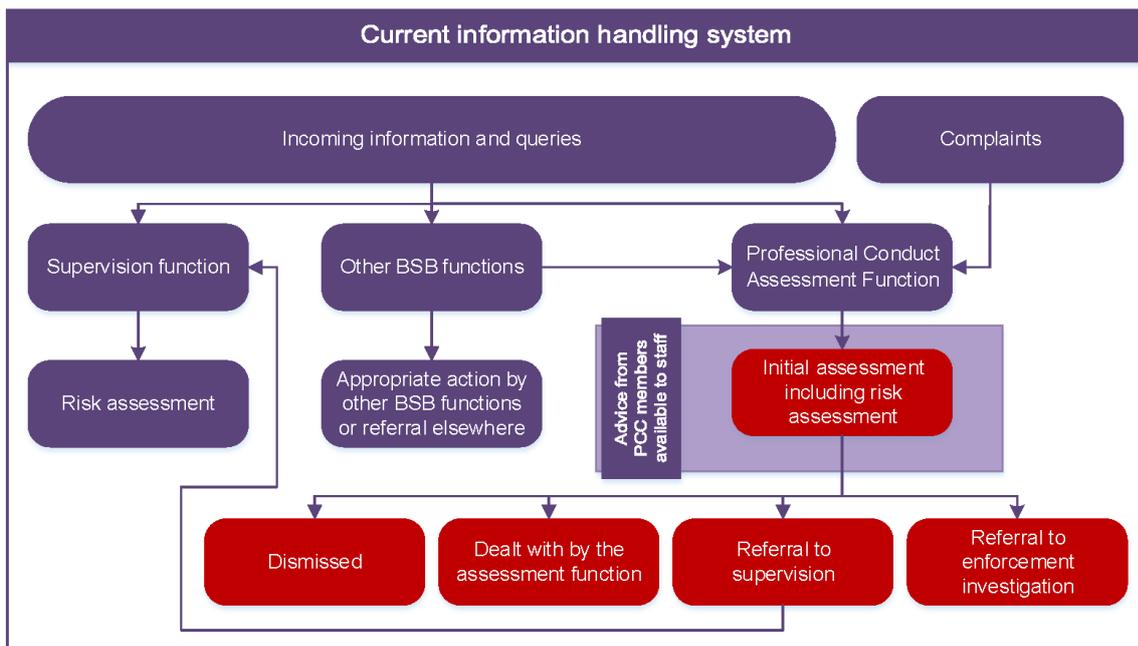
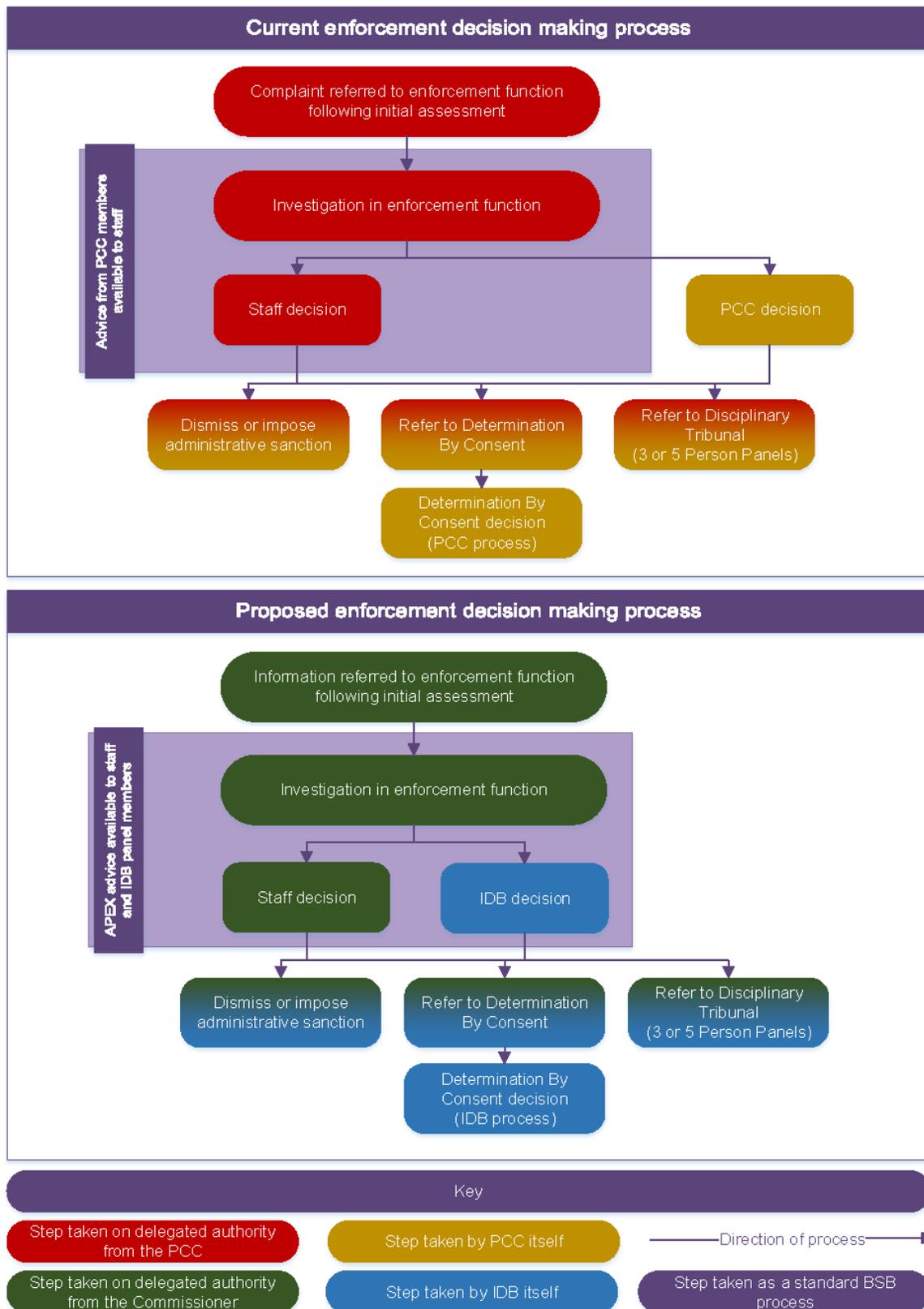


Figure 2: Current and proposed enforcement decision making process



How do the new rules achieve these changes?

83. There are two main areas where changes need to be made. First, our Standing Orders will need to be revised to establish, and set out the remit of, the IDB. Second, the current regulations governing the handling of “complaints” about the conduct of the regulated community (the Complaints Regulations, Part 5, Section A of the BSB Handbook) will need to be replaced with new regulations on enforcement decisions that reflect: the creation of the CAT and the IDB; the change in terminology; and the vesting of enforcement decision-making powers directly in the Executive and the IDB. No substantive changes to the Handbook are required in relation to authorisation review decisions as the relevant changes were made in 2017 when Authorisations Review Panels were created. The only amendments required will be limited to changing the nomenclature by replacing references to Authorisations Review Panels with references to the IDB.

Standing Orders

84. The Standing Orders (SOs) of the BSB is the key governance document that sets out the principles and rules for regulating the proceedings and business of the Board and its Committees, including membership, remit and appointment. The SOs are the means by which the BSB establishes its Committees, panels or any other formal group required to conduct the business of the BSB. They currently include the terms of reference for the PCC and Authorisations Review Panels and the requirements in relation to their composition. The SOs therefore need to be amended to establish the role of Commissioner and the IDB.
85. The SOs were amended in November 2018 to establish the IDB in name only. This allowed us to recruit IDB members and the IDB Chair and Vice-Chair ahead of the October 2019 start date. A second set of amendments to the SOs have been produced and approved, these will come into effect at the start of October 2019 and will give the IDB its powers whilst removing the PCC from the SOs. The SOs do not form part of this application as they are within our own constitutional power and do not require approval by the LSB, for reference they are attached as Annex F.

The Enforcement Decision Regulations

86. The proposed new “Enforcement Decision Regulations” can be found in Annex A. The new regulations are directed only at decisions in relation to potential enforcement action, as is the case with the current Complaints Regulations, and do not cover other processes for handling information.
87. In general, the approach to drafting the new regulations has been to specify each stage of the assessment, investigation and disposal process chronologically in much the same way as the Complaints Regulations are currently structured. Each section of the new regulations covers a different stage of the process and each begins with a breakdown of the powers of the decision-makers at that stage.
88. It is hoped that this will make the regulations easier to follow, particularly for lay people, thereby making the decision-making regime more transparent. We have also tried to ensure that each section of the regulations stands alone so that readers can determine if a person or body has relevant powers or responsibilities at any given stage without having to make an undue number of cross-references to other sections. This approach does lead to a level of repetition, but we consider the benefits in terms of clarity and ease of access warrant this.

The Enforcement Decision Regulations

Creation of the role of Commissioner and vesting in Executive of decision-making powers

89. The draft new regulations are predicated on the existence of the new commissioner role, discussed at paragraphs 20 - 25. The Commissioner's powers to take decisions are set out at rE2, rE3, rE14, rE19, rE20 and rE21 of Annex A.
90. The new regulations also give IDB panels direct powers, the decision-making powers of the Commissioner and the IDB overlap. This is deliberate and designed to replicate the current position whereby the Executive is authorised to take a range of decisions that the PCC can also take. This current overlap in decision-making powers works well and we want to ensure the flexibility it affords is retained in the new arrangements. However, it will require, as is the case in the current system, comprehensive operational policies demarcating the decisions that can be taken by the Executive and those that must be referred to the IDB⁹. We do not see this as problematic so long as the decision-making lines remain transparent.

Changes to terminology

91. As indicated above, we intend to move away from the use of "complaints" terminology. Therefore, the new regulations will no longer refer to complaints but instead use the terms "reports" and "allegations". The former refers to any information received which requires assessment by the CAT. Where information is assessed as revealing a potential breach of the BSB Handbook that requires formal investigation with a view to imposing an administrative sanction or taking enforcement action, it will be treated as an "allegation" as opposed to a "complaint" (see rE12 of Annex A). This means that the new regulations will no longer distinguish between information received from external or internal sources. Instead all information, from whatever source, will be processed in the same way and be subject to the same assessment tests.

Removing the regulations concerning the initial assessment process

92. As set out above, the regulations covering the initial assessment of "complaints" have been considerably simplified and the Commissioner has been given the general power to gather information for the purposes of assessing whether there has been a potential breach of the BSB Handbook as well as other supporting provisions (see A1 of Annex A). The detail of the initial assessment process will be set out in publicly available policy and guidance documents, which are in the final stages of development and will all be published and come into effect at the same time as the changes in this application, using criteria based on our risk assessment methodology.

Powers to refer information to other organisations

93. We have retained the powers for the BSB to refer information to other bodies or persons but the power to do so has been vested in the Commissioner as the IDB will have no role in the initial assessment of information (see rE4-rE11 of Annex A).

⁹ Under the current system cases referred to investigation are categorised, and the designated category determines whether decisions can be taken by the Executive or whether they must be taken by the PCC https://www.barstandardsboard.org.uk/media/1763065/150810_-_pg11_-_categorisation_of_complaints_-_live_updated_september_2015_.pdf

Test for deciding whether information should be treated as an allegation

94. We are proposing that the threshold criteria for deciding whether information should be treated as an allegation should be substantially the same as the criteria currently used to determine whether a complaint should be dismissed or referred to investigation. The new allegation test (see rE12 and rE13 of Annex A) is slightly different to the current test for investigation referrals in two ways: first, the relevant components of the current test have been merged into a clearer single regulation, and second the new test includes a specific risk criterion that more transparently allows for the possibility of information that represents a breach of the Handbook being assessed as not appropriate for investigation due to the low risk it presents. These revised threshold criteria will also be underpinned by publicly available policy and decision-making guidance documents as is currently the case with the Complaints Regulations.
95. The new test includes the same considerations as the previous test, save for the time limit which is addressed in paragraph 96, as well as an additional consideration around risk which is now more explicit. This is intentional and we have done this to ensure the new test is as adequate and robust as the previous test but with an additional focus on risk now included.

Time limit for submission of information

96. The Complaints Regulations currently include a time limit for the submission of complaints of 12 months from the date of the conduct. This time limit can be waived if consideration of the complaint is in the public interest having regard to the regulatory objectives. The time limit is very rarely the sole reason for dismissing a complaint and the public interest criterion is the pivotal factor in determining whether an “old” complaint should be taken forward. We therefore intend to remove the time limit from the regulations and all decisions will be based on whether the alleged conduct represents a risk to the regulatory objectives and can be fairly and properly investigated (see rE13 of Annex A). During our public consultation this decision was queried by the Bar Council. In order to reassure the public and the profession that it will have no significant impact, we have undertaken to review the need for a time limit after 18 months of the new regulations coming into force. We believe 18 months is sufficient time for the system to bed down so we can then assess the impact of the time limit change itself. Whilst we do not foresee any adverse impacts on either the public or the profession, this review period will allow us to assess any impacts such a change may have had. This safeguard on the removal of the time limit is, we hope, sufficient to give the profession confidence that any negative impacts will be addressed quickly.

Deferred sentences

97. The concept of deferred sentences was removed from the Disciplinary Tribunal Regulations in 2017 but remained in the Complaints Regulations for transitional reasons. As the transitional arrangements are no longer needed, all references to deferred sentences have been removed.

Power to expedite

98. The power to expedite cases is currently available to the PCC. Under this provision the PCC can order that the service of charges on a regulated person is expedited. This reduces the time limit for service from ten weeks to five. The power is rarely used by the PCC and we do not consider it would be appropriate for IDB panels to have the power to order this, given the intended separation of the IDB from the Executive which

also means that the IDB will have less direct knowledge of casework processes. We therefore propose not to include such a power in the new regulations. There is currently no formal power for the Executive to expedite cases, we do not propose to create one because we can manage case progress internally and prioritise cases as necessary.

Attendance on Chair or other nominated person

99. Currently, one of the options available to the PCC when dismissing a complaint, where the complaint nonetheless gives rise to concern about a regulated person's behaviour, is to order that the person "attend" on the Chair of the PCC or another nominated person to receive formal advice. The nominated person might be a Leader of a barrister's circuit, a senior member of the barrister's Inn, or even a Head of Chambers. This involves a face to face meeting to give the advice. It may be that using such a method to give advice would have a more significant impact on a barrister than a letter of advice, but it is difficult to regulate transparently and extends the regulatory regime to those who have no formal regulatory powers. Our view is that this means of giving formal advice is not appropriate in a modern, public-interest regulatory regime and therefore we are not intending to include it in the new regulations. The ability for an IDB panel to give formal advice will remain (see rE24 of Annex A), but such advice will be provided only in writing.

Referrals to Fitness to Practise and Interim Suspension Panels

100. Currently the Complaints Regulations include the power for the PCC to refer cases to Fitness to Practise and Interim Suspension panels although the substantive regulations governing these processes are contained in different sections of the Handbook¹⁰. Referrals under these processes are managed by the Executive and confirmed by two Office Holders of the PCC (one lay, one barrister), but never by the full PCC.
101. The intention is that the IDB will be able to recommend to the Executive that a case is referred to a Fitness to Practise or Interim Suspension panel, but the formal referral will be made by the Executive. The only exception to this is decisions on the imposition of immediate interim suspensions. Such decisions are currently reserved to the Chair of the PCC and we consider it right to retain independence on the rare occasion such decisions are necessary. Therefore, it is proposed that decisions under the new regime will be reserved to the Chair of the IDB, or other person authorised by him/her. This merely requires a change in title of the decision maker currently included in the Interim Suspension Regulations from the Chair of the PCC to the Chair of the IDB. All other referral powers included in the relevant regulations will be changed to the Commissioner rather than the PCC.

Consequential amendments

102. A number of minor consequential amendments will also need to be made to the Handbook to reflect the change in terminology and the creation of the IDB. These include removing the word "complaint" throughout the Handbook as well as references to the "PCC" and the "Complaints Regulations". These will be replaced with the appropriate references to "information" or "allegation", "the Commissioner", "IDB" and the "Enforcement Decision Regulations". Amendments will also need to be made to the Definitions section of the Handbook (Part 6) to remove and include relevant

¹⁰ Part 5.C and Part 5.D of the BSB Handbook cover Interim Suspension and Fitness to Practise respectively.

definitions. Finally, the correct cross-references to the Enforcement Decision Regulations will need to be inserted in place of references to the Complaints Regulations. A full list of the consequential amendments necessary can be found at Annex B.

How will the new systems benefit various groups?

103. The BSB has been mindful of equality and diversity issues when developing the proposals for both CAT and the IDB and we carried out equality impact assessments that have been updated regularly as our plans have matured. Our view is that there are no obvious adverse impacts for those from the protected groups. We consider the changes will promote equality and diversity. The centralising of our assessment functions will allow for more consistent risk-based decision-making and better monitoring of those decisions to ensure any potential indications of disparities in treatment are identified and addressed. It will also allow for trends in incoming information to be identified more easily and appropriate action taken to address any issues of equality in the way the Bar or the market is operating.
104. Similar benefits will also flow from the creation of the IDB, which will allow independent decision-making to be consistent across all relevant functions and for that decision making to be monitored consistently. Further, the use of new technology, the reduction in the size of the decision-making group and the increased flexibility in timing of meetings is likely to provide more opportunity for members of the IDB to be taken from a wider geographical area that is not so London-centric. The Board's decision that barrister Committee members (including the IDB members) will be paid in the future will also provide opportunities for a wider diversity of members of the Bar to be involved in the profession's regulatory decision-making.
105. We recognise, however, that the proposal that we do not anonymise summary case reports and case files in relation to the characteristics of the information provider when presenting cases to the IDB, is to some extent a step backwards as compared to the current position. However, we must balance the potential implications of this with ensuring the efficacy and quality of IDB decisions. It is essential that IDB panels can fully understand the content of the material being presented to them and the integrity of the decision-making process would be severely compromised if they were unable to do so. We therefore consider this proposal is justified. We have also taken into account that the decision to anonymise the characteristics of complainants in case reports for the PCC was not based on evidence of disparities in outcomes for complainants. Nevertheless, we will closely monitor the outcome of IDB decisions for any indications of potential bias. This will be done as part of our ongoing monitoring processes such as the annual reporting and our standard monitoring systems such as KPIs. This will allow us to embed the new system into our work and carry out ongoing and more dynamic evaluations of its performance. We will also consider whether any additional evaluation is necessary in advance of our next strategic plan.

Section B – What do the current rules say?

106. The Part 5 Complaints Regulations can be found on the BSB website. In reviewing the current rules, we have sought to give effect to the changes and approaches discussed above. In order to do this effectively it was, in our view, appropriate to create a new set of Enforcement Decision Regulations rather than trying to make such substantial amendments to the Complaints Regulations. In order to make this easier to review we have produced a reference table that, where possible, maps the current

Complaints Regulations to the Enforcement Decision Regulations (Annex E). However, it is important to recognise that the Enforcement Decision Regulations were never written with the intention of amending the Complaints Regulations and, as such, they should be viewed and understood as a new set of regulations which are internally consistent and exist without a need for reference to the Complaints Regulations.

Section C – How do the changes relate to the Regulatory Objectives?

107. This section sets out the impact of the proposed changes on each of the Regulatory Objectives, as set out in section 1 of the Legal Services Act 2007 (“LSA”).

Protecting and promoting the public interest

108. The public relies on the BSB to provide a high quality, transparent and independent decision-making system. It is essential for the retention of quality that the BSB has access to input from the profession both during the staff decision-making process and also as part of any independent decision-making bodies that it may establish. This access to input from the profession must always be balanced against the need for transparency and independence. It is our view that whilst the quality of the PCC’s decision making cannot be questioned, the processes used can be improved in terms of both transparency, via more detailed reasons for decisions, and independence, by removing the independent decision makers from the casework process and ensuring the Executive is given direct decision-making powers. We believe these changes will protect and promote the public interest by better balancing the need for quality decision-making against the need for transparency and independence in the process. Further, the use of a consistent approach BSB-wide to the assessment of information and the application of independent decision-making will give confidence to the public that the systems we employ support our objectives.

Supporting the constitutional principle of the rule of law

109. Barristers are specialist legal professionals who have a particularly important role in upholding the rule of law and providing access to well-administered justice through our court system. It is essential to the fulfilment of this regulatory objective that the systems we employ are able to maintain the standards of the profession which holds such an important role in society. This can only be achieved if the public has confidence that the BSB is effectively addressing breaches of the BSB Handbook and is seen to be addressing such breaches fairly and transparently, via system that stand up to scrutiny and are in line with modern regulatory practice.

Improving access to justice

110. We believe that these changes will promote access to justice by ensuring that a more diverse range of lay members and barristers can be involved in our independent decision-making processes. This will allow us to benefit from the perspectives of a deeper pool of decision makers who can provide perspectives of the nature of barriers to access to justice which we had not previously considered. This is particularly true with regards to the authorisations decisions which will be taken by the IDB, which are frequently decisions about who can and cannot enter the profession or which organisations can and cannot be included within our regulatory remit. By increasing the diversity of those who make the hardest decisions about the behaviour of and admission to the profession, we are able to improve access to justice.

Protecting and promoting the interest of consumers

111. We have previously discussed the problems with our approach to language use and terminology earlier within this paper. By making changes to the terminology we use, we believe we are able to align the expectations of consumers with the nature and remit of the BSB's work. We believe this realignment will better serve consumers by ensuring that they are able to address their concerns to the correct organisation more quickly and feel less disillusionment with the regulatory processes should the action we take not be what they expected.

Promoting competition in the provision of legal services

112. These changes are not aimed at addressing issues in the market or provision of legal services. However, we do expect that the use of a more consistent assessment approach will ensure that every type of legal services provider we regulate is assessed in a similar way. We believe this added consistency will create a level playing field in terms of what behaviour is and is not acceptable.

Encouraging an independent, strong, diverse and effective legal profession

113. Part of the remit of the new IDB will be authorisations decisions. These important decisions about who can and cannot be admitted to the legal profession are essential for ensuring it is independent, strong, diverse and effective. We believe by improving the transparency and independence of our decision-making that we will ensure this objective is met. However, should those admitted to the profession fall short of the public's expectations, and in so doing fall short of this objective, the changes we are making to our assessment and enforcement decision-making will better allow us to correct and address such behaviour more efficiently. In this way, these changes will improve the checks and balances for entry into the legal profession and allow for swift and effective resolution should a member of the legal profession fall short of their requirements.

Increasing public understanding of the citizen's legal rights and duties

114. It is unlikely that our changes will directly benefit the education of the public with regards to their legal rights and duties. However, we have discussed the current problems with the terminology we use and the way this can mislead the public as to our role within the regulatory system. It is likely that the correction of these misconceptions will better facilitate the public's understanding of this part of the system and, in so doing, give them a more accurate picture of their position in the legal landscape.

Promoting and maintaining adherence (by authorised persons) to the professional principles

115. Appropriate enforcement in response to breaches of applicable standards by regulated professionals is at the heart of these changes. This will indirectly promote adherence to the professional principles. The changes to the assessment of incoming information will allow us to better assess and act on breaches of the BSB Handbook and encourage reporting. The changes in terminology will ensure the information we need to address these issues is more easily brought to us and that information which is more appropriately directed to another body also reaches its destination expediently. And, the changes to decision-making will ensure we have the very highest quality of regulatory system for ensuring any issues are acted upon and, importantly for public confidence, are seen to have a highly effective, transparent and independent system.

Section D – How do the proposed changes relate to the Better Regulation Principles?

116. This section sets out how we have considered our obligation to have regard to the Better Regulation Principles in our proposed reforms.

Proportionality

117. The changes detailed in this application will allow the BSB to better focus its resources through streamlined decision-making whilst also ensuring decisions are taken at the lowest appropriate level. The rules themselves continue to allow for a proportionate allocation of resources so only the most serious cases are referred to disciplinary action. The new CAT will allow us to identify the correct regulatory response at a very early stage which will allow us to more efficiently respond to protect the relevant regulatory objective.

Accountability

118. The BSB's Independent Reviewer (see paragraphs 26-32) will also add additional accountability to the system. Currently the use of the PCC as both the decision-making body and the quality assurance body for staff investigations could be seen as an inappropriate cross-over in functions. The new system will separate quality review and assurance functions into a role known as the Independent Reviewer whilst leaving the members of the IDB to act as the decision-makers. This new Independent Reviewer role will encompass reviews of staff decisions ensuring there is quality and accountability in Executive and Commissioner decision-making.

Consistency

119. By establishing a centralised assessment function, which ensures all incoming information is evaluated in a similar way and by the same team, we are able to increase the consistency of information assessment. Additionally, by having staff members complete all Case Reports presented to the IDB, we are able to ensure that decisions are taken on consistent principles and documentation.

Transparency

120. We believe the new approach will increase transparency for those who are the subject of our investigation and decision-making process. The new regulations are more clearly laid out and are easier to understand and the process itself has been improved to demonstrate where independent decision-making is being used and where staff decision-making is considered to be appropriate.

121. As noted previously, the IDB will produce decision sheets which include detailed reasoning for decisions made by its panels. These decision sheets will allow readers to understand the individual reasons in contrast to the minutes-based approach. We expect that this will greatly improve the transparency of the decision-making process applied by our independent decision makers.

122. The IDB's panels will produce far more detailed records of their decisions than the current PCC, while ensuring greater accountability for decisions, particularly in the most serious cases.

Targeting

123. Our regulation is risk-based. Before we act, we work to identify the things that could go wrong, or have gone wrong, and we carefully consider the right regulatory tool or power to apply to each situation. By working in this way, we can take more proactive steps – acting before things go wrong and learning about which actions work best in any given situation. The creation of the CAT will allow for a consistent information assessment using our risk assessment methodology (for more information in our approach to risk assessment please see footnotes 1, 2 and 3).
124. In line with the BSB's governance principles, decision-making throughout the system will be delegated to the lowest appropriate level taking into account the complexity of the information. This means that trained staff members will initially assess all information without recourse to a Committee or other independent decision-maker. This reflects the current position in relation to complaints whereby 95% of initial assessment decisions are taken by the Executive under delegated authority from the PCC.

Section E – How will we evaluate success?

125. The changes detailed within this application will be monitored using the standard annual enforcement reporting process and during each stage of our casework process; this includes the use and analysis of KPIs and end to end times.
126. We have also committed to evaluating the removal of time limits discussed at paragraph 88 of this document, this will be carried out 18 months after the implementation of the changes.
127. Evaluation of success will also be carried out through the Independent Reviewer's ongoing review of cases (see paragraphs 26 - 32). This will establish a constant process of feedback and review of the implications of the changes and allow us to make any subsequent changes and improvements that we deem necessary.

Section F – How have we consulted on the proposed changes?

128. From March 2018 to May 2018 the Bar Standards Board (BSB) carried out a consultation on "Modernising Regulatory Decision Making" (the consultation)¹¹. Responses were received from the following individuals and organisations, however, not all responses addressed every question:
- The four Inns of Court – The Honourable Societies of: the Inner Temple; the Middle Temple; Gray's Inn; and Lincoln's Inn
 - The Bar Council
 - The Legal Ombudsman's Office
 - A current Vice-Chair of the PCC

¹¹ 'Modernising Regulatory Decision Making', Bar Standards Board, May 2018, accessible at: https://www.barstandardsboard.org.uk/media/1924546/modernising_regulatory_decision_making_-_consultation_paper.pdf

129. We asked the following questions and our responses can be found in our “Modernising Regulatory Decision Making – BSB Response” paper (the response paper)¹²:

- Do you have any views on the proposals for creating a centralised assessment function in the form of a CAT?
- Do you have any views on the proposal to move from the concepts and terminology of complaints, to the concept of “receiving information”?
- Do you have any views on the proposals for, and future structure and functioning of, the IDB?
- Do you consider the revisions to the Standing Orders, the Enforcement Decision Regulations and the consequential changes to the BSB Handbook will be effective in supporting the change in our approach to regulatory decision-making?
- Do you consider the changes in approach to our regulatory decision making could create any adverse impacts under the Equality Act 2010?

130. We made a number of changes to our proposed approach following our review of the responses to the consultation:

- We have reconsidered the proposed use of the terms “information” and “information provider” at the preliminary stage of the process. We have accepted that these are not necessarily user-friendly terms and agree that alternative terminology should be found. We will now use the term “report” to refer respectively to all types of information presented to us and appropriate language for those who have presented it to us.
- As discussed previously in this application, while, in principle, we remain of the view that three-person IDB panels may be sufficient to take independent decisions on enforcement issues, we were persuaded by the consultation responses, that five-person panels will be more appropriate for enforcement decisions in the early stages of the new regime. Therefore, we have adjusted our proposal accordingly. This change in our proposals was also informed by informal feedback from the pilot three-person IDB meetings that have been held since the end of 2017, which indicates that the views of the one barrister on the panel may hold too much sway and a panel may be more balanced if there is input from two barristers.
- We have established an 18-month review period to monitor the removal of the one-year time limit for making complaints to the BSB, if there are unforeseen consequences we will take any necessary action.
- The right to reconsider any allegation previously disposed of currently exists under the present model at rE90 of The Complaints Regulations. rE90 differs from the proposed rE58 in that it specifies that reconsideration of decisions should be based on two criteria: whether new evidence has been provided; and/or there is any other good reason to reconsider the decision. The new regulations originally removed these two criteria and left the decision to be entirely discretionary. A concern was raised in the consultation responses

¹² *Modernising Regulatory Decision Making – BSB Response*, Bar Standards Board, September 2018, accessible at: https://www.barstandardsboard.org.uk/media/1957528/mrdm_consultation_response_final.pdf

about the new provision being so open ended. On reflection, we decided that the current criteria included for reconsideration of decisions should also be included in the new regulations as they provide clarity and focus for both the Executive and the public.

- We have developed a new quality assurance system. This will establish the role of the Independent Reviewer who will conduct reviews of staff decisions when requested by a member of the public under the Request for Review procedure. The Independent Reviewer will also carry out a periodic review of a sample of files within the case management system, this function will replace, and mostly replicate, the file audit currently carried out by the PCC's Quality Review Sub Committee.

131. Further views and concerns were expressed during the consultation but, having considered these concerns, we decided not to amend our proposals – those concerns are:

- A concern was raised with the drafting of the proposed regulations due to the broad powers it confers upon the Commissioner. We decided that these powers replicated the current structure of authorisations and, where they did not, were necessary to facilitate the new approach.
- Some responses drew attention to the part of the consultation paper which proposed that we stop using the term 'dismissed' and 'dismissal' as it creates certainty as to outcome.

We are firmly of view that it would be inappropriate to use the term "dismissed" in relation to information/reports received under the new arrangements. To reintroduce this term at the preliminary stage undermines our attempts to reframe the relationship with the public and move away from terminology that implies that the BSB has made a value judgement about the content of the individual concerns raised. Our view remains that using alternative terminology to "dismissed", such as "no regulatory action required", is more appropriate and comprehensible and sufficiently definitive.

- It was noted that the use of virtual meetings could impact on the fairness of the decision making and suggested that face-to-face meetings be the norm. Our view is that it would not be appropriate to set the default position as meetings being in person with virtual meetings being the exception. Nevertheless, we recognise that appropriate and effective technology is essential to ensuring that the proposal to allow for virtual meetings operates efficiently.
- It was stated that the Executive may take too many decisions under the proposed new regime, in particular Fitness to Practise and Interim Suspension referrals, and that the decision-making powers of the Commissioner and the IDB appear to overlap.

However, the new arrangements will not create any significant difference in the level of Executive decision making that is present in the current system, albeit that those decisions are currently taken under standing authorities from the PCC. Currently approximately 70% of decisions are taken by the Executive without recourse to the PCC. The difference is that, in the future

system, the Executive will have direct powers to take such decisions rather than via authorisations given by the PCC.

- With regards to the concerns about overlapping powers, the Executive has a series of powers under the current system and these have now been codified into the new regulations. In effect, we are replicating the existing divide in powers between the PCC and Executive whilst setting this out in clear, publicly available policy to allow for flexibility and evolution in light of experience.
- The suggestion that lay members are not required for all panel decisions is, in our view, incompatible with the principles of regulation which the BSB follows. Lay involvement has been embedded in BSB decision making for many years and it is a principle that we consider essential to all independent decision making in the public interest. All committees and decision-making bodies at the BSB have lay majorities, including the current PCC, and we are of the view that this is in line with good governance principles.
- Several respondents had concerns about our proposed future approach to anonymisation and indicated that they would like the BSB to continue anonymising the identity of both parties. In an ideal world we would want to do so but our research shows that anonymising the “complainant” would make the full file documents very difficult to understand. We remain of the view that the efficacy and integrity of the decision-making process must be paramount.

132. A number of responses were received concerning the specific detail of the regulations, those responses were considered and our response given as part of our consultation response document (Annex D).

Section G – How will the proposed changes affect other Approved Regulators?

133. We do not foresee our decision to make these changes having any significant impact on other Approved Regulators. If there is any impact at all we expect it to be positive. We have a number of agreements and Memoranda of Understanding with other Approved Regulators, and other bodies which are not Approved Regulators, to share information when it is appropriate to do so. Having a higher quality assessment and decision-making process can only benefit the quality of the information we provide to other Approved Regulators and how we handle any information provided by them. Further, the ability to assess information more consistently and the ability to have decisions taken independently of the Executive mean that information we are provided by other Approved Regulators will be utilised more consistently.

Section H – How are we implementing the proposed changes?

134. The programme of work to modernise our regulatory decision-making discussed within this paper has been ongoing for a number of years and is now planned for an October 2019 implementation date. It has followed clear project timetables that are monitored regularly and adjusted as necessary. Formal project and programme management

arrangements will remain in place to provide the Board with assurances as to the implementation and evaluation of these changes.

135. Work is currently ongoing to rewrite, amend and draft various policy and guidance documents which will underpin the new regulatory framework. In addition, a recruitment process is currently underway for the IDB and APEX membership. We have received a lower number of application than we expected during that recruitment process, we are therefore going to seek non-APEX advice where necessary and appropriate. We had always envisioned the ability to seek non-APEX advice where specialisms did not exist within APEX and this is therefore just an extension of the proposed approach. We will then review the situation in early 2020 to determine whether further recruitment is necessary.

136. Following this drafting and recruitment period there will be a significant training period running from August to October where staff, IDB and APEX members are able to gain the knowledge and information they need to carry out their roles in the new system. The IDB and APEX training will include:

- An Operational introduction to the BSB/IDB
- BSB Handbook
- Equality & Diversity awareness and unconscious-bias
- Panel meetings – role play
- Writing effective reasoned decisions
- Chairing meetings
- Training on SharePoint, Star Leaf and Skype
- The appraisal and feedback system
- Virtual "drop-in" session(s) following the above as required
- Networking event for new and transferring IDB members

137. The staff training will include:

- The Case Management System
- Dealing with persons suffering from mental health issues and vulnerable persons
- Handling difficult callers and customer service
- E&D, cultural awareness, cross-cultural communication, unconscious bias, reasonable adjustments.
- Introduction: Overview of relevant changes
- Drafting IDB reports and APEX referrals
- EDR Regulations and new policies training
- Risk Assessment Training
- IDB secretary training
- CAT Initial Assessment Training
- The work of other BSB teams
- New/amended policies
- Letter drafting/ effective communication with people reporting to CAT
- BSB Handbook training
- IDB changes and the use of decisions sheets
- Referrals to CAT
- Powers of the Commissioner

138. Alongside ongoing recruitment, the IDB system pilot is continuing and the continual feedback from that process is being used to make improvements. This pilot-based approach will ensure that the changes are well tested before implementation and any issues are discovered ahead of October 2019.