



Consultation

Complaints Regulations: Amendment to the Professional Conduct Committee's power to take "no further action"

Purpose

1. This consultation seeks views on proposed changes to the Complaints Regulations (Part 5, Section A of the Bar Standards Board Handbook – "the Handbook") and consequential changes to the definition of professional misconduct. The changes are designed to address anomalies in the Handbook regarding the powers of the Professional Conduct Committee to impose "no further action" (NFA) in relation to breaches of the Handbook. These anomalies have made the use of the power almost redundant and incompatible with the definition of professional misconduct.

Background

NFA decisions under the old Code of Conduct – 8th Edition

2. The power of the Professional Conduct Committee (PCC) and its predecessors to impose NFA has existed for many years, but its application has evolved over time. Under Annex J of the old Code of Conduct 8th Edition (which was replaced with the Handbook in January 2014), the PCC had the power to dismiss complaints¹, determine that no further action should be taken on a complaint², impose an administrative sanction (in relation to a limited number of low level breaches of the Code³) and refer matters to disciplinary action for professional misconduct.⁴
3. By policy, as opposed to requirement under the Complaints Rules, the power to take NFA was reserved for cases in which the PCC was satisfied that a breach of the Code had occurred that warranted disciplinary action for professional misconduct⁵ but, for exceptional reasons such as ill health, it was not appropriate to refer the matter to disciplinary action. A decision to impose NFA was therefore a final disposal of a complaint, but was neither a formal dismissal nor a formal finding of professional

¹ Annex J to the Code of Conduct 8th Edition – Complaints Rules, rule 32(a)

² Ibid – rule 32(b)

³ Paragraph 901.1 of the Code of Conduct 8th Edition

⁴ Complaint Rules, rule 32(c)

⁵ Under the Code of Conduct 8th Edition, professional misconduct was defined at a paragraph 901.7 as "any failure by a barrister to comply with any provision of this Code other than those referred to in paragraph 901.1..."

misconduct. However, when taking such a decision, the PCC would have needed to be satisfied that there was sufficient evidence to prove professional misconduct. For this reason, NFA decisions were disclosed for the purposes of certificates of good standing and in relation to enquires made by the relevant bodies considering applications for silk (Queens Counsel Appointments) and judicial office (Judicial Appointments Commission).

4. In 2010, the PCC enshrined in a written policy the circumstances in which a NFA decision would be appropriate in order to ensure the fair application of the power, taking into account the disclosure of such decisions⁶. The policy provided that the PCC could only impose a NFA decision where it was satisfied:
 - a) that there was a real prospect of proving misconduct in front of a Disciplinary Tribunal to the criminal standard; and,
 - b) prosecuting the barrister would serve the Regulatory Objectives, set out in section 1 of the Legal Services Act 2007; but,
 - c) in the individual circumstances of the complaint, a NFA disposal could also satisfy the Regulatory Objectives.
5. The policy also stated that barristers subject to a NFA disposal had a right to object to the decision. If this happened, the PCC would reopen and reconsider the complaint. The matter would then be referred to a Disciplinary Tribunal to determine, unless the circumstances in relation to the complaint had changed. There was no right of appeal against a decision to take NFA. The ability to object to NFA decisions protected barristers from the disclosure of decisions on their conduct with which they disagreed and had not had the opportunity to defend their conduct in front of an impartial tribunal.
6. Therefore, the application of NFA under the old Code was only appropriate in circumstances where it would have been equally appropriate to have charged the barrister with professional misconduct. The power was very rarely used: the PCC took only three NFA decisions between January 2011 and January 2014.

BSB Handbook

7. In January 2014, the Bar Standards Board (“BSB”) introduced the Handbook, which replaced the old Code of Conduct. Part 5 of the Handbook sets out the Enforcement Regulations that include, at section A, the Complaints Regulations. To a large extent these regulations mirror the powers and procedures contained in Annex J to the old Code of Conduct. However, there are some notable differences which, along with other changes in the Handbook, have affected how the PCC can apply the power to take NFA decisions. In summary these differences are:
 - a) The definition of professional misconduct has changed. It is now defined as “a breach of [the] Handbook by a BSB regulated person which is not appropriate for disposal by way of **no further action** or the imposition of administrative sanctions” (emphasis added) – the Handbook, Part 6, Definition 166;

⁶ P14 – “Policy on the application of “no further action” decisions” – October 2010

- b) The power to impose administrative sanctions has been extended to all breaches of the Handbook – not just the limited number referred to in the old Code at paragraph 901.1 (see below paragraph 11 - Complaints Regulations, E37.3);
 - c) Decisions to impose administrative sanctions and take NFA are based on an assessment of the evidence on the balance of probabilities and are applied in relation to “breaches of the Handbook” as opposed to professional misconduct (see below paragraph 11 - Complaints Regulations, regulations E37.2 and E37.3);
 - d) The previous policy approach in relation to NFA decisions, as outlined at paragraphs 4 to 5 above, has been enshrined in the regulations (see below paragraph 11 - Complaints Regulations E46 – E49); and,
 - e) The Handbook currently restricts the power to dismiss complaints to circumstances where the conduct does **not** constitute a breach of the Handbook (the old rules technically allowed for dismissal of complaints where a breach of the Code had occurred but no action was warranted) – (see below paragraph 11 - Complaints Regulations, regulation E37.1).
8. As explained in more detail below, the impact of these differences has inadvertently created significant, but unintended, complex practical problems with the application of the power to take NFA decisions. These problems have made using the power very difficult and in effect rendered it redundant in its revised form. It is for this reason that the BSB is consulting on a proposal to remove the power from the regulations.

The position of NFA decisions within the current enforcement regime

9. The original intention behind the old power contained in the Code of Conduct to take NFA decisions was to allow the PCC to mark conduct that it considered amounted to professional misconduct by a means other than a referral to disciplinary action. It was applied in a context where administrative sanctions were only available for a very limited number of low level breaches of the Code and all other breaches constituted professional misconduct.⁷
10. The concept of NFA has been retained under the terms of the Handbook. However, it can no longer be applied in the same way as under the old Code of Conduct and is no longer intended to be a direct alternative to professional misconduct proceedings. This is demonstrated by the revised definition of professional misconduct which provides that a matter that is appropriate for NFA will **not** constitute professional misconduct and also by the terms of the power to take NFA decisions (see regulation E37.2 below).

11. The relevant regulations read as follows:

⁷ Ibid – footnote 3

- E37 When any investigation [of a complaint] is complete, the PCC must consider the complaint, together with the results of the investigation thereof, and may conclude (having regard to the enforcement strategy and any other published Bar Standards Board policy....) in respect of the complaints.....
- .1 that the conduct did not constitute a breach of the Handbook, in which case the PCC must dismiss the complaint....
 - .2 **that the conduct did constitute a breach of the Handbook (on the balance of probabilities) but that, in all the circumstances, no further action should be taken in respect of the breach in which case rE46 to rE49 apply (emphasis added); or**
 - .3 that the conduct did constitute a breach of the Handbook (on the balance of probabilities) and that the breach should be dealt with by an administrative sanction.....; or
 - .4 that the conduct may constitute a breach of the Handbook and (ii) if such were to be proved, that an administrative sanction would not be appropriate in all the circumstances, in which case rE38 applies;
- E38 Where the PCC has concluded that E37.4 is applicable, it must refer the complaint to a Disciplinary Tribunal....., provided that no complaint shall be referred unless the PCC is satisfied that:
- .1 There is a realistic proposes of a finding of professional misconduct being made.....; and
 - .2 That it is in the public interest, having regard to the regulatory objectives to pursue disciplinary proceedings.
- E46 Where the PCC decides to take no further action in respect of a complaint in accordance with rE37.2, the PCC shall write to the relevant BSB regulation person:
- .1 Notifying him of the provisions of the Handbook that have been breached by him and that the PCC has decided in this instance to take no further action; and
 - .2 Informing him of the consequences of its decision (including that the decision will be formally recorded and will be disclosable to third parties, where relevant, that it will be notified to the supervision team and, where relevant, in accordance with r47, that it will be notified to the barrister's Inn); and
 - .3 Confirming that if the BSB regulated person objects to the decision taken by the PCC that he may ask for the matter to be referred for resolution by the Disciplinary Tribunal in accordance with rE49;
- E47 If, when deciding to take no further action on a complaint in respect of a Barrister, the PCC nonetheless considers that the circumstances of the complaint are relevant to the Barrister's position as pupil supervisor, it may notify the Barrister's Inn of its concerns in such manner as it sees fit.

E48 Any decision by the PCC to take no further action will be formally recorded, will be disclosable to certain third parties (in accordance with the Bar Standard Board's policy on publication and disclosure) and may, where appropriate, be referred to the supervision team for continuing monitoring and supervision, but will not be made public.

*E49 The BSB regulated person shall have a right to object to a decision of the PCC to take no further action in accordance with **Section 5.A5**..... by asking for that matter to be referred for resolution by a Disciplinary Tribunal (emphasis added).*

Issues with applying the NFA regulations

12. Set out below are a number of issues that have arisen when attempting to apply the regulations on NFA.
13. First and most important, is the change to the definition of professional misconduct, which the Handbook provides is any conduct which is not appropriate for disposal by way of NFA or administrative sanctions. This change has significantly affected the fundamental nature of NFA decisions; they are now allied with decisions to impose administrative sanctions and are intended to be used for breaches of the Handbook, proved on the balance of probabilities, which do not amount to professional misconduct. In contrast, under the old rules, the NFA power was designed to be used when the PCC was satisfied that a breach amounted to professional misconduct and could be proved, if necessary, to the criminal standard in front of a Disciplinary Tribunal.
14. Secondly, the terms of regulation E37.2 denote that NFA decisions were intended to be applied in relation to a breach that does not warrant any specific action - ie, one grade above an outright dismissal but one grade below an administrative sanction. However, the transfer of the policy approach applied under the old Code to the Handbook, combined with the inclusion in the Handbook of a "right" to object to a NFA decision and have the conduct referred to a Disciplinary Tribunal (E49), renders an NFA decision a far more serious disposal. This is particularly so, as such decisions are still disclosable to third parties under E46.2 and the BSB's previous policy on disclosure still applies (see paragraph 3 above). This means that in practical terms, NFA decisions are much more serious than the imposition of administrative sanctions and more akin to decisions about professional misconduct, when this was not necessarily intended to be the case.
15. In conjunction with the change to the definition of professional misconduct and the standard of proof applied when taking NFA decisions, the new regulations have inadvertently created an anomalous situation whereby a breach of the Handbook that the PCC considers appropriate for disposal by way of NFA (and therefore, by definition, considers is not a matter of professional misconduct) could be referred to a Tribunal solely because the barrister objects to the NFA decision. Where such a situation arises, the PCC would effectively be forced to prove professional misconduct in front of a Tribunal in circumstances where it had originally determined, in accordance with the current definition, that the conduct did not represent professional misconduct. This creates an unsustainable circular decision-making process that makes the use of NFA in its current guise redundant.

16. Thirdly, and inextricably linked with the two points above, is the fact that the wider Complaints Regulations, as currently drafted, envisage that only matters that amount to professional misconduct will be referred to a Disciplinary Tribunal. Even though the right is available to regulated persons to have a matter subject to an NFA decision referred to a Tribunal, this right currently stands apart from the general provisions in the Complaints Regulations on referrals to Disciplinary Tribunals. Those provisions, as set out above (see regulation E38), require that any referral to a Disciplinary Tribunal is made only where there is a realistic prospect of a finding of professional misconduct being made and where it is in the public interest to pursue disciplinary proceedings.
17. Further, regulation E143, which can be found in the Disciplinary Tribunals Regulations (Section B of Part 5 of the Handbook), sets out that findings of professional misconduct by a Disciplinary Tribunal can only be made where the professional misconduct is proved to the criminal standard. This contributes to the unsustainable circular decision-making process for the PCC that makes it almost impossible to use the power to take NFA decisions effectively.
18. Taking into account all the points above, and regardless of the terms of E37.2, any PCC decision to take NFA, inevitably, would need to take into account the possibility of the barrister exercising his or her right to have the matter referred to a Disciplinary Tribunal. Therefore, when taking an NFA decision, the PCC would also need to be satisfied that there is a realistic prospect of proving, to the criminal standard, that the conduct represents professional misconduct. This fundamentally undermines the use of NFA within the terms of the current enforcement regime as it cannot be utilised in the way envisaged by regulation E37.2 – ie, as a means to address conduct which represents a breach of the Handbook, but falls short of professional misconduct.

Other anomalies

19. There are also two other associated anomalies in the regulations that have been revealed.
20. Complaints Regulation E37.1 currently prevents the PCC from dismissing a complaint following an investigation where the evidence shows that the conduct constitutes a breach of the Handbook. There is no power, as was available under the old Code, to dismiss a complaint following investigation where there is evidence of a breach of the Handbook, but it is in keeping with the enforcement strategy to dismiss the complaint because it does not justify any formal action.⁸ It could be considered that the power to take NFA fulfils this role but, as the points above indicate, under the current terms of the regulations, NFA decisions cannot do this as they are ultimately liable to referral to a Disciplinary Tribunal as professional misconduct.

⁸ Such a power to dismiss is available to the PCC prior to an investigation under regulation E32.4: *[the complaint] for any other reason is not apt for further consideration.*"

21. Also, it has become apparent that the reference in regulation E49 to “Section 5.A5” is a mistake as it refers to the Determination by Consent procedure, which is not relevant to NFA. A reference to “Section 5.A6” is to some extent more appropriate as that section is titled “BSB regulated person’s right to appeal from a decision **to take no further action** or from a decision to impose an administrative sanction” (emphasis added). However, the body of the provisions under this heading make no reference to decisions to take NFA and only gives a right of appeal against decisions to impose administrative sanctions. As there was previously a right of appeal under the old Code in relation to administrative sanctions and none in relation to NFA decisions, this appears to be an example of an inadvertent mistake in the transfer of the old NFA powers in the Code to the new Handbook.

Addressing the current anomalies in the application of NFA

22. The BSB recognises that the problems identified above regarding the use of the PCC’s power to take NFA decisions arise from a lack of detailed consideration of the practical implications of combining the enforcement regime in the Handbook with the old policy on NFA decisions. As a result, a complex and unsatisfactory situation has emerged in relation to the application of the NFA provisions under the Handbook. This was not intended and needs to be remedied.

23. At an early stage of the introduction of the Handbook, the PCC recognised that there existed problems with the application of NFA decisions and that the guidance relating to NFA decisions under the old Code of Conduct could not be applied. For this reason the PCC has not been able to consider the use of NFA when taking decisions but the position has been monitored. Experience shows that there are few, if any, circumstances in which the NFA provisions could be effectively applied in their current guise and, in any event, they were of limited applicability under the old Code. It has been possible to operate over the first year of the Handbook without using the power to impose NFA as, almost inevitably, no circumstances have arisen where it would have been possible, or appropriate, to make such a decision. Nevertheless, the BSB considers that it is unsatisfactory to retain a power that cannot be used effectively.

24. Consideration has been given to whether the application of the power to take NFA decisions could be made more coherent by removing the provisions relating to a barrister’s right to have a matter referred to a Tribunal. However, such an amendment alone would result in unfairness as regulated persons would still be exposed to NFA decisions being disclosed to third parties without the option to have the matters considered by an independent panel. Therefore removing the right to have a matter referred to a Tribunal would need to be combined with amending the regulations relating to the disclosure of NFA decisions to third parties and/or providing for a route of appeal.

25. The provisions relating to the imposition of administrative sanctions now included in the Handbook allow for any breach (proved on the balance of probabilities) to be dealt with by means of a formal warning, which is not currently disclosable. Such a power would seem to cover the overwhelming majority of circumstances where there has been a breach of the Handbook that falls short of professional misconduct and where there are

circumstances that would not warrant the imposition of the more serious administrative sanction of a fine up to £1,000. Where a matter is serious enough to warrant a referral to disciplinary action for professional misconduct, the view is that such a referral should be made. It will then be a matter for a Tribunal to decide whether the imposition of a disciplinary sanction of “no further action” is appropriate.⁹ If the circumstances are so exceptional as to warrant no action at all by the BSB, then a dismissal of the complaint could be appropriate; hence the BSB’s proposal to extend the circumstances in which complaints can be dismissed by the PCC to reflect the previous powers available to the PCC under the old Code (see paragraph 31 below).

26. It appears that the only hypothetical circumstances in which a decision to take NFA might play a role are where:
- a) a complaint is serious enough to amount to professional misconduct and so may not be suitable for an administrative sanction, but the PCC considers that there is no realistic prospect of the conduct being proved to the criminal standard; or,
 - b) the circumstances outlined in a) above apply except for the fact that the PCC considers there is a realistic prospect of success in achieving a finding of professional misconduct but the facts surrounding the conduct do not warrant a referral to disciplinary action.
27. In the circumstances outlined in paragraph 26, the proposal to revise the terms of the Complaints Regulations (see below) would mean that such cases would either have to be dismissed or an administrative sanction imposed – even though, but for the evidential issues, such a sanction would not have been considered. Nevertheless, the terms of regulation E37.2 are wide enough to encompass such decisions and if the ability to dismiss complaints, where there has been a breach, is reinserted there will be additional flexibility to deal with the situations outlined in paragraph 26.
28. It is recognised that, in very rare cases, the proposed revisions could result in barristers who have committed professional misconduct having complaints against them dismissed. However, such dismissals would only occur in exceptional circumstances where it is proportionate to the situation, for example, where a barrister is suffering from a terminal illness.
29. The BSB considers the risks of the circumstances outlined in paragraph 26 arising to be sufficiently low as to not require a substantial recasting, at this point in time, of the Complaints Regulations. Nevertheless, some amendments are clearly required as the application of the PCC’s power to take NFA, as currently drafted, is fraught with complexities, which were not originally intended by the drafters.
30. A fundamental review of the Complaints Regulations is planned for 2016/17. At that time, the range of powers available to the PCC will be considered in more detail – including

⁹ Regulation E159 of the Disciplinary Tribunal Regulations 2014, Part 5, Section B of the Handbook, gives a Disciplinary Tribunal the power to impose a disciplinary sanction of “no further action” following a finding of professional misconduct. Given the inclusion of the PCC power to NFA in the current definition of professional misconduct, this may lead to confusion.

whether, with insights from greater experience of the operation of the Handbook, they are sufficient and proportionate. At that stage, if not before, the BSB will also consider revising the approach to disclosure of PCC decisions to impose administrative sanctions. However, at present, such wider issues are not considered appropriate for a decision in the absence of a robust evidence base to support it.

Question 1: Do you agree that there is a need to amend the Complaints Regulations in the BSB Handbook in relation to the application of NFA decisions?

Proposal

Option 1

31. In order to address the problems set out above regarding the application of NFA decisions by the PCC, the BSB's preferred option is to remove the power entirely from the regulations but reinstate the power, previously available under the old Code, to allow the PCC to dismiss complaints where it considers there has been a breach of the Code but no form of sanction is warranted, taking into account the circumstances, the risk posed, and the enforcement strategy.
32. However, there are also other options (although not favoured by the BSB) available to address the situation. These are:

Option 2

33. The PCC's power to take NFA is retained, but the right to have a matter referred to a Tribunal is removed. There is put in place a clear appeal process relation to NFA decisions and the BSB policy on disclosure of NFA decisions is immediately revised to bring it in line with the current disclosure of administrative sanctions (ie, NFA decisions are not disclosed). This would allow for NFA to be used where a breach of the Handbook has been established to the PCC's satisfaction but no sanction is warranted. The option appears to have some merit. However, it produces a result that requires substantial amendment to the regulations for relatively little gain. It is highly unlikely that many, if any, cases would be considered under such a revised scheme, taking into account the available power to impose an administrative warning. Further, there would be high potential for confusion between the old Code of Conduct NFA regime and the new one. Nevertheless, this option has been considered and could be implemented.

Option 3

34. The PCC's power to take NFA is retained; the option for referral to a Disciplinary Tribunal is removed; a clear appeal process is established; but NFA decisions are still disclosed. This is the least favoured option because it could produce unfair results as NFA decisions would be made on the balance of probabilities and would still be disclosed as compared to the current non-disclosure of decisions to impose administrative sanctions.

Conclusions

35. Whichever option is adopted, the BSB considers it essential that any uncertainty in how the PCC's powers are applied should be eliminated. However, without a substantial recasting of the Complaints Regulations to allow for the creation of a new form of NFA decisions, its view is that, in practical terms, the power of the PCC to take NFA decisions in a coherent manner is severely limited. The most transparent option is to remove the power entirely. This would also have the advantage of removing the risk of unintended consequences in the creation of a new form of NFA in a different guise as outlined in Options 2 and 3.
36. Whatever option is adopted, the proposals are designed to be a "tidying up" exercise that will:
- a) remove the complexity and anomalies currently evident in the Complaints Regulations relating to NFA decisions;
 - b) align the various provisions of the Complaints Regulations with the definition of professional misconduct;
 - c) retain a level of flexibility in dealing with breaches of the Handbook that fall short of professional misconduct; and,
 - d) provide greater clarity for the profession, consumers, and the public in the application of the powers available to the PCC.
37. Accordingly, the BSB's preferred and formal proposal is to adopt Option 1 above by:
- a) removing the PCC's power to take "no further action" decisions as a final outcome of a complaint and, in consequence, amend the definition of professional misconduct to remove reference to NFA; and,
 - b) removing the restriction on the PCC's powers to dismiss complaints as set out in E37.1 to allow it to dismiss complaints where it considers this to be appropriate and consistent with the enforcement strategy – even where the complaint might constitute a breach of the Handbook.

Question 2: Do you agree with the BSB's formal proposal (Option 1) to address the anomalies in relation to the application of the PCC's power to take NFA decisions by removing the power and taking the actions set out at paragraph 31 above?

Question 3: If you do not agree with Option 1 above, do you have a preference, or any views, on Options 2 and 3 as outlined at paragraphs 33 and 34 above?

Amendments to the Handbook

38. The amendments to the Handbook required as a result of this consultation will depend on the responses received. The BSB does not intend to consult further on the detail of the relevant amendments but, considering the options presented, the amendments will consist of a combination of the following, if applicable:

- i. deletion from regulation E8.2 of the words “or take no further action on”;
- ii. E37.2 is amended to read ‘that the conduct did constitute a breach of the Handbook (on the balance of probabilities) but that, in all the circumstances, no enforcement action should be taken in respect of the breach in which case the PCC must dismiss the complaint and rE43 to rE45 apply’;
- iii. deletion of regulations E46 to E49 in their entirety or adaptations to these regulations;
- iv. deletion of the words “take no further action” from regulation E39;
- v. amendment to regulation E69.2.c to read “*there are no exceptional circumstances which would warrant the complaint being dismissed*”;
- vi. deletion of the words “*from a decision to take no further action or*” from the sub-title relating to appeals under section A6 of the Complaints Regulations. Alternatively, if NFA remains in some form, inclusion of a right of appeal to such decisions; and,
- vii. amendment to the definition of professional misconduct set out at definition 166 in Part 6 of the Handbook to remove the reference to NFA. (This would also remove any confusion that could be caused by the Disciplinary Tribunal having a power to impose “no further action” as a disciplinary sanction).

Summary of questions

- **Question 1:** *Do you agree that there is a need to amend the Complaints Regulations in the BSB Handbook in relation to the application of NFA decisions?*
- **Question 2:** *Do you agree with the BSB’s formal proposal (Option 1) to address the anomalies in relation to the application of the PCC’s power to take NFA decisions by removing the power and taking the actions set out at paragraphs 31 above?*
- **Question 3:** *If you do not agree with Option 1 above, do you have a preference, or any views, on Options 2 and 3 as outlined at paragraphs 33 and 34 above?*

Responding to this consultation

39. Responses to this consultation should be sent to Siân Mayhew, Policy and Projects Officer in the Professional Conduct Department, at smayhew@barstandardsboard.org.uk
40. If you wish to discuss any issues raised in this consultation, please contact Sara Jagger, Director of Professional Conduct at sjagger@barstandardsboard.org.uk or on 020 7611 1355.
41. Responses should be received no later than **10 April 2015**.