

BAR STANDARDS BOARD

REGULATING BARRISTERS

Part 1 - Public**Minutes of the Bar Standards Board meeting**

Thursday 18 September 2014, Room 1.1, First Floor
289 – 293 High Holborn, London, WC1V 7HZ

- Present:** Ruth Deech QC (Hon) (Chair)
Patricia Robertson QC (Vice Chair)
Rolande Anderson
Rob Behrens
Malcolm Cohen
Simon Lofthouse QC
Tim Robinson
Andrew Sanders
Anne Wright
- By invitation:** Sarah Brown (Special Adviser) – by phone for items 1-4
Isobel Leaviss (Independent Observer)
Emily Windsor (Special Adviser)
- BSB Executive in attendance:** Vanessa Davies (Director General)
Chloe Dickinson (Governance Support Officer)
Joanne Dixon (Qualifications Manager)
Marion Huckle (Policy & Quality Assurance Manager)
Sara Jagger (Director of Professional Conduct)
Andrew Lamberti (Communications Manager)
Ewen Macleod (Director of Regulatory Policy)
Chris Nichols (Supervision Policy Manager)
John Picken (Board & Committees Officer)
Pippa Prangley (Regulatory Risk Manager)
Amanda Thompson (Director of Strategy & Communications)
Simon Thornton-Wood (Director of Education & Training)
Stephanie Williams (Legal and Policy Assistant)
- Bar Council Executive in attendance:** Poli Avramidis (Chief Information Officer)
Mark Hatcher (Special Adviser to the Chairman of the Bar Council) – items 1-5
- Press:** Catherine Baksi (Law Society Gazette)

Item 1 – Welcome and introductions**ACTION**

1. The Chair welcomed members and guests to the meeting, in particular Isobel Leaviss (Independent Observer) who had been invited to present her annual report to the Board.

Item 2 – Apologies

- Justine Davidge;
- Sarah Clarke;
- Sam Stein QC;
- Richard Thompson;

- Stephen Crowne (Chief Executive, Bar Council);
- Nick Lavender QC (Chairman, Bar Council);
- Viki Calais (Business Manager);
- Oliver Hanmer (Director of Supervision).

Item 3 – Members’ interests and hospitality

2. None.

Item 4 – Entity Regulation

BSB 062 (14)

3. The Board considered an updated version of a paper on proposals to amend the Handbook on entity regulation. This followed consultation on rule changes to enable the BSB to regulate entities on a contractual basis, pending receipt of its statutory powers. The original paper was revised following the late receipt of a consultation response from the Bar Mutual Indemnity Fund (BMIF).
4. Ewen Macleod highlighted the following:
- the consultation raised several issues of concern ie:
 - ❖ the extent of proposed statutory intervention powers;
 - ❖ proposals concerning contractual remedies involving powers of the BSB to enter premises and access / control client files;
 - ❖ the potential threat of a significantly reduced membership of the BMIF should large numbers of single person entities come into existence. This would act against the public interest as it would no longer be possible to provide blanket cover under the mutual model. This could increase insurance costs for clients and cause instability and uncertainty within the market;
 - ❖ concerns expressed by the Legal Ombudsman and the Legal Services Consumer Panel that:
 - the proposed minimum level of cover (£500k) is too low, citing a lack of evidence to justify this level;
 - the minimum terms should focus on vulnerable clients but others should have an option to insure under different terms;
 - inclusion of an aggregate claim limit might mean consumers are not fully compensated.
5. He added that:
- the s69 powers consultation will address issues raised on statutory intervention powers;
 - the powers to enter premises and access / control client files will only be used in extreme circumstances when no other option is available to protect client interests eg to access abandoned chambers;
 - the BMIF has since provided more evidence to justify the proposed minimum cover level and advised that a move away from the same terms for all could risk clarity over cover, particularly if the “vulnerable” status of the client changed over time. Moreover a clause on aggregation is necessary as its omission would act as a significant disincentive for any reputable insurance company to provide cover for those entities the BSB wishes to regulate;
 - the Entity Working Group considers there is merit in the public interest arguments of the BMIF, given the expectation that, initially, most new entities will be single person companies. In consequence it believes the BMIF should be permitted to extend its monopoly to cover single person entities.

6. Members commented as follows:
- the key question is whether single person entities should be compelled to insure with BMIF. There is a risk of unintended consequences were this not to happen and we need to balance the public interest of retaining the mutual model with market freedom;
 - one option is to require single person entities to insure with BMIF but to review this model after a defined period of time (possibly two years after the date of authorisation of the first single person entity);
 - the BMIF submission is persuasive and also helpful insofar as it clarifies misunderstandings evident from other responses, notably that of the LSB Consumer Panel. The Act requires entities to be regulated so a viable insurance model is needed in order that they can be established; consumer interest required stability, experience and certainty in entity insurance;
 - there is very little difference between the work of a self-employed barrister and a single person entity and the BMIF position seemed best fitted to achieve the desired outcome. Once entities are established other market providers might come forward. A review may be necessary but a two year lead-in period may give sufficient time. We should monitor and review when there is sufficient evidence to hand;
 - the minimum cover level required by the SRA is currently higher than that proposed by the BSB (£500k) (although the SRA is consulting on reducing the stipulated minimum cover to £500k);
 - one of the proposed rule changes relates to provision of information to the BSB (rC64). Such documents fall under the privilege of the client rather than the regulator and it would be helpful to understand how this will apply in practice.
7. In response, the following comments were made:
- the minimum cover applies to individual claims – it does not represent the total limit;
 - the Handbook requires an entity to hold insurance levels appropriate for its business and this figure may be well above the minimum threshold;
 - the SRA threshold is higher because solicitors hold clients' money and the risks involved are correspondingly different;
 - regarding the provisions of rC64, we can either obtain client consent up front or hold documents securely (without reading them) until such consent is obtained. The key issue is that the rule allows documents to be appropriately safeguarded;
 - the review time limit could be agreed in principle but should also take into account annual renewal cycles and other administrative considerations that will have a practical bearing on the outcome.
8. **AGREED**
- | | | |
|----|--|-------------------|
| a) | to note the issues raised by respondents to the consultation. | |
| b) | to approve the proposed amendments to the BSB Handbook as outlined in the consultation. | EM to note |
| c) | to approve the proposed principles for minimum insurance terms and delegate to the Handbook Working Group responsibility for publishing detailed minimum terms guidance in the light of these. | EM to note |
| d) | approve the further recommendation that single person entities be required to insure with the BMIF, which seemed best fitted to safeguard the public interest and consumer interest but that this be reviewed after a period of time (in principle, two years after the date of authorisation of the first entity, subject to practical administrative issues such as renewal cycles). | EM to note |

- e) to note the commitment to keep insurance terms under review as experience of entity regulation develops.

Item 5 – Professional Conduct Committee / Professional Conduct Department Enforcement Annual Report 2013/14

BSB 063 (14)

9. Simon Lofthouse QC referred to the Annual Report for the Professional Conduct Committee and Professional Conduct Department for the year 1 April 2013 - 31 March 2014. He highlighted the following:
- there has been a significant fall in the number of internal complaints following changes to CPD regulation. The number of external complaints has remained the same;
 - there has been a rise in the number of barristers either disbarred or suspended;
 - the KPI target for concluding cases within service standard deadlines was achieved last year (76.7% against a target of 75%). The KPI threshold has now been raised to 80%;
 - satisfaction ratings on complaints handling has improved, particularly in relation to accessibility and transparency and openness.
10. With reference to KPIs, he also referred to the quarterly performance report presented to the Board on 11 September by the Chair of the Planning, Resources and Performance Committee. This showed a noticeable fall in Operating Performance Indicators (OPIs) which had caused a failure to achieve the overarching KPI standard for Q1 (2014/15). The following points were made:
- the OPIs were affected by the nature of the cases that were closed during the Q1 period. Several were older cases which took longer than usual to resolve either because of their complexity or because of successive procedural challenges on the part of the barrister concerned. This consequently affected the performance figures but does not imply any loss of productivity within the Department;
 - rather than look at statistics in isolation, we should consider the trend over time. This continues to show improvement in overall terms to the extent that the revised target (80%) can realistically be achieved.
11. He added that:
- the PCC now has near parity in terms of lay / barrister member numbers (22 lay / 24 barrister);
 - we continue to rely on the pro-bono support of prosecutors in pursuing enforcement work and the Committee is very grateful for their commitment and professionalism;
 - several action points have been identified as set out in paragraph 5.7 of the report.
12. He concluded by thanking the staff of the Department for their continued efforts during a period of significant change, in particular to Sara Jagger (Director of Professional Conduct) and Paul Martyn (Reports and Data Analysis Officer).
13. Members commented as follows:
- it would be useful to know more about the “determination by consent” procedure ie where, with the barrister’s agreement, PCD staff can make a finding of professional misconduct and apply appropriate sanctions;
 - the Bar Council was initially sceptical of the ability of the Legal Ombudsman to make a consistent and clear distinction between service and misconduct complaints. It would be helpful to know what has happened in practice;

- the statistics do not give the overall time frame from the date a complaint is received to the date it is finally resolved. This length of time is important from the complainant's perspective and should be recorded;
 - it would be helpful to know how we monitor the e&d impact of regulatory decisions on enforcement;
 - if KPIs are being missed because of long-running cases, it would be useful for the PRP Committee to be appropriately informed;
 - it is pleasing to note that we have achieved near parity in barrister / lay member representation. There was considerable disquiet expressed when this was first suggested but any fears have since proved groundless.
14. In response the following comments were made:
- determination by consent is working effectively. A Monitoring Committee has been established to check decisions made by staff and, to date, there have been no disagreements encountered;
 - there is no evidence to suggest the Legal Ombudsman is failing to identify cases of misconduct. A 10% sample of cases is routinely given to the BSB to check and this has not identified any anomalies;
 - the end-to-end timeframe could be measured but statistical returns would still be affected by external factors. When a case goes to tribunal, the BSB effectively loses control of the governing procedures. Cases are currently judged against the criminal standard which can also add to the preparation time. Nevertheless end-to-end times could be included in future reports, albeit with some caveats;
 - a meeting with the Bar Tribunal and Adjudication Service (BTAS) has been arranged for the autumn. One of the agenda items will concern KPIs for tribunal services;
 - e&d data about complaints is captured at source and subsequently analysed by the BSB's Research Team. The next full report is due in 2015;
 - efforts will be made to keep the PRP Committee appropriately informed of long running cases.
15. **AGREED**
- a) to note the report and to endorse the conclusions and action points contained therein.
 - b) to include information on end-to-end times for case resolution for future reports.
 - c) to ensure that the PRP Committee is informed about long-running cases should these detrimentally impact on performance figures.

VLD to
note

SJ / PM

SJ

Item 6 – Governance of Education and Training

BSB 064 (14)

16. The Board considered a paper concerning revisions to the Terms of Reference and scheme of delegation for the Education & Training Committee. It also received a tabled paper setting out a further revision to Annex 2 (the E&T Committee's Terms of Reference). In addition, Members noted that Rolande Anderson has now joined the Legal Education and Training Review (LETR) Change Programme Board (*full membership is Andrew Sanders, Rolande Anderson, Justine Davidge, Jane Walshe and Simon Thornton-Wood*).

17. Simon Thornton-Wood referred to the need to have a clear statement on the remit of the Education & Training Committee and how powers are delegated to Sub-Committees and, in particular, the LETR Change Programme Board. The Committee's existing Terms of Reference (ToR) could be interpreted in several ways leading to confusion and challenge. The new ToR also reflects the Board's vision to delegate greater decision-making into the executive.
18. Members commented as follows:
- unless there is an urgent or otherwise compelling reason for a paper to be tabled, then this should be avoided. In this context it is unfortunate that the revised Annex was distributed in this way;
 - the scheme of delegation (Annex 3) is difficult to interpret and the reason for the changes included in the tabled paper is not immediately clear;
 - as drafted, paragraph 3 implies the Committee is making decisions on regulatory requirements, whereas this is the preserve of the Board;
 - the wording in paragraph 1 relates to "formulation of policy". This could result in the Board being excluded from the debate on policy making, even though it retains the power of approval;
 - there needs to be a clear definition, and shared understanding, of terms used in the context of the ToR. This includes "oversee" (paragraph 2) and "implement" (paragraph 3).
19. In response, the following comments were made:
- the LETR Change Programme Board is due to meet on 29 September 2014 to approve the Project Initiation Documentation. Its delegated powers therefore need to be agreed before this date;
 - it may be possible to find an interim solution to the vires issue of the LETR Change Programme Board. Assuming that to be the case, it would be possible to re-visit the ToR and scheme of delegation at the next meeting.
20. **AGREED**
- a) to note the paper and to request that the revised Terms or Reference of the Education & Training Committee and associated changes to the scheme of delegation be considered again at the Board meeting on 23 October 2014. **JP to note**
- b) that Vanessa Davies consider options to enable the LETR Change Programme Board to function within the existing governance framework during the interim period. **VLD**

Item 7 – GRA Committee report to the Board (including the Annual Report from the Independent Observer)

BSB 065 (14)

21. Isobel Leaviss presented her Annual report. The salient points were:
- the report covers the period June 2013-June 2014 and focuses on the operation of the enforcement system;
 - it provides a substantial level of assurance that the enforcement system has operated in accordance with its aims and objectives;
 - her six monthly report to the GRA Committee in October had been much more cautious in tone. This was because the Professional Conduct Department was facing considerable pressure from a number of factors. These included work on the Handbook, high staff turnover, key staff absence due to illness, extra work generated by contested cases and challenges to historic cases following the publication of the Browne report which had highlighted Tribunal panel appointment anomalies.

Notwithstanding these pressures, overall performance had been sustained at a high level;

- eleven recommendations were made during the year to improve enforcement related processes. These had all been accepted and the majority have already been implemented;
- the BSB website has a greater volume of information on enforcement but site navigation could be improved to improve transparency and accessibility. A project to do this is underway;
- the BSB now publicises more about its enforcement activities. Even so, there is still considerable scope to enhance understanding of this role among the profession, consumers of legal services and the wider public;
- the corporate process for the recording, handling and monitoring of complaints about the BSB's services (including PCD) could be improved.
- her work for the immediate future will include the following:
 - ❖ case files not categorised as complaints;
 - ❖ monitoring of compliance with regulatory decisions;
 - ❖ complaints concerning PCD staff, prosecutors and PCC members (known as "professional complaints").

22. Members thanked Isobel for her comprehensive report. In response to a question about her term of office, she confirmed that this will now continue until 31 May 2016 (in all, a five year term from her original appointment date of 1 June 2011, though this is the cumulative effect of a succession of extensions to shorter term contracts).

23. The following comments were made:

- the role of Independent Observer was first mentioned in 2007 and doubts were expressed at the time as to its likely effectiveness. These reservations have since been proved groundless as significant improvements have been made as a result of the IO's observations;
- the Ombudsman Association recommends that Independent Observers are appointed for a full five year term in order that their independence is not compromised. We should bear this in mind when a replacement appointment is made in June 2016;
- it is not clear if the sample case files referred to in paragraph 2.1 of the report are selected by staff or by the Independent Observer, or what proportion these represent of all cases;
- it would help to have specific examples of how the BSB could enhance wider understanding of its enforcement role;
- in respect of the latter point, the BSB's Annual Report included case studies to good effect and there may be scope for extending this idea to information held on the website about enforcement.

**AT to
note**

**SJ to
note**

24. In response, the following comments were made:

- the Independent Observer confirmed that she had selected sample files herself and agreed to feedback on the proportion that these represented (see below);

Post meeting note:

The IO has since indicated that in addition to the case papers she had reviewed for PCC meetings and the Tribunals she had attended, she had reviewed 45 case files. The vast majority of these were closed case files. To put this in some context, the PCD opened 408 new cases in 2013/14 and had 334 active cases at the end of the fourth quarter.

- the earlier reports to the GRA Committee included some suggestions as to how wider understanding of the BSB's enforcement role could be achieved. Isobel Leaviss subsequently met Tim Robinson to discuss these communication issues. Currently the Chair's fortnightly briefing to the profession does include regular updates about enforcement but there is still no such feature in Counsel magazine, even though this was suggested several years ago;
- it might be useful to include some regulatory commentary about general caseload volumes and outcomes in press releases for disbarments to give them the appropriate context.

AL to
note25. **AGREED**

- a) to note the report and to receive the Assurance Statement included as part of the Annual report of the Independent Observer.
- b) to publish the IO's report (June 2013-14) on the BSB website.

FM

Item 8 – Chair's Report on Visits and Meetings: July-Sept 2014

BSB 066 (14)

26. The Chair referred to the Policy Forum event held on 4 September 2014 entitled "The future of legal services regulation". Sir Michael Pitt, Chairman of the Legal Services Board, spoke at this event and commented that:
- there is general agreement that the Legal Services Act is imperfectly drafted and there is scope to improve the structure of legal regulation;
 - the regulators themselves need to lead this discussion as there is no clear consensus as yet;
 - there may be some doubt as to the longer term future of the Legal Services Board but this is by no means certain.

27. The Chair added that there have been significant changes in the senior leadership of both the SRA and the LSB and this could also alter perspectives.

28. **AGREED**

to note the report.

Item 9 – Director General's Report

BSB 067 (14)

29. Vanessa Davies highlighted the following:
- further to the Policy Forum referred to above, there will be a Regulators' Summit meeting on 2 October 2014. Feedback will be available for the Board at the October meeting;
 - all BSB Committee Members have been contacted regarding extensions to terms of office pending a wider governance review. However not all have responded to indicate whether or not they wish to continue. It would be helpful if Committee Chairs could remind them about this.

JP / VLD
to noteComm
Chairs
to note30. **AGREED**

to note the report.

Item 10 – Any Other Business31. Board Appointments

The Chair announced the appointment of the following new Board Members:

- Adam Solomon (barrister member) – takes up the role with effect from 1 January 2015;

- Andrew Mitchell QC (barrister member) – takes up the role with effect from 1 January 2015;
- Nicola Sawford (lay member) – takes up the role with effect from 1 September 2015.

32. Lay PRP & Qualifications Committee Member, Keith Baldwin, will also be invited to attend meetings as a non-voting special adviser to the Board with effect from 1 January 2015. This is for a two-year period to 31 December 2016. The appointment is to assist with the Board's activities – particularly those centred on finance and efficiency, and major IT projects. If a lay board member vacancy should arise between 1 September 2014 and 31 August 2016, this will be offered to him.

Item 11 – Date of next meeting

33. Thursday 23 October 2014.

Item 12 – Private Session

34. The following motion, proposed by the Chair and duly seconded, was agreed:

That the BSB will go into private session to consider the next items of business:

- (1) Regulatory Standards Framework – self assessment 2014-15;
- (2) Update on LETR Change Programme;
- (3) Any other private business.

35. The meeting finished at 6.05 pm.