



Bar Council response to the LSB enforcement policy and rules of procedure consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board consultation paper entitled 'LSB enforcement policy and rules of procedure'.¹
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council welcomes the opportunity to comment on the LSB's enforcement policy, rules and procedure. We can see merit in the proposal to review this documentation given the inconsistencies that exist between the various versions of the rules. We recognise that a balance has to be struck between expressing policy in such general terms so as to have no great use and too much detail that may result in challenges by those who are the subject of an investigation if a particular issue is not included in the policy. We hope that the comments that we make in this response are given the appropriate weight since we speak from direct experience.

¹ Legal Services Board (2017) *LSB enforcement policy and rules of procedure*

Comments on the draft proposed statement of policy for enforcement

5. The Bar Council welcomes the changes that are outlined at page 3 of the statement of policy that provide further clarity about the role of the LSB with respect to enforcement and the statutory source of its functions.

6. We note that a considerable amount of guidance has been removed in the section that covers the LSB's approach to enforcement action at page 6 and we are concerned that the brevity of the new section does not provide sufficient information for approved regulators seeking information about how and when the LSB might take enforcement action, and for LSB staff seeking to interpret the policy and decide what action might be appropriate. The uncertainty may result in different approaches to enforcement, which could be exacerbated by staffing changes at the LSB.

7. The previous version of the policy provided guidance as to what might be considered to be an 'unreasonable' action by an approved regulator. It stated that 'in most circumstances it is unlikely that the LSB would consider an action or omission unreasonable merely because we would have acted differently or that the action or omission has had or is likely to have had an adverse impact on one or more of the regulatory objectives.' It clarified that the LSB would consider the rationale for the act in coming to a decision. We considered it to be a useful indicator as to the approach of the LSB and a useful reminder of what we are all seeking to achieve vis-a-vis the regulatory objectives. In the revised version, there is no guidance provided about how 'unreasonableness' might be defined. The new version states that the LSB will consider 'all the circumstances' when coming to a view, but there is less clarity about the threshold required to meet the test. There is also nothing to suggest that the LSB would consider the rationale for the act as there was in the previous version. There is no reason cited in the consultation paper for this change. We are concerned that the new version creates uncertainty for approved regulators and lacks clarity for those who are looking to find out when enforcement policy might be taken although the LSB cites 'clarity and accessibility' as one of the reasons for reviewing the policy. We urge the LSB to reconsider their approach to this section of the policy.

8. It seems to us that there has been a policy change to the way in which the LSB approaches enforcement but this has not been explicitly drawn out in the consultation paper. It may be that this is unintended. In the new 'enforcement process' section at page 7, the revised section on informal resolution states that the LSB may seek to exercise formal enforcement powers if one or more conditions in paragraph 8 are met. One of the conditions at paragraph 8 is that the act or omission has had or is likely to have an adverse impact on one or more than one of the regulatory objectives. The previous deleted guidance on page 6, by contrast, stated that 'in most circumstances it is unlikely that the LSB would consider an act or omission to be unreasonable if it

led to 'an adverse impact on or more of the regulatory objectives.' The new guidance could lead to a different approach taken by the oversight regulator and suggests that the threshold for formal enforcement action has been lowered. Whilst we agree that an action or omission affecting the regulatory objectives may warrant investigation; if this is intended as a policy change, then an explanation and rationale behind such a change ought to have been provided in the consultation paper.

9. On page 8, within the section 'gathering information and deciding to proceed' we note that the LSB has removed the following paragraph of text that provides guidance on when to use less onerous approaches to resolve issues:

'In some circumstances, the LSB must satisfy itself that its less onerous enforcement powers will not adequately address the matter before it uses its more onerous enforcement powers. In addition, financial penalties can only be used in certain circumstances. However the Act places requirements to only use financial penalties in certain circumstances and to ensure that less onerous enforcement powers will not "adequately address" a matter before using more onerous ones but does not otherwise prohibit the LSB from using combinations of enforcement powers. In the event that we decide to take formal enforcement action, we will consider whether a combined approach is the best means of achieving compliance. In order to ensure the rapid mitigation of risks to consumers and citizens, it may well be appropriate to institute a range of measures at an early stage, rather than progress step-by-step. However, our approach will always be proportionate and we will always explain why we have chosen a particular approach. Where we choose to consider the exercise of two or more enforcement powers together then we will ensure that the process that we follow prior to exercise of the power(s) complies with the requirements specified in the Act for all of the enforcement powers that we are considering.'

10. This is a cause for concern to us. We note that the financial penalties section of the policy has been elaborated on page 16 of the policy and the relevant parts of the Act drawn out, which is helpful. However, the other parts of this deleted paragraph provide a helpful steer as to the approach that the LSB might take when deciding what powers to use and this information does not appear to have been replaced elsewhere in the policy. Yet this would appear to be the most appropriate place for it. It is important that the policy is clear and instructive for those who are on the receiving end of a request so that they know what to expect and are able to organise themselves and respond accordingly.

11. The deleted paragraph stipulated that the LSB should consider whether a less onerous approach is possible, yet this has been removed from the current draft. We consider this to be fundamental for proportionate regulation and it is accepted

regulatory best practice. Many will be left wondering whether this deletion will mean that formal enforcement action will be more likely in lieu of the use of less onerous powers. An explanation has not been provided for its deletion.

12. The deleted text also encourages the LSB to explain to the approved regulator why it has taken a particular approach. This helps the approved regulator to understand the backdrop and rationale for the LSB's intended course of action and is important for transparency. We consider transparency to be a hallmark of regulatory best practice. We recommend reintegrating the guidance contained in the deleted paragraph into the current policy.

13. We are concerned that the consequence of deleting this section of the policy, together with the lower threshold for action that may result from the changes that we have outlined in paragraph 8 of this response could lead to more formal investigations being launched when there could be less onerous ways of resolving matters just as effectively. Investigations are expensive and time-consuming and the cost is borne by practitioners through the PCF. It is vital therefore, that the action is proportionate. We think the LSB should give this section of the policy further consideration.

14. The Bar Council welcomes the LSB's proposal to extend the informal resolution policy at page 11 with a new section on 'agreed steps'. This may help the LSB resolve issues in a more proportionate and less-resource intensive fashion. We note that at paragraph 32 of the policy, that the timeline will be set by the LSB and notified to the approved regulator. It could be helpful to consult the approved regulator before this is set to check that this will be workable in practice.

15. We think that the following deleted sentence was helpful because it outlined a reasonable approach to intervention:

'In taking account of the desirability of resolving informally matters which arise between the LSB, an Approved Regulator or the Tribunal, the LSB will comply with the requirement to ensure that its actions are transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.'

16. We are not sure why this sentence was removed from the current version of the policy. It outlines a considered and reasonable approach to enforcement and we suggest that it be reinstated into the policy.

17. The additions to the section on 'financial penalties' at page 16, 'intervention directions at page 18 and 'cancellation of designation as an approved regulator' at page 20 onwards are helpful since they bring out the relevant sections of the Legal Services Act 2007. It is appropriate to include all relevant statutory provisions.

Comments on the rules of procedure

18. We note that oral representations and oral evidence are generally discouraged by the LSB. However we think that it is useful for Approved Regulators to have the option to make such representations. We can see that there may be circumstances when oral representations and oral evidence are more conducive to an informal resolution process. For example they can be useful when describing the context to a particular act or omission and avoid more onerous exchanges of information that may lengthen investigations. It is to the benefit of all parties, including consumers of legal services, that the LSB is able to resolve issues in a quick and efficient manner.

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