

# Consultation on modifying the functions of the Bar Council

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**Response document relating to a recommendation and  
Order to be made under Section 69 of the Legal Services  
Act 2007**

**28 September 2017**

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## Introduction

1. Section 69 of the Legal Services Act (**the Act**) gives the Legal Services Board (**LSB**) the power to make a recommendation to the Lord Chancellor that an order is made to modify, or make other provision relating to, the functions of an approved regulator. Section 70 of the Act sets out the procedural requirements relating to a recommendation.
2. Any order made by the Lord Chancellor under section 69 of the Act must be made by statutory instrument<sup>1</sup> through the affirmative procedure,<sup>2</sup> ie approved by both the House of Commons and the House of Lords to become law.<sup>3</sup>
3. In accordance with section 70(2) of the Act, on 30 August 2016 the LSB published and invited representations on a draft of a proposed recommendation and a draft of a proposed order to modify, or make other provision relating to, the functions of the General Council of the Bar (**Bar Council**).<sup>4</sup> The consultation closed on 22 November 2016. A final draft order has since been produced and will be attached to the recommendation that will be made to the Lord Chancellor (see paragraph 62 below).
4. The Bar Council is an approved regulator under the Act, which has historically regulated the conduct of individual barristers. In view of the Act's requirement for separation of representative and regulatory functions, the Bar Council established and delegated its regulatory functions to the Bar Standards Board (**BSB**). References in this paper to the Bar Council exercising regulatory functions should therefore be read as to the BSB.
5. This order follows decisions by the LSB to grant applications by the BSB: in 2014 for approval of changes to BSB regulatory arrangements to enable the authorisation and regulation of entities; and in March 2016 for the BSB to be designated as a licensing authority. Among other things, this order will facilitate appellate arrangements (including as a licensing authority). It will also will place some of the powers of the BSB over persons regulated by it on a statutory basis, replacing existing contractual type arrangements.

## Background

6. In September 2013, the Bar Council amended its constitution (which determines and constrains the powers and functions that can be delegated to the BSB) to allow the BSB to make regulatory arrangements for the authorisation and regulation of non-barristers, including entities. This provided the BSB with a basis for entering into a contract with entities (as it already did

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<sup>1</sup> Section 204 (1) of the Act.

<sup>2</sup> Section 206 (4)(h) of the Act.

<sup>3</sup> Section 206 (5) of the Act.

<sup>4</sup>[http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/open/pdf/2016/2016\\_08\\_30\\_BSB\\_s69\\_order\\_consultation\\_FINAL.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/2016/2016_08_30_BSB_s69_order_consultation_FINAL.pdf)

with individual barristers), with those entities and their management agreeing to be regulated by the BSB and to adhere to its rules as part of the authorisation process.<sup>5</sup>

7. Under the Act, the BSB authorises individual barristers to carry on reserved legal activities. The BSB applied to the LSB in June 2014 to extend its remit to include the regulation of entities. The application comprised of a number of changes to the BSB Handbook to make it applicable to entities and those working in them. In reaching a decision on whether to approve the change to the regulatory arrangements, the LSB had to be satisfied that the BSB had the power to make the proposed changes.
8. Work with the BSB to identify the source of its powers to regulate entities, in addition to individual barristers, concluded that there is presently no statutory basis for this.<sup>6</sup> Our decision notice on the BSB's 2014 application, stated that the existing voluntary basis for regulation may be appropriate for arrangements where the interests of the approved regulator and the regulated person are aligned.<sup>7</sup> However, enforcing remedies under contract may present risk in contentious situations where parties may not necessarily cooperate. Therefore, we considered that grounding enforcement powers in statute is vital for consumer protection.
9. In March 2016, the LSB granted an application submitted by the BSB under Part 1 of Schedule 10 to the Act, seeking a recommendation to the Lord Chancellor that an order be made designating the Bar Council as a licensing authority.<sup>8</sup> The LSB made its recommendation on 17 May 2016<sup>9</sup> and the Bar Council's designation came into effect on 17 February 2017.<sup>10</sup> As confirmed in paragraph 6 above, the Bar Council has delegated this and all of its other regulatory functions to the BSB.
10. In order to be designated, there must be in place an appellate body to hear and determine appeals about the decisions of the licensing authority. At present, appeals from entities and alternative business structures (**ABS**) are heard by the High Court. On 17 May 2016 the LSB also made a recommendation under section 80 of the Act<sup>11</sup> to establish the General

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<sup>5</sup> Bar Council powers come from the agreement of its members and those it authorises to be bound by the constitution (and hence regulatory arrangements)

<sup>6</sup> The LSB and BSB jointly sourced an opinion from Nigel Giffen QC which supported the LSB's view that section 20(6) of the Act is not itself a source of vires but is concerned with where the power to authorise lies, in terms of the scheme of regulation laid down by the Act.  
<sup>7</sup>[http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/20141201\\_BSB\\_DN\\_For\\_Website.pdf](http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/20141201_BSB_DN_For_Website.pdf)

<sup>8</sup> See: Bar Standards Board licensing authority application

[http://www.legalservicesboard.org.uk/Projects/statutory\\_decision\\_making/BSB\\_Licensing\\_Authority\\_Application.htm](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/BSB_Licensing_Authority_Application.htm)

<sup>9</sup>[http://www.legalservicesboard.org.uk/Projects/statutory\\_decision\\_making/pdf/2016/20160517\\_MP\\_To\\_MG\\_Letter\\_Re\\_BSB\\_LA\\_Recommendation.pdf](http://www.legalservicesboard.org.uk/Projects/statutory_decision_making/pdf/2016/20160517_MP_To_MG_Letter_Re_BSB_LA_Recommendation.pdf)

<sup>10</sup> <http://www.legislation.gov.uk/uksi/2017/27/introduction/made>

<sup>11</sup> Which enables the Lord Chancellor by order to establish a body to hear and determine appeals by alternative business structures against licensing decisions.

Regulatory Chamber of the First-tier Tribunal (**FTT**) as the appellate body for Bar Council licensing authority decisions.<sup>12</sup>

11. The order proposed under section 69 of the Act would enable the BSB to make regulatory arrangements that would give effect to the appeal arrangements described above. It would also provide the BSB with comparable powers when dealing with entities to those conferred on it by the Act in relation to the regulation of ABS by virtue of designation as a licensing authority.
12. Some, but not all, of the powers described in the draft order were consulted on previously by the BSB. Where this was not the case, the LSB consultation highlighted the changes. Some of these changes of approach had emerged as consideration was given to drafting the order, with focus on the ability of the BSB to respond to risks associated with the different business structures it regulates over time.
13. The proposed changes were:
  - i) [Article 3](#) – *appeals*: the power to make regulations or rules allowing for appeals to the FTT against decisions made by the Bar Council (including arrangements enabling the FTT to suspend decisions where an appeal has been brought but not yet determined by the FTT)
  - ii) [Article 4](#) – *intervention*: to apply (with some amendments) provisions of Schedule 14 to the Act (a licensing authority’s powers of intervention) to the Bar Council as an approved regulator of individual barristers and entities<sup>13</sup>
  - iii) [Article 5](#) – *information gathering*: to allow for the gathering of documents and other information from individual barristers and entities for the purpose of assessing compliance with rules or regulations or any code issued by the Bar Council in its capacity as an approved regulator, with the ability to seek enforcement through the High Court
  - iv) [Articles 6 and 7](#) – *disciplinary arrangements*: to allow for disciplinary arrangements to apply to all persons regulated by the Bar Council<sup>14</sup> that, among other things, may include:

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<sup>12</sup>[http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/closed/pdf/2016/20160517\\_MP\\_To\\_MG\\_Letter\\_Re\\_LSB\\_S80\\_Recommendation.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/2016/20160517_MP_To_MG_Letter_Re_LSB_S80_Recommendation.pdf)

<sup>13</sup> Bodies that are not alternative business structures for the purposes of part 5 of the Act.

<sup>14</sup> Section 21(3) of the Act.

- the revocation or suspension of authorisation
  - the imposition of conditions on authorisation
  - financial penalties
  - disbarment or disqualification from specified activities
- v) [Article 8](#) – *practice rules on engaging disqualified individuals*: the power to require barristers and entities to check the BSB’s list of disqualified persons before engaging someone to carry out specified activities, and to seek permission to use a person in activities from which they are disqualified
- vi) [Article 9](#) – *compensation arrangements*: to make compensation arrangements that would apply to individual barristers and entities, and to administer those arrangements.

14. This paper summarises the results of our consultation and the Board’s decision.

## Outcome of consultation

15. Three representations were made. These were from the Bar Council, the Council of the Inns of Court (**COIC**) and the Institute of Barristers’ Clerks.

16. In summary, respondents disagreed with the proposed policy that the draft order would give effect to, including the need for it and the approach taken to consulting on it. In particular, there was disagreement on powers to regulate certain individuals being placed on a statutory basis, and on the order allowing for flexibility in the way that some powers may be applied.

17. The representations, along with the BSB’s consideration of them,<sup>15</sup> are discussed in more detail below against the different powers in the draft order.

## Appellate body for regulatory decisions (Article 3 of the draft order)

18. There was agreement among respondents who commented on appeals against ‘authorisation-type’ decisions for entities and ABS being heard by the FTT. However, respondents considered that the order should specify appellate arrangements and, in particular, that it should confirm that appeals against disciplinary tribunals will be heard by the High Court.

19. The Crime and Courts Act 2013 allows the BSB (and an Inn (or Inns) of Court) to confer a right of appeal to the High Court on matters relating to regulation

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<sup>15</sup> For example: [https://www.barstandardsboard.org.uk/media/1821869/04\\_annex\\_a\\_minutes\\_part\\_1\\_board\\_meeting\\_170126.pdf](https://www.barstandardsboard.org.uk/media/1821869/04_annex_a_minutes_part_1_board_meeting_170126.pdf) and [https://www.barstandardsboard.org.uk/media/1825038/bsb\\_part\\_1\\_agenda\\_170323.pdf](https://www.barstandardsboard.org.uk/media/1825038/bsb_part_1_agenda_170323.pdf)

of barristers (and other regulated persons).<sup>16</sup> This encompasses authorisation and disciplinary decisions. As a permissive power, this enables, but does not require, a route to the High Court.

20. Disciplinary arrangements for barristers are that the Bar Tribunal and Adjudication Service (**BTAS**) appoints and administers tribunals and panels on behalf of the President of COIC,<sup>17</sup> under regulations contained in the BSB Handbook. As described above, an independent appeal route exists to the High Court for findings and penalties imposed by BTAS.
21. As legislative provision exists, we note that this order would not need to specify appeal arrangements for disciplinary decisions to the High Court in the way suggested. In contrast, provision is needed if a route is to be available to the FTT.
22. One respondent stated that it is wrong, in principle, for statutory powers to be sought or given that are not required and where there is no intention to exercise them. This theme was repeated in relation to other Articles in the draft order. It indicated that this is especially the case where those powers would involve an extension, by delegated legislation, to powers already given expressly by primary legislation, or an extension of powers in primary legislation into new situations.
23. Although expressed on more than one occasion, the suggestion that the BSB does not require or intend to make use of powers in the draft order appears to misunderstand the BSB's position. In several cases, with appellate arrangements for disciplinary decisions being one example, the BSB has said that it does not have plans to use the powers at this time. Its intention is that appeals against authorisation and licensing decisions are heard by the FTT, with disciplinary appeals continuing to the High Court. However, the approach described above would help to facilitate change if this is deemed appropriate.
24. A change to appeal arrangements would involve an application by the BSB to amend its regulatory arrangements. We would look at the evidence for change, including views in response to the necessary consultation by the BSB on its proposed policy.
25. We are clear that the existence of powers, for example, those in the Crime and Courts Act 2013, does not prohibit change. The Act expressly envisages the LSB making a recommendation under section 69 with a view to an order being made if this would enable an approved regulator to carry out its role

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<sup>16</sup> Section 24 Crime and Courts Act 2013

<sup>17</sup> With the Inns of Court responsible for "Calling barristers to the Bar."

more effectively and efficiently,<sup>18</sup> notwithstanding what powers (statutory or non-statutory) may exist elsewhere.<sup>19</sup>

### **Powers of intervention (Article 4 of the draft order)**

26. One respondent commented on this proposal and objected on the basis that the intended powers are more onerous than the nature and level of risk posed by bodies and persons authorised by the BSB. This includes in comparison to the possible profile of ABS. This is on the basis of the prohibition on handling client money, or paying or receiving a referral fee, and the serious consequences of intervention, including freezing or forfeiture of barristers' personal income and savings.
27. In the respondent's view, an appropriate level of justification for acquiring these powers has not been provided. The BSB gaining rights by virtue of becoming a licensing authority was considered as not providing justification for taking such powers in other contexts. Reference was also made to the LSB having suggested that the regulation of ABS be rolled back because it is too onerous for the level of regulatory risk posed. The respondent also considered that the proposal did not provide an adequate process for challenge and appeal, and advocated creating certainty for the profession by narrowing the circumstances in which intervention could be used.
28. As discussed above, our decision notice in November 2014 on the BSB's application to regulate entities indicated agreement with the BSB on the need for statutory underpinning of its regulatory functions. Although the BSB application and our decision on it was concerned with entities, it was concluded during the course of drafting the order that this position applies equally to individuals.
29. The BSB approach to regulating entities is set out in its policy statement.<sup>20</sup> This reflects its decision at the outset to be a specialist regulator for areas in which it has expertise. However, the BSB has acknowledged the potential for its approach to broaden as its experience grows. This appreciates the potential for the market to develop in response to opportunities and challenges.
30. While it is possible that those regulated by the BSB might presently be viewed as low risk overall, relative to other types of legal practitioner, risks posed by chambers and entities are assessed individually. Levels of supervision depend on the rating (high, medium or low) assigned by the BSB. This recognises the potential for harm that can result from cases of non-

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<sup>18</sup> Section 69(3) of the Act.

<sup>19</sup> Section 69(8) of the Act.

<sup>20</sup> [https://www.barstandardsboard.org.uk/media/1668991/entity\\_regulation\\_policy\\_statement.pdf](https://www.barstandardsboard.org.uk/media/1668991/entity_regulation_policy_statement.pdf)



compliance with rules, including in relation to holding client money. Disciplinary findings continue to highlight that while rules may be in place, compliance with them is not assured, and so the BSB needs to be able to respond to potentially serious situations.<sup>21</sup>

31. In light of representations the BSB has taken steps to assure itself on the appropriateness of the proposed powers, including in relation to their application to individual barristers, with the Ministry of Justice (**MoJ**) and external advice. In terms of checks and balances, where one or more prescriptive intervention condition is satisfied the order provides a role for the High Court in the BSB exercising its powers. This is able to balance the public interest with the rights of the authorised person. Ultimately, it is for the BSB to ensure on a case by case basis that a power is exercised proportionately.
32. We share the BSB's view that statutory intervention should be an option of last resort. It has indicated this will only apply to cases where all other possible regulatory action has already failed. This will be published as a policy statement and formalised within BSB rules (which would need to be approved by the LSB, as discussed at paragraph 23), with the decision to invoke these powers reserved to the Director General.<sup>22</sup> In updating the Regulatory Triage Assessment (**RTA**) for this order (Annex B), the BSB has, however, highlighted that it has encountered at least one situation where its supervision function may have used intervention powers had they been available. It has also discussed the potential difficulties of using non-statutory powers where urgent action has been needed to protect clients' interests.
33. Being equipped to deal with existing and emerging risks allows the BSB to strike an appropriate balance between protecting consumers and the legitimate interests of those regulated. This includes protecting the reputation of the profession as a whole (with implications for access to justice), as well as enabling its development. As discussed above, the nature of and timescales associated with the process for putting in place legislation presents the potential for harm in the event this is done only once problems arise.
34. Our consultation noted the desirability of an approved regulator having consistent powers at its disposal, regardless of the business model involved. This remains our view. Although parity is not the reason for this order, since we are satisfied that the powers are necessary in and of themselves, variation in risk profiles across business models are not so significant as to call for different regulatory regimes. LSB research has, as noted, identified that ABS have not presented the level of risk anticipated by the Act. However, the proposed amendments to ABS regulation, which were discussed with all the

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<sup>21</sup> For example, in relation client money, see: <http://www.tbtas.org.uk/wp-content/uploads/2013/07/Oliver-White-v-BSB-December-2015.pdf>

<sup>22</sup> [https://www.barstandardsboard.org.uk/media/1821869/04\\_annex\\_a\\_minutes\\_part\\_1\\_board\\_meeting\\_170126.pdf](https://www.barstandardsboard.org.uk/media/1821869/04_annex_a_minutes_part_1_board_meeting_170126.pdf)

approved regulators, were limited to section 83(5)(b) and Schedules 11 and 13 to the Act.<sup>23</sup> These are concerned with the approach to licensing ABS. Changes to Schedule 14 have not been recommended.

### **Information gathering (Article 5 of the draft order)**

35. A respondent suggested that it was unnecessary for the BSB to have a statutory power for information gathering. This was on the basis that the BSB's existing powers are sufficient and that no case has been made for those proposed in the order, with no evidence or prospect of any material degree of risk of challenge to existing arrangements.
36. The points raised repeat ones discussed in relation to the provisions above, with information gathering falling within those situations where co-operation between parties may not be guaranteed. In such situations, the existence of statutory powers may discourage attempts to frustrate regulation, with the role of the High Court serving as a check on the actions of the BSB. Paragraph 28 discusses the scope for the development of the market, with this followed by our view on the BSB being able to deal with existing and emerging risks.

### **Disciplinary arrangements (Articles 6 and 7 of the draft order)**

37. The three respondents commented on the proposed approach set out in these articles.
38. Two of these stated the need to be clear that an order under disciplinary arrangements to disbar a barrister can only be made by a disciplinary tribunal, and not by the BSB. These respondents were also of the view that the proposed limits on fines are unrealistic in relation to possible misconduct and the ability of an individual to pay the maximum of £50 million. They expressed a preference for the order not specifying figures, but rather these being set by regulators after consultation.
39. Two respondents said that issues have not been raised with the current voluntary basis of regulation that need to be remedied. The view was expressed that putting arrangements on a statutory footing for the purposes of being able to disqualify barristers is not a proper basis for seeking or granting statutory powers that are otherwise unnecessary. One of the respondents also expressed the view that there is no basis for powers over employees, in relation to whom it found the LSB consultation confusing.
40. Current BSB disciplinary arrangements are discussed at paragraph 19 above. Under its regulations, disbarment can only be ordered by a five man BTAS panel. The BSB is clear that it does not have plans to remove the function of a disciplinary tribunal, as is reflected in the changes to the Disciplinary Tribunal

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<sup>23</sup>[http://www.legalservicesboard.org.uk/news\\_publications/LSB\\_news/PDF/2015/20150720\\_Delivering\\_On\\_Deregulation\\_Regulators\\_Rise\\_To\\_The\\_Challenge.html](http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2015/20150720_Delivering_On_Deregulation_Regulators_Rise_To_The_Challenge.html)

Rules which were approved by the LSB in June 2017.<sup>24</sup> However, the draft order would allow for the evolution of regulation over time, in the face of experience, without the need for further legislation (although any order to disbar would still have to be as a consequence of a disciplinary process, which would be capable of being appealed). In addition to consultation, such a change would have to take account of COIC's function, and would need approval by the LSB of an application to change the BSB's regulatory arrangements.

41. In terms of fines, as a general principle, having an unspecified amount does not reflect good practice, since it introduces uncertainty. In practice, that could allow for amounts higher than those set out in the consultation document. For this reason, the MoJ considered during the drafting process that an upper limit is necessary.
42. The proposed amounts would replicate those set for ABS in Rules made under section 95(3) of the Act.<sup>25</sup> In replicating these, the drafting takes account of the potential development of the Bar. This includes new ways of working and operating environments. As discussed above, this scope for change was reflected in the intent of entity regulation. However, the order appreciates that change is not limited to that business model. The existence of an upper limit, though, does not mean that the BSB intends to move immediately to it. Instead, it allows it to respond to developments in a considered way, but with the potential for harm associated with having to seek additional legislation mitigated.
43. The BSB's preference was initially that the order would provide it with powers to take action against individuals in addition to those who are regulated persons for the purposes of section 176 of the Act.<sup>26</sup> This would have allowed it to address outsourcing of employment arrangements to companies that are not themselves authorised persons. Such powers would be comparable to those available to the Solicitors Regulation Authority.<sup>27</sup> However, in the course of developing the draft order it became apparent that this was not possible. This is because the scope of regulation cannot be extended in this way via secondary legislation.
44. While this is the case, the BSB considered it prudent to progress with putting disciplinary and disqualification powers on a statutory footing. While limited to regulated persons, disqualification could be from a wider range of activities associated with carrying on legal services. Views were sought on this in the LSB consultation, and on the draft order more generally, given that its scope

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<sup>24</sup> [http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/pdf/2017/20170622\\_BSB\\_DTR\\_Decision\\_Notice.PDF](http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/2017/20170622_BSB_DTR_Decision_Notice.PDF)

<sup>25</sup> <http://www.legislation.gov.uk/uksi/2011/1659/contents/made>

<sup>26</sup> Section 176 (2) of the Act: A person is a regulated person in relation to an approved regulator if the person –  
(a) is authorised by the approved regulator to carry on an activity which is a reserved legal activity, or  
(b) is not so authorised, but is a manager or employee of a person who is so authorised.

<sup>27</sup> Section 43 of the Solicitors Act 1974.

is wider than that consulted on by the BSB previously, in applying to individual barristers and to non-barristers (within the scope of s176 of the Act).

45. In light of the representations, the BSB considered the feasibility of the suggestion to narrow the scope of its proposed disciplinary powers.<sup>28</sup> However, the discussion on placing the voluntary approach to regulation on a statutory basis is equally applicable here and the BSB has concluded that the draft order is proportionate, including in relation to individual barristers. As above, we do not accept the BSB not seeking to make immediate use of powers provided for in the order negates the appropriateness of introducing them.

### **Practice rules on engaging disqualified persons (Article 8 of the draft order)**

46. Two respondents commented on the proposal, with one of them of the view that existing provisions in the BSB handbook concerned with prohibitions on employment render the proposals unnecessary. The respondent suggested that existing rules could provide disqualification powers in relation to individuals not currently regulated by the BSB without the need for this article.
47. Another respondent expressed the view that a statutory footing is in direct contrast to the ‘light touch’ regulation that the BSB said it would operate. In the respondent’s view, sufficient checks and balances are imposed on chambers personnel via the handbook and that there is no evidence of need for these powers, which do not reflect the stated aims of the BSB and which it has said it does not intend to use. In its view, contractual arrangements with employers are sufficient to deliver consumer protection. It indicated that it should be made clear that any change in the BSB’s position would be preceded by a further consultation before the powers might be deployed and there should be an opportunity to take legal advice.
48. For the reasons discussed above for articles 6 and 7, the scope of the draft proposal is limited to being able to impose practice rules on regulated persons in relation to engaging disqualified persons. The points reviewed above on existing provisions in the Handbook operating on a voluntary basis also apply here in terms of the ability of a regulator to take action in contentious situations and address risk of harm.
49. In most cases we would anticipate issues being dealt with through employment relationships. However, it is possible that considerations for employers will not match those of the BSB. As such, it is not certain that a person would be prevented from being engaged elsewhere, and that the risk of harm to consumers and to the reputation of the profession will be addressed.

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<sup>28</sup> [https://www.barstandardsboard.org.uk/media/1821869/04\\_annex\\_a\\_minutes\\_part\\_1\\_board\\_meeting\\_170126.pdf](https://www.barstandardsboard.org.uk/media/1821869/04_annex_a_minutes_part_1_board_meeting_170126.pdf)

50. To be clear, as is the case for other provisions, the order as drafted would give the BSB powers to introduce rules. It does not, of itself, change the BSB's approach. To do that the rule change application process to amend the BSB Handbook, as discussed at paragraph 23, would apply.

### **Compensation arrangements (Article 9 of the draft order)**

51. Three respondents felt it is wrong to seek and grant powers that are not necessary and that the BSB has no intention of using at this time. Attention was drawn to the BSB application to become a licensing authority, which referred to the prohibition on barristers holding client money as minimising the risk that a client will suffer losses as a result of misconduct.

52. One respondent considered there to be no material risk of a situation arising where losses would need to be mitigated by a compensation fund, or in which the setting up of a compensation fund would be justified. Another respondent suggested it was highly undesirable that the BSB should acquire powers that would enable it to increase the financial burden borne by the Bar in the absence of any evidence as to its necessity now or its likely necessity in the future.

53. For the reasons given in relation to other proposals, it was suggested that equivalence with powers associated with ABS is not a justification for inclusion of this power.

54. As the BSB does not consider it necessary to introduce compensation arrangements at this time, we appreciate the concern and points around evidence based regulation. However, as with other powers that the BSB is not proposing to exercise now, the draft order recognises that this position may change, for example as the regulated market evolves, and the draft order would allow the BSB to respond to this change without the need for further legislation. This includes addressing wider considerations than simply the loss of client money (as is the case for other approved regulators).

55. The BSB, LSB and MoJ have worked over a period of more than three years to progress the draft order to this point. If needed, further legislation would be dependent on securing necessary support for the legislative process, with an associated time frame of several more months. In the absence of compensation arrangements, harm could occur in the intervening period. In contrast, the inclusion of this enabling power means the BSB would be able to respond in a shorter period of time.

56. In relation to the use of this enabling power, if the BSB did seek to introduce such arrangements, this would need to be in response to a growing body of evidence of a risk which needed to be addressed. The process associated with changes to the BSB Handbook is discussed above.

## Changes to the draft Order since consultation

57. No substantive changes have been made to the draft order that require us to make a statement under section 70 of the Act.<sup>29</sup> A number of minor changes have been made. These are mainly presentational in nature and reflect the BSB’s designation as a licensing authority, with one clarification as follows:

Article 6(2)	For the avoidance of doubt “ <i>amongst other things</i> ” is substituted in place of “ <i>in particular</i> ”, to confirm that the provisions 6(2)(a) – (f) within disciplinary arrangements are not exhaustive.
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58. After the period for the receipt of representations was completed, and in accordance with its usual process, the MoJ sought pre-clearance of the order from counsel of the Joint Committee on Statutory Instruments.

59. As a consequence of that review a number of further minor drafting amendments were made to the order. Those amendments are noted in the summary table below:

Article 1	<p><i>‘Citation and commencement’</i></p> <p><i>“...2016.” has been replaced with:</i></p> <p><i>“...2017 and comes into force on 6<sup>th</sup> April 2018.”</i></p> <p><i>Article 1(2) “This article and articles 2, 3 and 5 to 9 come into force on the day after the day in which this Order is made.”</i></p> <p><i>and</i></p> <p><i>Article 1(3) “Article 4 comes into force on the 22<sup>nd</sup> day after the day on which this Order is made.”</i></p> <p><i>have been deleted.</i></p>
Article 3(1)	<p><i>Deletion of “if any” from:</i></p> <p><i>“The General Council of the Bar may make regulations or rules providing for appeals to the First-tier Tribunal against decisions made by the General Council of the Bar in its capacity as and approved regular, including in its role, <del>if any</del>, as a licensing authority.”</i></p>
Article 4(1)	<p><i>The following text (<b>in bold</b>) was added to footnote (b)</i></p>

<sup>29</sup> Section 70(5) of the Act.

	<p><b><i>“(b) Paragraph 1(3)(d) of Schedule 14 was amended by S.I. 2017/540 and paragraph...”</i></b></p> <p><i>Deletion of “if any” from article 4(1)(a):</i></p> <p><i>“...the General Council of the Bar in its capacity as an approved regulator (other than in its role, <del>if any</del>, as a licensing authority);”</i></p>
Article 4(3)(b)(iv)	<p><i>Amended from:</i></p> <p><i>“a meeting of creditors is held in relation to the body under section 95 of that Act (effect of company’s insolvency)...”</i></p> <p><i>To:</i></p> <p><i>“a winding up becomes a creditors’ voluntary winding up under section 96 of that Act (conversion to creditors’ voluntary winding up)...”</i></p> <p><i>Footnote (a) has also been amended from:</i></p> <p><i>“Section 95 was amended by S.I. 2009/864 and 2010/18.”</i></p> <p><i>To:</i></p> <p><i>“Section 96 was substituted by section 126 of, and Schedule 9, paragraphs 1 and 20 to, the Small Business, Enterprise and Employment Act 2015 (c.26).”</i></p>
Article 5(1)	<p><i>Deletion of “if any” from:</i></p> <p><i>“The General Council of the Bar may make rules requiring a relevant authorised person to produce documents and provide information for the purpose of ascertaining whether or not the provisions of rules or regulations made, or any code issued, by the General Council of the Bar in its capacity as an approved regulator (other than in its role, <del>if any</del>, as a licensing authority) are being complied with.”</i></p>
Article 6(2)	<p><i>Article 6(2)(c) amended from:</i></p> <p><i>“...ordering the disbarment by the relevant Inn of Court of a relevant authorised person who is an individual...”</i></p> <p><i>To</i></p>

	<i>"...ordering the disbarment by the relevant Inn of Court of a relevant authorised person who is a barrister..."</i>
Explanatory Note to Article 3	<p><i>Deletion of "if any" from:</i></p> <p><i>"Article 3 enables the General Council of the Bar to make regulations or rules providing for appeals to the First-tier Tribunal against decisions made by the General Council of the Bar in its role as an approved regulator, including in its capacity, <del>if any</del>, as a licensing authority."</i></p>
Explanatory Note to Article 4	<p><i>Replacement of:</i></p> <p><i>"...article 4(1)(b) and (c)..."</i></p> <p><i>With:</i></p> <p><i>"...article 4(1)(b) to (d)..."</i></p>
Explanatory Note	<p><i>Amended from:</i></p> <p><i>"A regulatory triage assessment has been prepared for this instrument and can be found at <a href="http://www.legislation.gov.uk">www.legislation.gov.uk</a> or obtained from the Head of Legal Services Policy, Justice and Courts Policy Group, Ministry of Justice, 102 Petty France, London, SW1H 9AJ."</i></p> <p><i>To:</i></p> <p><i>"A Regulatory Triage Assessment has been prepared for this instrument and can be found at <a href="http://www.legislation.gov.uk">www.legislation.gov.uk</a> or obtained from the Head of Legal Services Policy, International and Legal Services Division, Judicial, Rights and International Directorate, Ministry of Justice, 102 Petty France, London, SW1H 9AJ."</i></p>

60. Following a further review by the LSB on 24 August 2017, the following corrections were made:

Article 6(1)(a)	<p><i>Insertion of the word "a" as follows:</i></p> <p><i>"...in the case of a relevant authorised person which is <u>a</u> body..."</i></p>
Article 7(2)(b)	<i>Insertion of "..., and..." as follows:</i>



	<i>“...in the case of a relevant authorised person which is a body, a manager of the body, <b>and</b>...”</i>
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### The Board’s decision

- 61. Having considered the outcome to the period for representations and the changes made to the order in the pre-clearance process, on 11 September 2017 the Board decided that it should proceed with the recommendation to the Lord Chancellor that the section 69 order be made.
- 62. The text of the final recommendation that will be made to the Lord Chancellor and the draft order that will be attached to it are at Annex A.

### Impact Assessment

- 63. Included in the consultation paper for comment was a draft RTA that was produced by the BSB and approved by the MoJ. The views expressed on the draft RTA amounted to a substantive reiteration of representations made on the proposed powers in the draft order, eg in relation to the approach to assessing the cost of compensation arrangements (Article 9).
- 64. After the consultation close, there was further work on the RTA to clarify the BSB’s need for powers detailed in the order. The final version will be published by the MoJ with the section 69 order that is laid before Parliament.

### Annexes

- A. Recommendation to the Lord Chancellor and draft section 69 order
- B. RTA.

## **Annex A: Recommendation by the LSB to the Lord Chancellor under Section 69 of the Legal Services Act 2007 and draft statutory instrument**

Dear Lord Chancellor

### **Recommendation by the Legal Services Board to the Lord Chancellor under section 69 of the Legal Services Act 2007**

#### **Proposed recommendation for the Bar Council**

1. On 11 September 2017 the Legal Services Board decided to make a recommendation to the Lord Chancellor that you make an order under section 69 of the Legal Services Act 2007 (the Act) which would modify the functions of the Bar Council to allow it to:
  - i. make regulations or rules allowing for appeals to the General Regulatory Chamber of the First-tier Tribunal (FTT) against decisions by the Bar Council (including arrangements enabling the FTT to suspend decisions where an appeal has been brought but not yet determined by the FTT)
  - ii. apply (with some amendments) the provisions of Schedule 14 to the Act to the Bar Council as an approved regulator of individual barristers and entities
  - iii. make rules to allow for gathering of information from individual barristers and entities for the purposes of assessing compliance with rules or regulations, or any code issued in its capacity as an approved regulator, with the ability to seek enforcement through the High Court
  - iv. make disciplinary arrangements to apply to all persons regulated by the Bar Council that, among other things, may include the revocation or suspension of authorisation or imposition of conditions on them, financial penalties and disbarment or disqualification from specified activities
  - v. make rules to apply to individual barristers and entities regulated by the Bar Council to allow controls on the use of persons that it has disqualified from specified activities under its disciplinary arrangements
  - vi. make compensation arrangements that would apply to individual barristers and entities, and to administer those arrangements.
2. A draft of the order is attached to this recommendation.
3. In accordance with the requirements of section 70(2) of the Act, the Board published a draft of the proposed recommendation and draft order on 30 August

2016 and invited representations about the proposals to be made to the Board by 22 November 2016. The Board has had regard to the representations duly made.

4. In accordance with section 70(1) of the Act, the recommendation is made with the consent of the Bar Council.

Chairman, Legal Services Board

28 September 2017

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DRAFT STATUTORY INSTRUMENTS

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**2017 No.**

**LEGAL SERVICES, ENGLAND AND WALES**

**The Legal Services Act 2007 (General Council of the Bar)  
(Modification of Functions) Order 2017**

*Made* - - - - - **\*\*\***

*Coming into force in accordance with article 1*

The Lord Chancellor makes the following Order in exercise of the powers conferred by section 64(2), (3) and (4), section 69(1), (4) and (6), and section 204(3) of the Legal Services Act 2007<sup>(a)</sup>.

In accordance with section 69(2) and (3) of that Act, this Order is made following a recommendation made by the Legal Services Board to which was annexed a draft order in a form not materially different from this Order.

The Legal Services Board has made the recommendation with the consent required by section 70(1) of that Act and after complying with the requirements in section 70(2) to (5) of that Act.

In accordance with section 206(5) of that Act, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

**Citation and commencement**

1. This Order may be cited as the Legal Services Act 2007 (General Council of the Bar) (Modification of Functions) Order 2017 and comes into force on 6th April 2018.

**Interpretation**

2. In this Order—  
“the Act” means the Legal Services Act 2007;

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(a) 2007 c. 29.

“relevant authorised person” means a person authorised by the General Council of the Bar (other than by the grant of a licence under Part 5 of the Act) to carry on an activity which is a reserved legal activity<sup>(a)</sup>.

### **Power to make regulations or rules providing for appeals to the First-tier Tribunal**

**3.**—(1) The General Council of the Bar may make regulations or rules providing for appeals to the First-tier Tribunal against decisions made by the General Council of the Bar in its capacity as an approved regulator, including in its role as a licensing authority.

(2) The regulations or rules made under paragraph (1) may provide for the First-tier Tribunal to suspend the effect of a decision of the General Council of the Bar (whether or not the decision has already taken effect) while an appeal against that decision has been brought and has not yet been finally determined or withdrawn.

### **Power of intervention**

**4.**—(1) Subject to the modifications in paragraphs (2) to (4), Schedule 14 to the Act (licensing authority’s powers of intervention)<sup>(b)</sup> applies in relation to—

- (a) the General Council of the Bar in its capacity as an approved regulator (other than in its role as a licensing authority);
- (b) a relevant authorised person;
- (c) in the case of a relevant authorised person which is a body, a manager of the body, and
- (d) an employee of a relevant authorised person,

as it applies in relation to a licensing authority, a licensed body and a manager or employee of such a body.

(2) Schedule 14 to the Act is to be read as if each reference to—

- (a) a “licence” were a reference to an “authorisation”;
- (b) a “licensed body” were a reference to a “relevant authorised person”;
- (c) “the licensing authority” or “the relevant licensing authority” were a reference to “the General Council of the Bar”, and
- (d) a manager of a licensed body were a reference to, in the case of a relevant authorised person which is a body, a manager of the body.

(3) Paragraph 1 of Schedule 14 to the Act has effect as if—

- (a) for sub-paragraph (3) there were substituted—

“**(3)** For the purposes of sub-paragraph (2) a relevant insolvency event occurs in relation to a relevant authorised person if—

- (a) in the case of a relevant authorised person who is an individual, the person has been made bankrupt or has made a composition or arrangement with the person’s creditors in England or Wales;
- (b) in the case of a relevant authorised person which is a body, in England or Wales—
  - (i) a resolution for a voluntary winding-up of the body is passed without a declaration of solvency under section 89 of the Insolvency Act 1986 (statutory declaration of solvency)<sup>(c)</sup>;
  - (ii) the body enters administration within the meaning of paragraph 1(2)(b) of Schedule B1 to that Act (administration)<sup>(d)</sup>;

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(a) “Reserved legal activity” is defined in section 12(1) of the Act.

(b) Paragraph 1(3)(d) of Schedule 14 was amended by S.I. 2017/540 and paragraph 11(9) of Schedule 14 was amended by section 91 of, and Schedule 12, Part 3, paragraph 189 to, the Postal Services Act 2011 (c. 5).

(c) 1986 c. 45.

(d) Schedule B1 was inserted by section 248(2) of, and Schedule 16 to, the Enterprise Act 2002 (c. 40).

- (iii) an administrative receiver within the meaning of section 251 of that Act (interpretation) is appointed;
  - (iv) a winding up becomes a creditors' voluntary winding up under section 96 of that Act (conversion to creditors' voluntary winding up)(a);
  - (v) an order for the winding up of the body is made, or
  - (vi) a compromise or arrangement between the body and its creditors (or a class of them) is in force;
- (c) in the case of a relevant authorised person which is a body, established outside the jurisdiction of England and Wales, the body is—
- (i) subject to an event in its country or, as the case may be, territory of incorporation that corresponds to an event as set out in sub-paragraphs (b)(i) to (v), or
  - (ii) subject to an event that corresponds to an event as set out in sub-paragraph (b)(vi).”, and
- (b) for sub-paragraphs (5) and (6) there were substituted—
- “(5) Where this Schedule applies in relation to a relevant authorised person by virtue of sub-paragraph (1)(a) it continues to apply—
- (a) in the case of a relevant authorised person who is an individual—
    - (i) after the individual's death (and for these purposes, the Schedule is to be treated as applying to a personal representative of the individual as it would apply to a relevant authorised person);
    - (ii) after the individual's authorisation has been revoked or the individual's authorisation has otherwise ceased to have effect;
  - (b) in the case of a relevant authorised person which is a body, after the body's authorisation has been revoked or the body's authorisation has otherwise ceased to have effect.
- (6) For the purposes of this Schedule “relevant authorised person” includes—
- (a) a person whose authorisation is suspended;
  - (b) a person to whom this Schedule continues to apply by virtue of sub-paragraph (5);
  - (c) except in this paragraph, a person whose authorisation has been revoked or whose authorisation has otherwise ceased to have effect.”.

(4) Paragraph 18 of Schedule 14 to the Act has effect as if in sub-paragraph (2) there were inserted before paragraph (a)—

“(za) if the relevant authorised person is an individual who is or was a partner in a partnership, any of the individual's partners or former partners,”.

### **Power to gather information**

**5.**—(1) The General Council of the Bar may make rules requiring a relevant authorised person to produce documents and provide information for the purpose of ascertaining whether or not the provisions of rules or regulations made, or any code issued, by the General Council of the Bar in its capacity as an approved regulator (other than in its role as a licensing authority) are being complied with.

(2) Rules made under paragraph (1) may include provision that—

- (a) the General Council of the Bar may, by notice, require a relevant authorised person to produce documents, or documents of a description, specified in the notice;

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(a) Section 96 was substituted by section 126 of, and Schedule 9, paragraphs 1 and 20 to, the Small Business, Enterprise and Employment Act 2015 (c. 26).

- (b) the General Council of the Bar may, by notice, require a relevant authorised person to provide information, or information of a description, specified in the notice;
  - (c) the General Council of the Bar may, by notice, require a relevant authorised person to attend at a time and place specified in the notice to provide an explanation of any document produced or information provided by virtue of the rules;
  - (d) the General Council of the Bar, or a person appointed by it, may take copies of or extracts from a document produced by virtue of the rules;
  - (e) the General Council of the Bar may pay to a relevant authorised person such reasonable costs as may be incurred by that person in complying with a requirement imposed by virtue of the rules.
- (3) A notice given to a relevant authorised person by virtue of rules made under paragraph (1)—
- (a) may specify the manner and form in which any documents are to be produced or information is to be provided;
  - (b) must specify the period within which the documents are to be produced or information is to be provided;
  - (c) may require documents to be produced or information to be provided to the General Council of the Bar or to a person specified by it.
- (4) If a relevant authorised person refuses or otherwise fails to comply with a requirement imposed by virtue of rules made under paragraph (1) to produce documents, provide information, or comply with a notice under paragraph (2)(c), the General Council of the Bar may apply to the High Court for an order requiring the person to comply with that requirement.

#### **Disciplinary arrangements: sanctions**

**6.**—(1) The General Council of the Bar may make disciplinary arrangements, including disciplinary rules, in relation to—

- (a) a relevant authorised person;
- (b) in the case of a relevant authorised person which is a body, a manager of the body, and
- (c) an employee of a relevant authorised person.

(2) The disciplinary arrangements made under paragraph (1) may, amongst other things, make provision for—

- (a) the revocation or suspension of a relevant authorised person’s authorisation;
- (b) the imposition of conditions on a relevant authorised person’s authorisation;
- (c) ordering the disbarment by the relevant Inn of Court of a relevant authorised person who is a barrister;
- (d) the imposition of a fine not exceeding £250 million in relation to a relevant authorised person which is a body and £50 million in relation to an individual;
- (e) the giving of a notice that an individual must complete such continuing development activities as may be specified;
- (f) the giving of a warning, a reprimand or advice in relation to future conduct.

#### **Disciplinary arrangements: disqualification**

**7.**—(1) The disciplinary arrangements made under article 6(1) may include provisions enabling the General Council of the Bar to disqualify those individuals set out in paragraph (2) from one or more of the activities in paragraph (3) if the disqualification condition is satisfied.

(2) The persons are—

- (a) a relevant authorised person who is an individual;
- (b) in the case of a relevant authorised person which is a body, a manager of the body, and
- (c) an employee of a relevant authorised person.

- (3) The activities are—
- (a) acting as HOLP or HOFA of a relevant authorised person which is a body;
  - (b) being a manager of, or being employed or remunerated by, a relevant authorised person which is a body;
  - (c) being employed or remunerated by a manager or employee of a relevant authorised person which is a body, in connection with that body’s business of carrying on a legal activity<sup>(a)</sup>;
  - (d) being employed or remunerated by a relevant authorised person who is an individual, in so far as the employment or remuneration relates to that individual’s practice of a legal activity;
  - (e) being employed or remunerated by an employee of a relevant authorised person who is an individual, in connection with that relevant authorised person’s business of carrying on a legal activity;
  - (f) undertaking work in the name of, or under the direction or supervision of, a relevant authorised person, in so far as the work relates to that relevant authorised person’s practice of a legal activity, and
  - (g) being employed or remunerated by a body (corporate or unincorporate) in which one or more relevant authorised person holds a material interest, in so far as the employment or remuneration relates to that relevant authorised person’s practice of a legal activity.
- (4) The disqualification condition is satisfied in relation to an individual if—
- (a) that individual has (intentionally or through neglect)—
    - (i) breached obligations placed upon that individual by the General Council of the Bar, or
    - (ii) caused or substantially contributed to a breach of obligations imposed by the General Council of the Bar by a relevant authorised person, or a manager or employee of a relevant authorised person, and
  - (b) the General Council of the Bar is of the view that it is undesirable for that individual to continue to carry out one or more of the activities set out in paragraph (3).
- (5) The General Council of the Bar must keep a list of individuals who are disqualified by virtue of disciplinary arrangements made by virtue of this article and the activities from which they are disqualified.
- (6) In this article—
- (a) “HOFA” means an individual who is appointed Head of Finance and Administration for a relevant authorised person which is a body in accordance with rules made by the General Council of the Bar;
  - (b) “HOLP” means an individual who is appointed Head of Legal Practice for a relevant authorised person which is a body in accordance with rules made by the General Council of the Bar;
  - (c) “material interest” has the same meaning given in paragraph 3(1) of Schedule 13 to the Act.

**Practice rules: engaging persons disqualified under disciplinary arrangements**

- 8.—**(1) The General Council of the Bar may make rules requiring a relevant authorised person to—
- (a) consider the list referred to in article 7(5) before engaging an individual to carry out any of the activities referred to in article 7(3), and

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(a) “Legal activity” is defined in section 12(3) of the Act.



- (b) seek its permission before engaging an individual to carry out any activity from which that individual is disqualified by virtue of disciplinary arrangements made by virtue of article 7.

(2) The General Council of the Bar may make rules as to the effect that any permission given under rules made under paragraph (1)(b) is to have upon the disqualification of the individual the relevant authorised person is seeking to engage.

### **Compensation arrangements**

**9.—**(1) The General Council of the Bar may make compensation arrangements<sup>(a)</sup>.

(2) For the purpose of giving effect to paragraph (1) the General Council of the Bar may make rules which authorise or require it to make particular arrangements and such rules may include—

- (a) establishing and maintaining one or more funds;
- (b) requiring a relevant authorised person or a relevant authorised person of a description specified by the rules to contribute to any fund established and maintained by virtue of sub-paragraph (a) by making periodical payments as specified by the rules to the General Council of the Bar;
- (c) provision as to the investment of any money that forms part of any fund established and maintained by sub-paragraph (a) and otherwise as to the management, administration, insurance or protection of such fund;
- (d) provision as to the taking out and maintaining of insurance with authorised insurers by the General Council of the Bar;
- (e) requiring a relevant authorised person or a relevant authorised person of a description specified in the rules to contribute to the premium payable on any insurance policy maintained by virtue of sub-paragraph (d) by making periodical payments as specified by the rules;
- (f) provision as to the management and administration of any insurance policy taken out and maintained by virtue of sub-paragraph (d);
- (g) requiring a relevant authorised person or a relevant authorised person of a description specified in the rules to take out and maintain insurance with authorised insurers;
- (h) prescribing the conditions which an insurance policy taken out and maintained by virtue of sub-paragraph (g) must satisfy;
- (i) the circumstances in which a compensation claim may and may not be made;
- (j) the form and manner in which a compensation claim is to be made;
- (k) the procedure for determining a compensation claim;
- (l) the extent to which discretion may be exercised by the General Council of the Bar in determining whether payment in respect of a compensation claim should be made, and
- (m) the minimum and maximum amounts payable in respect of a compensation claim or a compensation claim of a description specified in the rules.

(3) In this article “compensation claim” means a claim for a grant or other payment under compensation arrangements made by the General Council of the Bar.

**[DRAFT -NOT FOR SIGNATURE]**

Date

*Name*  
Minister of State  
Ministry of Justice

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(a) “Compensation arrangements” is defined in section 21(2) of the Act.

## **EXPLANATORY NOTE**

*(This note is not part of the Order)*

This Order modifies the functions of the General Council of the Bar in respect of its regulatory arrangements as an approved regulator under the Legal Services Act 2007 (c. 29) (“2007 Act”).

The regulation of legal services in England and Wales is governed by the 2007 Act. Under that Act only a person who is authorised or who is exempt from the requirement to be authorised may carry on a reserved legal activity (as defined in section 12 of the 2007 Act). Authorisation can be given only by an approved regulator or, in relation to a licensable body, by a licensing authority.

Article 3 enables the General Council of the Bar to make regulations or rules providing for appeals to the First-tier Tribunal against decisions made by the General Council of the Bar in its role as an approved regulator, including in its capacity as a licensing authority.

Article 4 applies Schedule 14 (licensing authority’s power of intervention) to the 2007 Act to the General Council of the Bar in its capacity as an approved regulator only and to those listed in article 4(1)(b) to (d) as it applies to a licensing authority and licensed bodies (or managers or employees of such bodies) subject to the modifications in article 4(2) to (4).

Article 5 enables the General Council of the Bar to make rules enabling it to serve a notice requiring a relevant authorised person to produce documents and to provide information for the purpose of ascertaining whether or not the provisions of any rules, regulations or code made or issued by the General Council of the Bar are being complied with. If a relevant authorised person refuses or fails to comply with a requirement set out in the rules the General Council of the Bar may apply to the High Court for an order requiring the person to comply with the requirement.

Article 6 enables the General Council of the Bar to make disciplinary arrangements, including disciplinary rules, in relation to a relevant authorised person or a manager or employee of a relevant authorised person.

Article 7 enables the General Council of the Bar to include in any disciplinary arrangements the power to disqualify those listed in article 7(2) from the activities referred to in article 7(3) if the disqualification condition referred to in article 7(4) is satisfied. It also requires the General Council of the Bar to maintain a list of individuals disqualified under its disciplinary arrangements and the activities from which such individuals are disqualified.

Article 8 enables the General Council of the Bar to make practice rules requiring a relevant authorised person to consider the list of disqualified persons referred to in article 7 before engaging an individual to carry out any of the activities referred to in article 7(3) and to seek the permission of the General Council of the Bar before engaging an individual to perform any activity from which that individual is disqualified. The General Council of the Bar may also make rules as to the effect of any permission given upon the disqualification of the individual the relevant authorised person is seeking to engage.

Article 9 enables the General Council of the Bar to make compensation arrangements. To give effect to such arrangements the General Council of the Bar may make rules which may include, amongst other things, the power to establish and maintain a compensation fund, to require relevant authorised persons to contribute to that fund, to take out and maintain insurance or to require relevant authorised persons to contribute to the premium payable for that insurance or to require relevant authorised persons to take out and maintain insurance with an authorised insurer.

A Regulatory Triage Assessment has been prepared for this instrument and can be found at [www.legislation.gov.uk](http://www.legislation.gov.uk) or obtained from the Head of Legal Services Policy, International and Legal Services Division, Judicial, Rights and International Directorate, Ministry of Justice, 102 Petty France, London, SW1H 9AJ.

## Annex B: Regulatory triage assessment

<b>Regulatory Triage Assessment</b>	
<b>Title of regulatory proposal</b>	Bar Standards Board (BSB Section 69 Order) Modification of the functions of the General Council of the Bar
<b>Unique identifying number</b>	MoJ011/2015/RTA
<b>Lead Department/Agency</b>	Ministry of Justice
<b>Expected date of implementation</b>	December 2016
<b>Origin</b>	Domestic
<b>Date</b>	03/08/2016
<b>Lead Departmental Contact</b>	Mel Panteli
<b>Departmental Triage Assessment</b>	Low cost regulation/fast track
<p><b>Rationale for intervention and intended effects</b></p> <p>The Bar Council is an approved regulator under the Legal Services Act 2007, which acts through the Bar Standards Board (BSB). The draft Order seeks to modify some of the Bar Council's regulatory powers, in particular in relation to its regulation of authorised bodies (other than licensed bodies) although it does also contain some provisions which relate to authorised individuals. The Bar Council already has rules to do much of what is proposed but this legislation will place on a statutory footing, those non-statutory arrangements that already exist in the BSB Handbook. It also gives the BSB the ability to make rules providing for appeals against decisions by the Bar Council in its capacity as an approved regulator and, also for appeals as a licensing authority to the General Regulatory Chamber of the First-tier Tribunal (FTT). It also seeks to give the Bar Council a power to establish compensation arrangements.</p> <p>Government intervention is necessary because these modifications can only be made by Order made by the Lord Chancellor under section 69 of the Legal Services Act 2007.</p> <p>The aim of these changes is to enable the Bar Council to carry out its role more effectively or efficiently, including to ensure more simplified enforcement processes. In the case of the appeal jurisdiction, the current arrangements which allow appeals against decisions made by a licensing authority to the High Court, were always intended to be temporary and therefore it is desirable to replace this with a permanent solution. In the case of the compensation arrangements, the power to make such rules is needed to safeguard clients' interests for the future. These powers will create consistency with other regulators in the legal sector and hence protect clients more effectively.</p>	
<p><b>Viable policy options (including alternatives to regulation)</b></p> <p>There are 6 options being considered which cover the following:</p> <p>Option 1: Establish a jurisdiction for the FTT to hear appeals relating to BSB regulatory decisions.</p> <p>Option 2: Establish a statutory power for the Bar Council to intervene into failing law practices.</p> <p>Option 3: Establish a statutory power for the Bar Council to make rules requiring information or documents from those whom it regulates and enforce this in the High Court.</p> <p>Option 4: Establish a statutory power for the Bar Council to make disciplinary arrangements, including disciplinary rules in relation to those regulated by it.</p> <p>Option 5: To enable the above disciplinary arrangements to include provision about the disqualification of individuals regulated by the Bar Council.</p> <p>Option 6: Establish a statutory power for the Bar Council to make compensation arrangements.</p> <p>The preferred approach is to implement options 1-6. By implementing all 6, the Bar Council can achieve all of the powers that the BSB has identified as necessary. Each proposal is, however, desirable and necessary on its own.</p>	

**Initial assessment of business impact**

Option 1 will have a monetisable impact of c. £33,600 on business over 10 years, which equates to £3,600 per year. This equates to approx. £48 per entity authorised by the BSB as a one-off contribution.

Option 6 will have a maximum monetisable impact of £87,000 per year on average for a five year transitional period, assuming the power to implement a compensation fund is used. This cost will be spread over all businesses regulated by the BSB (both individual practitioners and entities). This equates to approximately £6 per practising barrister, although the contribution made by each would vary, due to the income-based method of calculating barristers' practising certificate fees. After the five year transitional period, there will be a net reduction in business costs of c. £30,000 per year. So over a ten year period to total net impact would be £300,000.

Options 2-5 have a negligible impact on business.

Total estimated impact on business is therefore £93,720 per year if measured over 5 years. If measured over 10 years the impact will be £33,360 per year.

**One-in, Three-out status**

This measure is a qualifying regulatory provision under the Small Business, Enterprise and Employment Act 2015. The measure will result in costs to business and the costs have been assessed as an 'IN', in scope of the Business Impact Target and One-in, Three-out requiring a compensatory 'OUT'.

**Rationale for Triage rating**

The measure is in scope for the low cost fast track regulatory process. Our estimated total cost to business is £93,720 per annum.

## Triage approval

	<b>NAME</b>	<b>DATE</b>
<b>Departmental signoff (SCS):</b>	Elizabeth Gibby	09/08/2016
<b>Lead Economist signoff:</b>	Ewen Macleod Bar Standards Board	03/08/16
<b>Better Regulation Unit signoff:</b>	Sheila Morson	09/08/2016

<b>The Deputy Chief Economist confirms this for the Fast Track as a deregulatory/low cost regulatory measure:</b>	Andrew Meads	10/08/2016
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## Supporting evidence

### **1. The policy issue and rationale for Government intervention**

The BSB undertakes the regulatory functions of the Bar Council, an approved regulator under the Legal Services Act 2007 (LSA). The Bar Council's powers derive from its constitution and all members (and non-members who are authorised to undertake reserved legal activities by the Bar Council) agree to be bound by both its constitution and the BSB's regulatory arrangements (including the BSB Handbook). In relation to authorisation to conduct reserved legal activities, the BSB's regulatory arrangements are given a statutory underpinning by the LSA once approved by the Legal Services Board (LSB).

The BSB has identified a number of areas where additional powers are needed in order for the Bar Council to exercise the role of approved regulator more effectively and efficiently. These included identifying areas where it would be useful to extend, or place on a statutory footing via intervention, disqualification and amending their regulatory arrangements regarding appeals, the Bar Council's powers and functions via an order under section 69 of the LSA.

### **2. Policy objectives and intended effects**

The rationale for amending the Bar Council's powers is primarily to ensure that a range of regulatory tools and functions may be exercised more

effectively. This would ensure a level playing field between different regulatory regimes where different statutory frameworks exist. In order to ensure that the BSB has effective regulatory tools within a statutory framework so that it can undertake its role as a regulator properly, it needs a wider range of statutory powers.

The BSB believes that seeking an order under section 69 is the correct means to achieve these policy objectives, because there is no existing legislation that would provide the same or similar outcomes to those identified below. The BSB believes that the proposed order is the most proportionate way to deal with the issues that have been identified. However, the powers sought in the order need not lead directly to new regulatory arrangements or additional regulation.

In some cases the order will only place on a statutory footing non-statutory arrangements that already exist in the BSB Handbook. In others, the Order seeks to provide the BSB with powers consistent with other, similar, regulatory regimes.

### **3. Policy options considered, including alternatives to regulation**

There are 6 options being considered which cover the following:

Option 1: Establish a jurisdiction for the FTT to hear appeals relating to BSB regulatory decisions.

Option 2: Establish a statutory power for the Bar Council to intervene into failing law practices.

Option 3: Establish a statutory power for the Bar Council to make rules requiring information or documents from those whom it regulates and enforce this in the High Court.

Option 4: Establish a statutory power for the Bar Council to make disciplinary arrangements including disciplinary rules, in relation to those regulated by it.

Option 5: To enable the above disciplinary arrangements to include provision about the disqualification of individuals regulated by the Bar Council.

Option 6: Establish a statutory power for the Bar Council to make compensation arrangements.

The preferred approach is to implement options 1-6. By implementing all 6, the Bar Council can achieve all of the powers that the BSB has identified as necessary. Each proposal is, however, desirable and necessary on its own. The only alternative to regulation is the status quo, as the desired changes can only be made using legislation.

### **4. Expected level of business impact**

Option 1: Establish a jurisdiction for the FTT to hear appeals relating to BSB regulatory decisions.

The Order would enable the BSB to make rules to permit its decisions to be appealed to the General Regulatory Chamber of the First-tier Tribunal. At present, it is intended only that rules will be made in relation to appeals

concerning entity authorisations and related decisions and the impact assessment reflects this (it would be possible to extend this to other decisions in the future, but as there are no plans to do so the impact of this has not been quantified).

Entities can appeal against the refusal of an authorisation application, the imposition of a condition or a modification of the terms of authorisation, a refusal to grant a modification of authorisation if requested by the entity, or the imposition of a suspension (other than as a result of disciplinary proceedings). In such cases, the entity can seek a review by the BSB followed by an appeal to the High Court. Similar arrangements exist in relation to a litigation authorisation. Where the BSB concludes that an individual is unsuitable to act as a Head of Legal Practice (HOLP) or Head of Finance and Administration (HOFA) the individual or entity can seek a review or appeal in the same way.

The appeal route to the High Court was introduced as a temporary measure until the BSB could seek an order to give the jurisdiction for such appeals to the General Regulatory Chamber of the First-tier Tribunal (which was the stated policy objective in the BSB's previous entity regulation consultations). This order will empower the BSB to make necessary rules providing for such appeals to be heard by the First tier Tribunal.

Costs:

Costs to HMCTS: HMCTS will recover its costs from the BSB – this will include both set-up costs and costs per hearing.

Costs to individuals or entities seeking to appeal: The BSB will not seek to recover the costs of appeals directly from those who are appealing. Those who wish to appeal will pay an administrative fee to HMCTS of £100 (plus an additional £500 if an oral hearing is required). This represents a saving on the equivalent costs that would be charged in the High Court. The remainder of HMCTS costs will be paid by the BSB and recovered from the regulated entity community as a whole. This will be taken into account in setting fees for entity authorisation and annual renewal. Based on the number of entities authorised in the first 6 months (35) the BSB would expect no more than approx. 70 entities to be authorised per year. Assuming similar numbers going forward, the BSB would expect one appeal per year, however the rate of entity authorisations has since slowed so it is likely to be fewer than one appeal per year. In any event the average increase to entity fees taking account of the costs discussed below would be approx. £48 per new entity expressed as a one-off (although the amount charged to each entity will vary depending on its size and could also be recovered through annual renewal fees rather than a one-off charge at initial authorisation). The 'set up costs', including the fee for the first 10 hearings will be paid out of a general BSB budget and recovered from entities over time (hence the initial fee to HMCTS will be paid by practising certificate fees from the Bar as a whole).

Costs to the BSB: Because the BSB is not seeking to recover the costs of appeals directly from those who are appealing, the costs of HMCTS will be

paid by the BSB from its general budget. This will be recovered from the authorisation fees of entities that are regulated by the BSB. These costs will include:

- Start-up costs: £3,600
- Ongoing average cost per case: £3,000 per appeal (assuming 90% of appeals will be decided on the papers and 10% will need an oral hearing)

Benefits:

Benefits to HMCTS: The current appeal route to the High Court was only agreed by HMCTS as a temporary measure on the understanding that this task would be taken on by the FTT in due course. This proposal ensures that HMCTS can recover all start-up and ongoing costs from the BSB. It also ensures that capacity in the High Court is not taken up by administrative appeals from the BSB. This would replace the current situation where appellants may be liable to pay costs in the High Court if they bring an appeal there.

Net impact of Option 1: Costs are estimated to be up to £33,600 over the first 5-10 years.

#### Option 2: Establish a statutory power for the Bar Council to intervene into failing law practices.

The BSB believes it is desirable to have a statutory power of intervention – to take control of client money and files when something has gone seriously wrong – into individuals’ practices and entities and to eliminate any residual risk that it may be prevented from taking action to protect clients. There may also be cases where such a power, or the threat of it, is in the public interest as, in such situations, the regulator needs to protect the interests of clients, obtain alternative representation and secure their papers or other assets. The BSB has identified a real risk that would justify intervention in spite of the prohibition on barristers holding client money. It has encountered at least one situation where its supervision function may have used intervention powers had they been available. It is arguably the case that the risk of such events materialising may increase as novel business models develop in the future.

Currently, the BSB relies on non-statutory powers although these may take time and can be challenged. Where the BSB has considered taking such action in the past (e.g. going to the High Court to seek an injunction over a regulated person) it has identified some potential difficulties in seeking to take such action without a clear statutory power to do so, which reinforced the view that intervention powers were an important tool in the most serious cases where urgent action was needed to protect clients’ interests. The proposed order will apply Schedule 14 of the LSA, subject to modifications, to the Bar Council as it applies in relation to a licensing authority and so enables the BSB to use the powers of intervention that it would have as a licensing authority if designated as such.



## Costs:

Costs to BSB and regulated persons: No increased costs of seeking to enforce this power, as compared with the “do nothing” option, which would require the BSB to seek a court order in advance of taking any action.

The Order will enable the BSB to seek a court order to recover costs from those who are the subject of intervention and related persons, which will mitigate impact on the wider regulated community.

## Benefits:

Benefits to the BSB and the public: The proposal will clarify the legal basis for the BSB’s powers in this area. It will reduce the risk of challenge and provide clarity for regulated persons and the public.

Net impact of Option 2: The net impact of this proposal is negligible.

Option 3: Establish a statutory power for the Bar Council to make rules requiring information or documents from those whom it regulates and enforce this in the High Court.

The BSB does not have a statutory power to require the disclosure of information or documents but its regulatory rules require regulated persons to comply with requests to do so. Failure to comply constitutes misconduct that could lead to disciplinary action and, in extreme cases, the BSB could seek a court order to enforce such requests but this is not set out in statute and could be subject to challenge.

The proposal will give the Bar Council powers to gather information similar to those available to licensing authorities under the LSA. This will enable the BSB to give notice requiring disclosure of information or documents where it is necessary to seek the information for the purpose of investigating compliance with its regulatory arrangements and to enforce compliance with such a notice in the High Court.

## Costs

Costs to the BSB, regulated persons and HMCTS: No increased costs predicted, as compared with the “do nothing” option.

## Benefits

Benefits to the BSB and the public: The proposal will clarify the legal basis for the BSB’s powers in this area. It will reduce the risk of challenge and provide clarity for regulated persons and the public.

Net impact of Option 3: The net impact of this proposal is negligible.

Option 4: Establish a statutory power for the Bar Council to make disciplinary arrangements, including disciplinary rules, in relation to those regulated by it.

The Bar Council's constitution permits it to enter into contractual arrangements with non-barristers (including entities and their owners and managers) under which they agree to abide by the BSB Handbook and submit to the jurisdiction of the Bar Tribunal and Adjudication Service. Whilst this contractual relationship has been relied on to date, the Bar Council does not have an express statutory power to make disciplinary rules. The BSB believes these powers should be stated unambiguously in secondary legislation. The effect of the Order would be to give the Bar Council a general statutory power to discipline all "regulated persons" within the meaning of the LSA, which would include barristers, employees of anyone authorised to practise by the BSB as well as entities. In the case of barristers, there would be no practical change, other than the legal source of the power. In the case of employees, the BSB does not intend to exercise any new disciplinary jurisdiction over them so there will be no practical impact following the introduction of the Order.

Costs

Costs to the BSB and regulated individuals: Costs are expected to be negligible, because its processes and rules will be unchanged.

Benefits

Benefits to the BSB and the public: The proposal will clarify the legal basis for the BSB's powers in this area. It will reduce the risk of challenge and provide clarity for regulated persons and the public.

Net impact of Option 4: The net impact of this proposal is negligible.

Option 5: To enable the disciplinary arrangements to include provision about the disqualification of individuals regulated by the Bar Council.

The BSB Handbook includes a power to disqualify a "regulated person", which by virtue of section 176 of the LSA includes not only those authorised but also employees and managers of authorised persons.

As the current arrangements are largely contractual in nature, the absence of an express contractual relationship between the BSB and each individual employee means that it would be more appropriate for this power to be expressly statutory in nature. There are strong public interest reasons for ensuring that those who are employed by BSB regulated persons can be subject to disqualification in situations where they have caused or substantially contributed to a BSB authorised person breaching their duties.

## Costs

Costs to the BSB and regulated individuals: Costs will be negligible, because processes and rules will remain the same.

## Benefits

Benefits to the BSB and the public: The proposal will clarify the legal basis for the BSB's powers in this area. It will reduce the risk of challenge and provide clarity for regulated persons and the public.

Net impact of Option 5: The net impact of this proposal is negligible.

## Option 6: Establish a statutory power for the Bar Council to make compensation arrangements.

The primary reason regulators have compensation funds is to address the risks associated with handling client money. This risk is not currently addressed in the BSB's current regulatory regime because there is a prohibition on holding client money, but the BSB acknowledges that its assessment of the risks inherent in the market may change over time, particularly with the onset of entity regulation and growing innovation in the sector. The scope and purpose of a Compensation Fund is wider than simply dealing with the loss of client money and could cover other potential loss by clients, for example related to professional indemnity insurance. So the BSB may wish to have a compensation fund that compliments its insurance arrangements even where those whom it regulates do not hold client money.

If the Bar Council is designated as a licensing authority it will acquire a power to establish a compensation fund for ABS entities in any event. The BSB therefore believes it is necessary to "future proof" its regulatory arrangements by seeking the same power in a section 69 Order to enable the Bar Council to do the same in its capacity as Approved Regulator acting through the BSB.

## Costs

Costs to BSB and regulated persons: Any costs incurred would be as a result of changes to the BSB's regulatory arrangements that are not currently planned, following extensive consultation and an application to the Legal Services Board. The "do nothing" option assumes the BSB may set up an insurance-based compensation arrangement in any event. If this option is pursued, this could be replaced by a levy on the profession to establish a compensation fund. The value of such a fund has not been decided, but for the purposes of assessing the impact of this proposal, it is assumed that a fund of around £500,000 from which payments could be made would be backed up by a reduced insurance policy. If the fund were set up over 5 years, this would lead to an additional cost to the profession of £100,000 in the first year, which would reduce in subsequent years as the cost of the insurance policy reduces compared to the "do nothing" option. Once the fund is established the ongoing costs are assumed to be an annual £30,000 saving

on the “do nothing” option. Any further levies on the profession would be dependent on claims against the fund, which have not been estimated.

Net costs are estimated as follows:

Year	BSB insurance (£000)	Levy on profession (£000)	Total costs (£000)	Net cost compared to “do nothing” (£000)
1	50	100	150	100
2	45	100	145	95
3	40	100	140	90
4	30	100	130	80
5	20	100	120	70
6 and subsequent	20	TBC	20	(30)

Benefits to the BSB and the public: The proposal will clarify the legal basis for the BSB’s powers in this area. It will enable a broader range of policy responses, should the identified risks in the market require the BSB to introduce compensation arrangements to protect the public.

Net impact of Option 6: The net impact is estimated as up to £435,000 in total for a transitional period of 5 years (£87,000 per year) followed by net benefits of around £30,000 pa thereafter.

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