

Sara Jagger  
 Director of Professional Conduct  
 Bar Standards Board  
 289-293 High Holborn  
 London  
 WC1V 7HZ



**LEGAL SERVICES  
 BOARD**

Legal Services Board  
 One Kemble Street  
 London  
 WC2B 4AN

T 020 7271 0086  
 F 020 7271 0051

[www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk)

8 October 2014

Dear Sara,

### **BSB enforcement and investigation**

I am writing following our meeting. The purpose of the meeting was to discuss the BSB's response to our recent information requirement about the BSB's investigative processes and enforcement cases. The purpose of this letter is to set out our final observations after reviewing the response to our information requirement and following our discussion. We intend to provide a copy of this letter to our Board and in due course it will be published with the rest of the Board papers.

First, I would like to thank you and your colleagues for the open and cooperative way in which you have approached this exercise. We are impressed with your ability to collate the information in a quick and accessible form. When we met we covered three main issues: status of cases outside the BSB's operational performance indicators or considered inactive; approach to old cases; and, reliance on pro-bono support. I would like to record our understanding of where we have arrived at in relation to each of these issues.

### **Status of cases**

We requested information regarding the BSB's investigation and enforcement cases that were inactive and/or outside the BSB's operational performance indicators. For the purposes of this work "inactive" was defined as cases that had not had any activity on them in the last thirty days.

The information provided by the BSB suggested that cases that were inactive or outside the BSB's operational performance indicators accounted for 37% of the BSB's open cases (95 out of 256 open cases). Of those 95 cases, 64% had a status of "adjourned."

At the meeting you explained that a case having the status of "adjourned" does not necessarily mean that the case has been adjourned by the Barristers Tribunal and Adjudication Service (BTAS). It also encompasses decisions made by the BSB to put an investigation on hold and you outlined a number of circumstances in which this might happen to an investigation. This included, amongst other things, circumstances in which the allegation of misconduct relates to an ongoing court case and also where a number of allegations of misconduct have been made against the same barrister and the BSB is pursuing a lead case. You also explained that, when it puts an investigation on hold, the

barrister(s) that are the subject of the allegation of misconduct and the complainant(s) are informed.

Broadly we consider the BSB's approach to be appropriate. However, we note that recording the status of such cases as "adjourned" in the BSB's systems has the potential to cause some confusion regarding the BSB's performance on its enforcement cases. Accordingly, you may wish to consider alternative, more detailed descriptions that best capture the actual reasons for the case being put on hold. However, providing the complainant(s), the subject(s) of the complaint and those that may be required to give evidence know the status of the investigation and the reasons for the case having been put on hold, we have little concern.

We think it is worth bearing in mind that recent case law findings suggest that regulators should always consider whether regulatory investigations can be continued even when those under investigation are facing, or may face, criminal proceedings. It is at the discretion of the regulator to decide whether to adjourn regulatory proceedings in such circumstances but case law points to adjournment only when there is a real risk of serious prejudice.<sup>1</sup> We do however accept that, when allegations concern ongoing cases in other forums, regulators need to be mindful of the requirements of fairness to those ongoing proceedings.

### **Approach to old cases**

The information provided by the BSB to the LSB showed that the oldest open case on your database was nearly ten years old and 20% of cases were over two years old. We discussed with you what was driving the age of these cases and whether you had a strategy to resolve such cases in a timely fashion and to ensure that future cases do not last that long.

You told us that the BSB has taken a number of steps to standardise directions and disclosure of documentation in the interests of speeding up its cases. We consider that such initiatives should help to facilitate the progression of cases. You also noted that for the old cases it has the option of using outside counsel and legal support as opposed to relying on barristers acting pro-bono to prosecute the cases – again, this ought to help speed up the process.

We discussed whether barristers subject to misconduct allegations who continue to practise during a prolonged investigation period present a risk to the public. You assured us that whilst the BSB can use interim orders to prevent those that are a risk to the public from practising, in most cases this is unnecessary. This is because the barristers concerned are either willing to agree to undertakings to not offer work to the public or to inform clients about the conduct issues under consideration by the BSB before providing their services; or their continued practice does not in your view constitute a risk to the public.

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<sup>1</sup> Mote v Secretary for Work & Pensions [2008] CP Rep 13

We recognise your concern that those subject to allegations of misconduct are barristers and therefore have significant expertise and experience in legal matters, as do the barristers they instruct to represent them. They may be particularly adept at exploring all available avenues for challenging both the substance and the process of the investigation, with consequential impact on the duration of the case. However, and as noted in a decision in relation to the Nursing and Midwifery Council, regulators must shape their procedures to accommodate the practical reality of litigious life.<sup>2</sup> You may want to consider how the BSB can reform its process further to help ensure that cases do not continue beyond a reasonable time whilst the investigative process remains fair.

### **Reliance on pro-bono**

The BSB's investigation and enforcement process draws heavily on the expertise of those it regulates. Pro-bono barristers and lay people are involved with bringing the products of BSB investigations together and determining whether to refer a case to the disciplinary tribunal. When a case is referred for a disciplinary tribunal, a barrister offering his or her services for free will prosecute the case. In our discussion you noted that (i) the quality of the barristers offering their services was very high, (ii) the BSB executive offers significant support to the barristers concerned and (iii) more recently, you have used paid counsel and legal support for delayed and prolonged cases.

The LSB is cautious about the BSB's marked reliance on pro-bono resources, particularly for prosecution. This is because we think that there is a risk that barristers may be unable to devote appropriate time and attention to cases, particularly those that are particularly complex or long running, on a pro-bono basis. However, we are reassured at the efforts the BSB makes to ensure that this reliance does not have an impact on the timeliness of cases. Nonetheless, we encourage you to remain vigilant in relation to this issue.

Once again we thank you for your and your colleagues cooperation. We consider that this letter closes our work on these specific issues. However, we will expect the BSB to reflect on these matters and its progress on resolving the oldest cases as part of the regulatory standards assessment exercise due to take place in 2015/16. I am sending a copy of this letter to your colleague Vanessa Davies.

Yours sincerely,



**Caroline Wallace**  
Director of Strategy

E [caroline.wallace@legalservicesboard.org.uk](mailto:caroline.wallace@legalservicesboard.org.uk)

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<sup>2</sup> *The NMC is not of course responsible for the conduct of the defence. However, the NMC is obviously responsible for its own conduct; and the complexity of the case and "the practical reality of litigious life" are matters which the NMC must shape its procedures to accommodate. When every allowance is made for the extent to which the conduct of the defence contributed to the delay, the length of time which these disciplinary proceedings took remains disgraceful.* Johnson and Maggs v Nursing and Midwifery Council, [2013] EWHC 2140 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2013/2140.html>

