



**LEGAL SERVICES
BOARD**

Legal Services Board
One Kemble Street
London
WC2B 4AN

T 020 7271 0050
F 020 7271 0051

www.legalservicesboard.org.uk

Freedom of Information request

Date request received: 09 June 2015

Date of response: 06 July 2015

LSB reference: 20150609-01

Request and response:

I write in response to your email of 9 June 2015 in which you requested information as to how the LSB holds the BSB to account under the Legal Services Act, and the factors that the LSB took into account in considering the BSB's rule change application which was received on 22 July 2011. I can confirm that the LSB holds some of the information that you have requested.

Responses to each of your individual requests are set out below in italics:

- 1. Please enumerate, describe in detail, and give current examples of, how the LSB holds the approved regulator of barristers the BSB to account under the auspices of the Legal Services Act 2007 for the BSB's performance in the day to day regulation of barristers.**

Information about how the LSB assesses whether the approved regulators' performance is compatible with the requirements set out in the Legal Services Act 2007 can be found on the [Developing standards and performance](#) page of our website.

- 2. In relation to the Decision Notice issued by the LSB under Part 3 of Schedule 4 of the LSA 2007 to the BSB dated 18 August 2011 and published by the LSB on 19 August 2011 (hereinafter to be referred to as the "Decision Notice"). Please provide a copy of the following information which is information the BSB was under a duty to provide to the LSB under Schedule 4 Part 3 "Alteration of Approved Regulator's Regulatory Arrangements" :-**

(1) the original application/s made by the BSB to the LSB and all accompanying material provided by the BSB to the LSB,

The BSB's application of 22 July 2011 can be found on the [closed applications](#) page of our website.

(2) any other information provided to the LSB by the approved regulator the BSB,

The attached issues log sets out answers provided by the BSB in response to queries raised by the LSB upon receipt of the application. A section of this document has been withheld as it is exempt from disclosure under section 42 of the Freedom of Information Act 2000 (information subject to legal professional privilege).

(3) any advice obtained by the LSB under paragraph 22 of Part 3 of Schedule 4 of the LSA 2007 from the OFT, the Consumer Panel, the Lord Chief Justice, and such other persons as the LSB considered it reasonable to consult regarding the application prior to the LSB issuing the Decision Notice,

The LSB did not consult with any of the bodies to which you refer in relation to this application.

(4) any written, and/or oral representations duly made to the LSB under paragraph 23 of Part 3 of Schedule 4 of the LSA 2007 by the BSB as applicant, and any draft and final report of oral representations made by the LSB of the BSB's oral representations and any comments by the BSB on the draft report of oral representations made by the LSB prior to the LSB issuing the final report of oral representations and the Decision Notice,

The LSB did not receive any written or oral representations from the BSB in relation to this application.

(5) any other information which the LSB considered relevant to the application/s, and

There is no other information, separate to that already disclosed, which the LSB considered relevant to the application.

(6) enumerate, describe, provide information, on how the LSB considered the granting of the application/s would not be prejudicial to the regulatory objectives of the BSB, and

(7) enumerate, describe, provide information on how the LSB considered the granting of the application/s would not be contrary to any provision of the LSA 2007, or, any other enactment, and

(8) enumerate describe, provide information on how the LSB considered the granting of the application/s would not result in any of the "designation requirements" ceasing to be satisfied in relation to the approved regulator the BSB, and

(9) enumerate, describe, provide information, on how the LSB considered the granting of the application/s would not be contrary to the public interest, and

(10) enumerate, describe, provide information, on how the LSB considered the granting of the application would comply with the procedures (whether statutory or otherwise) which applied in relation to the making of the alteration/s, and

(11) in relation to (10) above please enumerate, describe, provide information on each and every procedure statutory or otherwise which applied in relation to the making of the alteration/s which the LSB considered was in fact complied with by the BSB in relation to the making of the alteration/s.

In response to your questions 2(6) – (11), I enclose a copy of the refusal criteria checklist that was completed in relation to this application

- 3. Please confirm whether the LSB consulted any Third Party in acquiring any information that it has disclosed under this request.**
- 4. Please confirm whether the LSB consulted any Third Party prior to issuing any response under the request to confirm that the LSB does not hold any of the information requested.**

In response to your questions 3 and 4, I can confirm that the LSB did not consult any Third Party in dealing with this request.

- 5. If the LSB will claim the information is not held under the FOIA by the LSB please confirm whether the information was ever held by the LSB at any time prior to this request.**
- 6. If the LSB will claim information is not held under the FOIA please confirm where the information is now held, and which individual and/or, entity and/or, Public Authority, and/or Statutory Body now holds the information.**

In response to your questions 5 and 6, I can confirm that there is no relevant information that was previously held by the LSB that is now in the possession of another individual or body.

- 7. Please enumerate and describe in detail why the LSB does not consider it part of the process of holding an approved regulator the BSB to account to be concerned with the “effective from dates” of any Alteration to the Regulator’s Regulatory Arrangements that the LSB approves under Schedule 4 Part 3 of the LSA 2007.**

The LSB’s approach to dealing with rule change applications is set out on the [Alterations to regulatory arrangements](#) page of our website, including our Rules for rule change applications.

I trust that this addresses your information request, but if you are dissatisfied with our response, you have the right to ask for an internal review or to submit a complaint (see LSB’s Freedom of information – Complaints procedure:

http://www.legalservicesboard.org.uk/can_we_help/l_sb_policies_procedures/freedom_of_information/index.htm).

Q2 (2) Issues log

Issues Log

Name of application BSB ATP

Updated 02-Aug-11

Project Issue Number	Author	Date Identified	Rules reference	question for AR	AR RESPONSE	DECISION DATE	DECISION AND COMMENTS
1	ld	02/08/2011	general	It appears that one of the intentions of the rule to "tidy up" the different categories of barrister. It would be helpful if you could map the different categories of barrister to the 5 different categories and explain whether there are changes to what these categories of barrister can do in relation to their work and how they will interact with the BSB. Also, can you confirm if the 5 categories are in fact new? It may be helpful to discuss this further	The Categories are not new and are as present; Pupil, Dual Capacity, Self-employed, Employed & European Registered lawyer. The categories are mapped out in annex 4 to the application. The proposed changes will not so much "tidy up" but close the loophole that surrounds Rule 206 barristers. There are approximately 100 barristers who fall under the 206 rule and by 31/3/12 they will have to notify us that they intend to be registered under this rule and they will have to confirm this annually. As a result of this, the number of barristers in this pool is likely to reduce and public protection will be strengthened.	11/08/2011 (meeting)	this was discussed further at the meeting on 11/08/2011. BSB explained further that the only changes to 206 barristers was that no further barristers could join this category and that they would now have to provide information annually to remain within this category. Accept BSB response
2	ld	02/08/2011	Register	Is there the potential for confusion for members of the public from the BSB register and the Bar Council public access register? What steps will be taken to avoid confusion particularly in relation to the limited PC which might be perceived negatively?	The Bar Council's Public Access <i>Directory</i> and the BSB register serve two different purposes. The former relates only to those barristers who are eligible to undertake direct access and seek to advertise their services to the public. The BSB Register will give full details of rights of audience, litigation, public access etc. We will discuss with the BC whether the difference should be clarified on their website. The Register will not show that a barrister has a limited practising certificate but will show they have lower or no rights of audience & there will be an explanation as to the meaning of the terms	11/08/2011	Accept BSB response
3	ld	02/08/2011	Register	What steps will be taken to ensure that members of the public can understand the implications of different categories of barrister?	The Register will display 'pop-ups' on screen, explaining each category of barrister, as it does at present	11/08/2011	Accept BSB response
4	ld	02/08/2011	Register - rule 13.2	Is it the intention to have information about the Bar Register available in other places than the internet?	Enquiries can be made regarding the status of practitioners by phone, email or in writing and are handled daily by the Records Office. The BSB Register will be electronic and will be updated daily. Any hard copy register is, invariably, dated and consequentially not completely accurate.	11/08/2011	Accept BSB response
5	ld	02/08/2011	Register - rules 9.5 and 25	Reference is made to surcharges that might be levied for non-payment and sanctions that might be applied. Have BSB considered whether the publication of this information would assist choice of barristers by potential clients and others?	This information would not be published as there may be genuine and innocent reasons as to why such charges may have been levied and in such circumstances the public may be make a decision without the full facts (hence no public protection value in publication). Any barrister who is subject to the complaints process and against whom there is a disciplinary finding, will have the outcome of the process listed on their register entry.	11/08/2011	Accept BSB response
7	ld	02/08/2011	para.3.3	What is the progress of the procedures and guidance referred to in para.3.3? What steps are BSB taking to ensure that they will be in place sufficiently before the proposed implementation of the rule change?	A governance framework has been put in place and project management principles have been applied to the project, including establishing a project group and work teams. Annex 3 to the application gives details of milestones. The project is supported by a full project plan and team plans.	11/08/2011 (meeting)	BSB confirmed at the meeting that the project was running to plan and timescales. They plan to publish guidance which is part of the communication programme to support the implementation of the rule change. This may include FAQs, scenario-based FAQs, staff training, briefing papers and information to be provided to other stakeholders. The communication plan will begin in the Autumn. Accept BSB response.
8	ld	02/08/2011	Rule 9.1	There will be different fee levels for different types and levels of barrister. What steps have the BSB taken to ensure that systems and processes are sufficiently robust to deal with different barristers, with different levels of seniority who operate in different capacities?	There have been different fee levels for different types and levels of barrister for over 40 years. These arrangements remain under review. They were consulted upon in 2010 and will again be the subject of consultation in Autumn 2011. Any changes will be the subject of the Bar Council budget and PCF submissions to the LSB in Dec 2011.	11/08/2011	Accept BSB response

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9	ld	02/08/2011	para. 3.7	this rule involves a new procedure being implemented for all barristers at the same time. Have the BSB estimated how many barristers might fall into the late payment of PCs and be subject to the new processes in the first year? What steps are they taking to ensure that there is sufficient resource available to address any issues arising from an increase in the number of barristers going to the PCC and removing references to barristers from the register? What steps will be taken to ensure that consumers suffer no detriment?	The requirement to have a practising certificate is not a new one and has been in place for over a decade. As a result, we have an experienced team in place who are well practised in the processes required to ensure compliance. What is changing now is that we will require barristers to provide, coincidentally with making payment, evidence of insurance and CPD. This, together with the common due date, will provide additional challenges (to some extent lessened by the new core database, which will bring in greater automation). Our emphasis will be on our procedures prior to the 1 May 2011, where we will ensure that there is comprehensive communication with the profession before and after the due date to remind them of their obligations and also to establish the number of barristers who are exercising reserved legal activities without a practising certificate. This involves contact with individuals, chambers and employers. We do not necessarily anticipate an increase in the numbers historically referred to the Professional Conduct Department. All barristers will be informed that failure to obtain authorisation will result in not being included in the BSB Register. At this point they would be committing a criminal offence if they continue to exercise reserved legal activities and would be referred to our professional conduct department if there is evidence that they are doing so.	11/08/2011 (meeting)	the reference to "2011" should read "2012". BSB do not anticipate there being an increase in the numbers of barristers without a PC than is currently the case under current rules after the renewal date. They will target resources where they have evidence that barristers are continuing to practice. They also confirmed that barristers continue to be covered by their PI insurance if they continue to practice without a practising certificate. Accept BSB response
10	ld	02/08/2011	Monitoring, compliance and enforcement	There is limited reference to the steps that the BSB will take to address the issue of those who continue to practise who have not renewed their PC and have not provided the information that the proposed rule change will require. How will they ensure that members of the public are protected? For example how will the status of a barrister who has not complied with the requirements be shown on the register? when will changes if any be made to the register? What steps will be taken to ensure that they do not practise? Would clients be protected by PII with a barrister not in compliance with these rules?	The Records section will be working to identify by early May, those who continue to practise but have not renewed their practising certificate and will take appropriate action to seek to ensure that PCs have been renewed (including writing to the barrister's chambers / employer). From the 1 May, any barrister who has not paid for a practising certificate and therefore does not hold one, will not be included in the BSB Register. The emphasis of enforcement action will be on those whom we have reason to believe are continuing to exercise reserved legal activities. We will then consider in each case what action can be taken to protect the public. In addition to referral to our Professional Conduct Dept, we have been in discussions with the DPP and have a draft policy for reporting illegal practice to the police in sufficiently serious cases (although this is subject to further negotiation with ACPO). We will ensure that the consequences of non-compliance are well publicised. In any case, the majority of barristers will continue to have professional indemnity insurance with BMIF, which will protect their clients' interests.	11/08/2011 (meeting)	BSB went into more detail about the steps that they will take to target barristers who fail to renew their PC or provide the appropriate information. They emphasised the importance of chambers and employers and that failure by them to put pressure on barristers was also a potential disciplinary route. They said that there were also seeking agreement with DPP/ACPO about progressing failures criminally. Accept BSB response
11	ld	02/08/2011	temporary certificates para.3.12	can we see a draft of the guidance which sets out the criteria for issuing temporary practising certificates?	This is now attached as annex 8	12/08/2011	this was provided by email and will be reviewed.
12	ld	02/08/2011	temporary certificates	Can you confirm that temporary certificates can only be issued to barristers who have lodged an application for review and no other circumstances. What is the longest that a barrister is likely to hold a temporary certificate?	The longest period would be no more than 3 months, although it is hoped that the application would be considered within a shorter period of time. Temporary certificates can only be issued if barristers seek review of the refusal.	11/08/2011	Accept BSB response
13	ld	02/08/2011	para. 3.11	One of the objectives of the application is to harmonise the authorisation process for barristers. Can you explain further why employed barristers and self employed barristers will be dealt with differently?	Self-employed & employed barristers will not be dealt with differently as under this new system the process will be harmonised meaning i.e. the same renewal date and the same processes for non-compliance. Para 3.11 of the application deals with limited practising certificates for employed barristers. Historically some employed barristers had limited or no rights of audience but were nevertheless able to practise as barristers providing advice to their employers. When the requirement to do pupillage and the three year rule were introduced, they were allowed to maintain the rights they already had notwithstanding the new rules. No self employed barristers are in this position - hence the provisions on limited practising certificates apply, in practice, only to employed barristers.	11/08/2011	Accept BSB response

Project Issue Number	Author	Date Identified	Rules reference	question for AR	AR RESPONSE	DECISION DATE	DECISION AND COMMENTS
14		02/08/2011	rule 8	is it the intention to provide guidance as to the circumstances in which a barrister might receive a reduction in fees payable?	We have an extant policy with regard to fee reductions, which is based on gross earnings. We intend to maintain this policy.	11/08/2011	Accept BSB response
15		02/08/2011	rule 9.1	This section does not say "(acting by the Bar Standards Board)" It would also be helpful to know whether this language is consistent with language used elsewhere	This section does not refer to the BSB as it is the responsibility of the AR (ie the BC) to set the PC fee. The phrase 'acting by the BSB' is used where other regulatory / enforcement action is being taken.	15/08/2011	[REDACTED]
16	ld	02/08/2011	rules 11.4 and 12.1	How do rules 11.4 and 12.1 work together? 11.4 uses the words "shall not" and 12.1 uses the words "may not"	These rules relate to two different processes; ie 11.4 relates to having insurance in place at the application stage (and is mandatory) whereas 12.1 applies in the circumstances where a barrister's insurance has lapsed and as a result the practising certificate would be revoked (and is discretionary). This is because there are no circumstances in which we would grant a PC to a barrister without insurance. Removing an existing PC is a different matter, which might adversely affect existing clients (it is important to note that BMIF covers claims against all practising barristers who have insured with BMIF even if they have failed to pay the current premium). The aim in these circumstances is initially to secure compliance rather than revoke the PC, hence the power is discretionary.	15/08/2011	Accept BSB response
17	ld	02/08/2011	rule 15	Does the lack of consistency in terminology between a "current" and a "valid" practising certificate cause a problem? Paragraph 202 of the Code of Conduct says that a barrister may practise as a barrister provided that he has a <u>current</u> practising certificate, whereas Rule 1 in Annex 1 refers to a <u>valid</u> Certificate i.e. one that lasts up to 31 March each year and for one month thereafter. So, a PC issued on 1 April in any year will be 'current' up to 31 March in the following year, but 'valid' up to the end of April in the following year. Does this mismatch cause a difficulty applying the Code?	There is no intended difference between the meaning of the two words. As such, we do not think this creates a problem. However, there is no reason why we could not amend to ensure consistency. 17/08/2011 After consultation with colleagues, we have concluded that the easiest way to address your lawyer's concerns around conflicting terminology is simply to remove the word "current" from paras 202(c) and 404.2(j). We think that this approach is appropriate because from the point of view of the code a barrister will either have a practising certificate or not (hence no need to replicate the word 'valid' – which avoids questions such as how a Head of Chambers knows whether a PC is "valid" or not). I hope this is sufficiently clear now, but please let me know if not.	17/08/2011	This was discussed at the meeting and BSB will determine the language they will use and inform LSB. BSB have told us that they will alter the language in subsequent emails. This will involve amendment to the code of conduct proposals and keeping the rule proposals as they are. Accept BSB response 17/08/2011
18	ld	02/08/2011	rule 22	You may want to consider the drafting of this to include a reference to what it is they have become aware of (ie of it coming to their attention)	We do not think this is necessary. Separate guidance will be produced to compliment the rules as part of the application process.	11/08/2011	Accept BSB response
19	ld	02/08/2011	rule 23	is it your intention to issue refunds in the event that circumstances of a barrister change?	We have an extant policy in relation to refunds, with which we intend to continue.	11/08/2011	Accept BSB response
20	ld	02/08/2011	Annexes 5&6	Have you considered whether any steps need to be taken to mitigate the negative impacts set out in these annexes?	The steps we are taking to mitigate any negative impacts are outlined in the Action Planning section of Annexes 5 and 6 to the application	11/08/2011	Accept BSB response

Project Issue Number	Author	Date Identified	Rules reference	question for AR	AR RESPONSE	DECISION DATE	DECISION AND COMMENTS
21	ld	02/08/2011	annex 5	can you explain why page 5 of annex 5 says that the rule relating to those who have been out of practice for 5 years will not be implemented until 2014?	At present the BSB does not know what form the training requirement will take. This will be informed by the outcome of CPD review.	11/08/2011(meeting)	This was further explained at the meeting. It links to the fact that reform as a consequence of CPD review will impact this but will not be in place until 2013 and will need to be in place for a year before it can be reported on to BSB. Accept BSB response
22	ld	02/08/2011	CPD and annex 5	Annex 5 says that the CPD requirement will not be implemented until after the CPD review is completed. The rule application also says that the BSB has agreed that the BSB will not use its discretion to refuse to renew a practising certificate on CPD grounds. What steps will you take to ensure that Barristers are aware of this guidance? What steps will you take to ensure that Barristers are aware of any changes arising from the CPD review to the practising certificate rules? What steps will be taken to ensure that a proportionate approach to the CPD requirement is taken?	The issue outlined in Annex 5 relates to issue 21. The authorisation process will ask barristers to confirm whether they have completed CPD, if a barrister has not completed CPD, they will not be refused a practising certificate. These barristers will be asked the reason why they have not completed CPD and what they are doing to remedy the situation. Barristers will still be required to complete CPD hours and we will continue to monitor this under our existing system. This will be explained in our application guidance. The outcomes of the CPD review will inform how the system will change and whether there will be a definite link between a barrister not completing their CPD hours and being refused a practising certificate. The outcome of the CPD review is a separate project and will have a communication plan etc.	11/08/2011	Accept BSB response
23	ld	02/08/2011	annex 6	Can you explain why some of the boxes in this annex have not been ticked?	This was a formatting issue - please see the revised Annex 6, attached	11/08/2011	Accept BSB response
24	ld	02/08/2011	general	the consultation document had referred to not being able to back date renewals after the grace period. What has happened to this issue? What will happen to PCs renewed after 13 months?	The incentive to renew by the grace period would be lost if PCs were backdated and we have received legal advice that we cannot legally backdate PCs as we cannot legitimise the illegal activity of carrying on reserved activities without a PC. PCs renewed after the end of the grace period will commence from the date when they are renewed and the register will reflect this.	11/08/2011	Accept BSB response
25	ld		annex 8	You say that if a practising certificate is issued it will usually be valid for 3 months from the date of issue. Does this mean that the certificate will be for a fixed period of 3 months? What happens in the event that a longer period is needed?	The Qualifications Committee would have discretion to award a temporary certificate for as long as was necessary, if the circumstances of the case required it to be more than 3 months (or indeed could issue a further certificate if the issue had not been resolved within the original time frame)	16/08/2011	Accept BSB response

Project Issue Number	Author	Date Identified	Rules reference	question for AR	AR RESPONSE	DECISION DATE	DECISION AND COMMENTS
26	ld		annex 8	<ul style="list-style-type: none"> You have said that the circumstances in which a barrister will usually not be granted a certificate are when the BSB has revoked a practising certificate or when the BSB has refused to amend a PC. Can you tell me what the route for appeal would then be for these circumstances 	<ul style="list-style-type: none"> The route of appeal will always be to the Qualifications Committee for any decisions made under these rules. Whilst such appeals are being considered, a panel of the Qualifications Committee will make a decision about whether to issue a temporary practising certificate (as stated in the guidance, this decision would be taken by the Secretary / Chair / Vice Chair of the Committee). Any such decision may be appealed to the full Qualifications Committee under our normal procedures. The guidance states that a temporary practising certificate will not normally be issued in the circumstances mentioned above. This means we would normally expect a barrister to cease practising immediately if we have revoked his certificate or continue practising as per his existing certificate if we have refused to amend his certificate until the Qualifications Committee has considered the matter. I will discuss the rationale for both scenarios separately. In the case of a refusal to amend a certificate, this would only arise where a barrister was asking us to increase the scope of his practice. A temporary certificate would therefore not be necessary, as our refusal would not place him in a worse position. He would be entitled to continue practising under the terms of his existing certificate – there would clearly be risks in temporarily extending the scope of his practising certificate simply because he had asked us to do so, if the BSB was not satisfied that this was appropriate. In a case where a practising certificate had been revoked, this would apply where (a) the barrister had been disbarred (in which case a temporary practising certificate would clearly be inappropriate); or (b) a discretionary decision had been taken by the BSB that there was a risk to the public resulting from a breach of rule 12. In scenario (b) we would only have taken such a decision after giving the barrister written notice and an opportunity to make representations before revocation. In such a case, if the Qualifications Committee Panel (or on appeal, the full Committee) felt that there were in fact no risks to the public then it could depart from the guidance and issue a temporary practising certificate. 	16/08/2011	Accept BSB response.

Q2 (11) Refusal criteria checklist

Assessment of application for changes to regulatory arrangements against the criteria in Schedule 4, para 25

Schedule 4, para 25 sets out the circumstances when the LSB can refuse to approve an application from an approved regulator or licensing authority for changes to regulatory arrangements. In recommending that an application is approved you need to demonstrate that you have considered the refusal criteria and reached a sensible conclusion that they have not been met and that therefore the application should be approved.

	Reasons for refusing an application	Y/N	Commentary
25(3)(a)	Would granting it would be prejudicial to the regulatory objectives?	N	
(b)	<p>Would granting the application would be contrary to the LSA07 or other legislation</p> <p>Or would result in designation requirements ceasing to be satisfied</p> <p>The designation requirements (25(4)) are</p> <ul style="list-style-type: none"> • A requirement to have appropriate internal governance arrangements • A requirement that the applicant is competent, has sufficient resources to perform the role of AR in relation to RLA for which it is designated • The requirements of paragraph 13(2)(c)-(e) <p>Paragraph 13(2)(c)-(e) requires</p> <ul style="list-style-type: none"> • That the applicant's proposed regulatory arrangements make appropriate provision • The proposed regulatory arrangements comply with the regulatory conflict requirements (s.52 and s.54 of the Act) • Those arrangements comply with the requirements for complaints about authorised persons (s.112) and the duty of authorised persons to co-operate with investigation (s.145) 	<p>N</p> <p>N</p>	<p>The main risks identified with this application were the capacity and competence to deliver the changes. These were raised with the BSB via the issues log and discussed at a meeting on 12/08/2011. We were satisfied with the answers given to us that the BSB were aware of the risks and had taken sufficient action to mitigate them.</p>
(c)	Would granting the application would be contrary to the public interest	N	
d)	Would granting the application would allow an Approved Regulator to authorise carrying on of RLA for which it is not approved	N	
(e)	Would granting the application enable the AR to license persons to carry on RLAs for which it is not a licensing authority	N	
(f)	Has the alteration has been made otherwise than in accordance with procedures for rule changes	N	