

BAR STANDARDS BOARD

REGULATING BARRISTERS

Compliance and Enforcement – Statement of Policy – Consultation

Bar Standards Board's response

Introduction

1. The Bar Standards Board (BSB) welcomes the opportunity to comment on the Legal Services Board's consultation on "Compliance and Enforcement – Statement of Policy".
2. The BSB is fully supportive of the Law Society's response to this consultation and endorses the comments and concerns expressed in it. The BSB takes a different view on being entitled to an oral hearing but this is the only area of difference between it and the Law Society. The BSB's response provides additional comments or amplification on particular points rather than reiterating the points already made by the Law Society. Where no additional comment is made the LSB may assume that the BSB agrees with the points raised by the Law Society.

Q1: Aim of the strategy and achievement of regulatory objectives

3. The LSB consultation paper refers repeatedly to the interests of consumers and those who are regulated. However, the regulatory objectives include (amongst other matters) the public interest, the rule of law and access to justice. Para 2.4 of the paper, in particular, suggests that the LSB will prioritise certain regulatory objectives (those in s1(d) and (f)) over others in weighing up whether or not to exercise its powers. That approach amounts to imposing on the Approved Regulators a particular policy as to how they should prioritise a set of regulatory objectives which the Act (quite deliberately) has not ranked in an order of priority. Neither the LSB, nor the Approved Regulators, should forget that there are in fact 8 regulatory objectives and that they do not all pull in the same direction. Balancing them is inevitably a matter of judgment on which reasonable views may differ.
4. It goes without saying that compliance with the regulatory regime established by the Act is the outcome to which both the LSB and the Approved Regulators are committed. Any genuine misunderstanding about what that might require should be resolved by cooperation and dialogue between the LSB, as oversight regulator, and the Approved Regulators. Inappropriate use of powers to sanction Approved Regulators will undermine rather than enhance regulatory performance. The starting point for the LSB's strategy should therefore be that exercising any of the

powers of sanction should only be undertaken when alternate avenues have been pursued and exhausted.

Q2: Deciding whether action is appropriate and when acts or omissions have been unreasonable

5. The LSB is required by section 49(3) of the Act to have regard to the principle that its principal role is to be an oversight regulator. Section 49(4) requires that in preparing policy statements such as this, the LSB “must have regard to the principle that the Board should not exercise any of those functions by reason of an act or omission of an approved regulatory unless the act or omission was unreasonable.”
6. Those sections and the principles expressed in them should be hard-wired into the very structure of the LSB’s enforcement and compliance policy; instead they are merely referred to in passing at para 2.4. This is a fundamental flaw, because it means that the policy is not conditioned in the way that the Act envisaged and required. That then creates a risk that the policy could become the mechanism for subverting the clear distinction the Act draws between the roles of the front-line regulators, i.e. the Approved Regulators, and the LSB as oversight regulator.
7. The LSB’s role, as oversight regulator, is to ensure that the systems and processes established by the Approved Regulators are fit for purpose (as, for example, in ensuring independence) and that, in making its decisions, the Approved Regulator addresses its mind to the correct matters and approaches its task reasonably. Only in specific and limited circumstances, defined by the Act, must the LSB itself assume a front-line regulatory role.
8. It follows from that division of responsibility, and from the terms of s49(4), that it is no part of LSB’s role to substitute its own view for the Approved Regulator’s simply because it disagrees with the conclusion reached. It is generally acknowledged that the regulatory objectives are, to a degree, in tension with one another and views can reasonably differ on how best to reconcile and promote them. It must necessarily follow that it is no part of the LSB’s role to second guess the balance an Approved Regulator may strike, in this respect, in deciding what course is most appropriate to meet them, as long as it has addressed its mind to the right matters and approached the task reasonably.
9. If the decision is reasonable it must be allowed to stand and cannot properly form the basis for sanctions, even if the LSB might have decided differently had it been in the role of front-line regulator itself. What is more, the reasonableness of regarding a given course of action as compatible with the regulatory objectives is not to be assessed solely by reference to the interests of consumers and regulated persons but by reference to all of the regulatory objectives.
10. The consequence is that the LSB should only intervene by way of its powers to impose sanctions in circumstances where the Approved Regulator would be amenable to judicial review as having acted (in effect) unlawfully or irrationally. It is consistent with the role of oversight regulator for the LSB then to intervene to obviate the need for members of the public or regulated persons to bring a judicial review. That is quite different from trespassing on the role of the Approved Regulators in making the decisions for which they are responsible.
11. It is of course implicit in this that the Approved Regulator will be able to explain, if asked to do so, the reasons for its decisions and how it has balanced the regulatory

objectives in any given case. Likewise, the LSB should be able to explain its rationale for any intervention it makes.

12. The LSB is proposing, in what follows in the consultation paper, a structure for compliance and enforcement which is similar to that adopted by other regimes to deal with the risk that delinquent businesses may calculate that the profits from breaching the regulatory regime will exceed any likely fine (as, for example, under the regimes for which the FSA or OFT are responsible). Ensuring compliance and enforcement between regulators and commercial enterprises is, however, entirely different to ensuring compliance as between regulators with differing roles within the same regime. Approved regulators are not-for-profit enterprises performing a function in the public interest. There is no place for punitive and “*in terrorem*” fines in the relationship between Approved Regulators and the LSB. If anything, that threat could only tend to undermine the atmosphere of openness and cooperation which should characterise that relationship. The ability to impose fines on other regulators is a highly unusual power. There is no parallel, for instance, in the relationship between SIB and the SROs it recognised. The power should therefore be used very sparingly, with great caution and with an acute awareness that doing so may undermine rather than enhance the effectiveness of the Approved Regulator.

Q3 -4 Informal resolution – Collection and dissemination of information

13. The LSB is in a pivotal position to publish information and data, to commission research and to stimulate policy debates through its consumer panel. Engagement with regulators to achieve informal resolution of potential difficulties is part of that aspect of the LSB’s role. The BSB would urge the LSB to put a much greater emphasis on such activity and to view the tools of public censure, directions financial penalties and intervention directions as fallbacks to be resorted to only in the event that all else fails.
14. The information that the LSB proposes to gather under paragraph 3.7 could be used for far more constructive purposes than those identified under paragraphs 3.8 and 3.9. Paragraph 3.8 seems to suggest an immediate presumption that formal information gathering powers may be used when it would seem more logical to seek more information from the Approved Regulator, frontline regulator or any other appropriate third party first. The matters that can be considered and taken into account are very wide but do not explicitly accommodate matters such as whether or not a new regulatory risk appears to be emerging that may require closer monitoring or scrutiny by the LSB, or whether equality and diversity issues are emerging. For example, the BSB is especially concerned about the differing practices regarding the payment of referral fees which exist and the range of different requirements in codes which are in place. The BSB would like the LSB to operate flexibility in the factors it can take into account and the range of uses to which information may be put.
15. When informal resolution is pursued, the BSB considers that the published record should be agreed by the parties to the informal resolution process. Decisions on whether or not to publish should be made on a case by case basis.

Q5 Performance targets

16. Performance targets can be set in relation to the performance by an approved regulator of any of its regulatory functions. They may be designed to ensure that those functions are, for example, discharged more efficiently and cost-effectively. Performance Targets and monitoring should, as far as possible, be arrived at by consensus and in collaboration with the Approved Regulator, working with its independent regulatory arm. It is suggested that the LSB should set high level targets and outcomes, [in combination with guidance, where appropriate]. An overly prescriptive or detailed set of targets runs the risk of the LSB being seen to be micro-managing the regulatory role, which is not consistent with the objectives of the Act.
17. Of course, there may be areas where there is sufficient commonality of view that some targets may span all approved regulators. For example, requirements to inform the public about the work of the profession. The BSB welcomes and supports the proposed widening of the permitted purposes to include the regulatory objective of “increasing understanding of the citizen’s rights and duties”.

Q6 and 7: Directions

18. The BSB is very concerned about the use of directions to require money to be spent in a particular way. This power should only be used in the most extreme of circumstances and as last resort. Sufficient notice would need to be given so accounting and auditing requirements could be ascertained and proper financial governance adhered to. Section 32(5) must be carefully borne in mind when considering this type of action.

Q8: Censure

19. The BSB envisages censure operating only in serious circumstances and where there has been recklessness or blatant disregard of the regulatory objectives. Public censure is a severe and potentially extremely damaging sanction when applied to a regulator. It has the potential to seriously undermine confidence in the Approved Regulator and the credibility of the regulatory regime. For this reason it should be used carefully.

Q9 et seq: Financial penalties

20. This is a major area of concern for the BSB. The Law Society’s comments are strongly endorsed in this respect, with further concerns raised below.
21. In general, the LSA 2007 provides for a progression from cooperation, to performance targets, to directions and only thereafter to fines. (Only in the case of breaches of section 30 (internal governance rules), or section 51 (control of practising fees charged by approved regulators) can the LSB proceed directly to a fine.) It must, logically, be the case that fines could only be appropriate for unreasonable behaviour (see above), which is persisted in despite directions and other such measures, and which has a (demonstrably) serious enough adverse impact to make a fine a proportionate course, always bearing in mind that the effect of fining an Approved Regulator is to reduce the available funds for it to do its job.
22. The criteria need to consider the overall impact of the penalty: is it being imposed for deterrent effect or to merely signal disapproval? The BSB would like to see the

evidence-base for the statement that “the LSB views the threat of a large financial penalty as a significant incentive on an approved Regulator to ensure compliance.” The only evidence of which the BSB is aware is that of the SIB and SRO regime, where SIB was demonstrably able to exert influence over the policies and operations of SROS when their performance faltered, as happened at IMRO. It therefore seems more likely that it is the impact of being made the subject of a public sanction from the oversight regulator rather than the quantum of a fine that will be most effective in achieving compliance. It is suggested that other forms of influence, or a much more modest fine, would be sufficient to achieve the LSB’s aims when coupled with the public nature of a formal sanction.

23. The analogy with utilities and competition law (made in paragraph 3.37) is completely misplaced, as has already been stated. Approved Regulators are non-profit-making bodies regulating in the public interest. Turnover (paragraph 3.37) is equally an inappropriate measure in this context, not least for the reasons the LSB itself gives at paragraph 3.38.
24. The comparison with GDP (para 3.40) is, with respect, irrelevant. The Approved Regulators are obliged to regulate in the light of their judgments as to what their duties under the Act require of them, not on a referendum basis. The paper proposes that they should instead be treated as if they were in a joint enterprise, for profit, with those whom they regulate, exposed to fines calculated accordingly, and that exposure then used as a means of making those who are regulated apply pressure on their regulator. That is to transfer control mechanisms that might be appropriate as between a regulator, a delinquent profit-making enterprise and its shareholders (the utility and competition examples) to a situation that could not be more different.
25. A calculation that produces a £10m fine for a regulatory body like the BSB whose annual budget for that function is about half that amount is self-evidently disproportionate. Even the lowest of the three methods proposed in para 3.42 produces a disproportionately large figure of £3,750,000.
26. If it is necessary to set a maximum level of fine at all, the BSB suggests that a more proportionate approach would be to consider past behaviour and assess the degree of risk posed. The Law Society has proposed an approach based on comparison with fines applicable to it under the LSCC regime. Neither the Bar Council nor BSB has been fined under that regime, or indeed to any great extent at all in the past. The maximum that can be imposed by the Legal Services Ombudsman is £15,000 and nothing close to this ceiling has ever been contemplated. History therefore shows that there only a modest financial penalty is needed in order to obtain compliance. Increasing the maximum fine level to such large figures as are proposed is simply not justified on the evidence of past history.
27. The effect on those regulated must also be considered in assessing what should be set as the maximum level for any financial penalties (and whether any and if so what fine is appropriate in any given case). The Approved Regulators have no profit stream from which to pay fines. They are obliged to pass them on to those who pay practising certificate fees. This has the effect of penalising those who are regulated, who may in fact be the very people whose interests have been adversely impacted by the behaviour which the fine is designed to sanction. This is not comparable to the company/shareholder relationship, where it is reasonable to treat the shareholders as sharing in the profits produced by delinquent behaviour and able, collectively, to control the behaviour of the company to prevent such behaviour.

28. The BSB considers that the criteria that the LSB should use to assess the level of the maximum financial penalty fee should include:
- The detrimental impact a high maximum fine would have on cooperation between the LSB and Approved Regulators and in particular on the degree of frankness and openness Approved Regulators would feel able to show in volunteering to the LSB information about aspects of their own performance that could be improved and seeking guidance about how to achieve that improvement;
 - The Approved Regulator's past track record of compliance;
 - The proportionality of the maximum fine to the Approved Regulator's income and the numbers of persons regulated;
 - The practicability of paying a fine at the maximum level in any year in which a budget has already been set and income raised by way of practising certificate fees;
 - The impact the maximum level of fine would have on continued financial viability of the regulator.
29. The LSB is also urged to consider how the Approved Regulator may be expected to raise the funds necessary to pay a fine, especially if it is so large. If the Approved Regulator is unable to raise the funds from the profession there is a very real risk that the Approved Regulator may be forced towards bankruptcy. This result may be completely disproportionate to the issue at hand. If the LSB considered that an Approved Regulator were not discharging its responsibilities so seriously that it should no longer continue in operation, then the appropriate steps towards cancellation of designation should be taken, rather than forcing the Approved Regulator to fail through this means.

Q15 -16 Determining level of penalty

30. There should be no question of Approved Regulators being fined for a genuine misunderstanding. Genuine misunderstandings can and must be dealt with by other available means.
31. It would surely only be in a rare and extreme case that fines would ever be the proportionate and appropriate response (i.e. in relation to an AR which deliberately persisted in an unreasonable stance on a matter that demonstrably had a significant adverse impact, but not otherwise) which makes it a little difficult to address the question of what the aggravating factors should be that lead to a fine at the upper rather than lower end of any scale.

Q? Hearings

32. In circumstances where there are no further non-statutory appeals the BSB submits that a party should be entitled to have an oral hearing where this is requested. The same should equally apply in the case of a fine, because of the serious impact, despite the existence of a statutory appeal. The BSB thinks that there is considerable value in dealing with things face to face. Oral hearings can have a useful role in dispelling misapprehensions on either side as to the nature of the issues. Removing this as an option may be both counter-productive and prove to be

a false economy in the longer term if, for example, mistaken decisions are arrived at that have to be corrected by way of an appeal. It is not as if the numbers of such sanctions are likely to be so great as to make oral hearings an impractical and overly burdensome measure. Sanctions not only impact on the Approved Regulator but also affect the interests of those regulated and the credibility of the regime as a whole. In these respects the position is not comparable to that of, say, individual lawyers whose regulator is considering a reprimand, where it is well established that there is no requirement for oral hearings, and this justifies adopting a different approach and treating oral hearings as the norm unless the parties agree this to be unnecessary in the given case.

Bar Standards Board
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