

To:	Legal Services Board	
Date of Meeting:	27 May 2015	Item: Paper (15) 26

Title:	Investigation – Bar Council and internal governance rules – compliance with fourth undertaking	
LSB Strategy fit:	‘Performance, Evaluation and Oversight’	
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Status:	Official (restricted)	

Summary:

The Bar Council (as approved regulator) proposed four informal undertakings to the LSB in November 2013 to conclude our investigation into the Bar Council’s inappropriate involvement in the Bar Standards Board’s (BSB) application to the LSB to change its Code of Conduct in relation to the “Cab Rank Rule”.

The fourth undertaking, related to the BSB undertaking a review and making a rule change application if necessary, was wholly delegated to the BSB and included two clear deadlines. In 2014, the BSB failed to comply with the first deadline (end July 2014). At the time, the BSB apologised and gave assurances that the second and final deadline would be met (end July 2015).

Although the BSB assure us that they will comply with the undertaking by the final deadline, given the history, it is prudent for us to prepare before the end of July our initial views on our compliance expectations and the options open to us if the BSB’s submission is judged to fall short of these expectations. Clearly, the nature of the LSB response can only be determined after the deadline and in the light of the BSB’s actions.

This paper describes the preparations that we are making ahead of the end of July, to ensure any action taken by the Board after the final deadline is timely, proportionate and targeted. We will update the Board again at the July meeting, but would welcome an early discussion on the Board’s risk appetite and ‘tone’ to set on this issue.

Recommendation(s):

This paper is for information only and no decisions are required at this stage. We would, however, welcome the Board discussing its risk appetite in relation to the various scenarios and options presented in the paper.

Risks and mitigations

Financial: N/A

Legal:	Preparatory work outlined in the paper may require additional legal resource, as we would need to establish the legal basis for and the implications of taking action. [JC]
Reputational:	Risks in this area from being seen not to take sufficiently robust action in response to any failure to comply but also, conversely, from being seen to be disproportionate in undertaking additional work to assess compliance by the BSB following the deadline.
Resource:	Resource requirements could be significant depending upon the nature of the BSB's response. Planning and preparation ahead of the deadline will help to mitigate this.

Consultation	Yes	No	Who / why?
Board Members:		x	
Consumer Panel:		x	
Others:			

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
13, 14, 16–22, 27–32	Section 36: information likely to the free and frank exchange of views for the purposes of deliberation	3 October 2015

LEGAL SERVICES BOARD

To:	Board	
Date of Meeting:	27 May 2015	Item: Paper (15) 26

Investigation: Bar Council and internal governance rules – compliance with fourth undertaking

Purpose

1. The next few months will see the conclusion of the period of informal resolution following the 2013 LSB investigation of the Bar Council; the first and, to date, only LSB investigation of an approved regulator. It is prudent to prepare our initial thoughts on our compliance expectations and the options open to us if the BSB fall short of these expectations.
2. Our present focus is on compliance with the fourth undertaking. This was wholly delegated to the BSB, and featured two clear deadlines:
 - iv. By the end of July 2014, complete and publish a review (by delegation wholly to the BSB) as to whether it is appropriate for the standard contractual terms, the related BSB Code of Conduct Cab Rank Rule provisions (including 604 (g) and 604 (h)) and definitions within part x of the BSB's Code of Conduct to remain within the BSB's regulatory arrangements. Additionally if an application to the LSB to alter the BSB's regulatory arrangements is necessary following the review, it must be made by July 2015.*
3. The Board may recall that the BSB failed to comply with the July 2014 deadline in the first part of the fourth undertaking. Although it opted not to take enforcement action at the time, the Board stressed to the BSB the critical importance of compliance with the second part of the undertaking.
4. In the light of the BSB's failure to comply in 2014, and alongside more recent discussions between the BSB and the LSB, we have started to prepare for a range of possible outcomes to enable the Board to respond in a timely, proportionate and targeted manner once the final deadline of the end of July 2015 has passed. Clearly, the nature of the LSB response can only be determined after the deadline and in the light of the BSB's actions.
5. We will provide an update to the Board at its meeting in July. As the LSB's powers to investigate and remedy poor regulatory performance are at the heart of our oversight role, we have a keen interest in a satisfactory end to this investigation, from both a regulatory and reputational perspective.

Recommendation

6. This paper is for information only and no decisions are required at this stage. We would, however, welcome the Board discussing its risk appetite in relation to the various scenarios and options presented in the paper.

Background

7. Section 30 of the Legal Services Act 2007 (the Act) requires regulators to separate representative functions from regulatory functions. This principle of separation within approved regulators is regarded as key to achieving the Act's first regulatory objective: protecting and promoting the public interest. The LSB has made Internal Governance Rules 2009 (IGR) concerning the ways this may be done.
8. In 2013, the LSB investigation into the Bar Council found, amongst other things, that the Bar Council had failed to comply with requirements imposed on it by the IGR and that its actions had an adverse impact on the public interest by undermining the principle of independent regulation.
9. The Bar Council wrote to the LSB in October 2013 accepting the investigation's findings and the outcomes required to remedy them. It sought informal resolution of the investigation and offered four undertakings. **Annexes A and B** provide details of the investigation and the undertakings.
10. At the time, the LSB Board were assured that the Bar Council's response provided the necessary recourse for action in the event that these commitments were not met. The first three undertakings have been complied with, although in each case after the LSB has been involved.
11. In July 2014, the BSB failed to comply with the first deadline in the fourth undertaking. Following this, the Board discussed formal enforcement options, including public censure. Meetings and correspondence with the BSB led to an apology from the BSB for not complying and assurances that it would not happen again. The LSB Board did not take the matter further but re-emphasised to the BSB in light of its failure to meet the first deadline, the critical importance of compliance with the second.
12. We have reviewed the BSB's project documentation on an ongoing basis since then, alongside a programme of discussions and meetings with the BSB. Although we hope it will not come to pass, given the history, it is prudent for us to prepare for the scenario that the BSB does not fully comply with the undertaking.
13. [REDACTED]
14. [REDACTED]

Factors that might lead to a failure to comply?

15. The desired outcome of the fourth undertaking is a completed review of whether it is appropriate for standard contractual terms, related Cab Rank Rule provisions and definitions to remain within the BSB's regulatory arrangements, and an application to the LSB to alter arrangements as necessary (by end July 2015). Against this outcome, a failure to comply could arise from one or more of the following.

(I) [Redacted]

16. [Redacted]

17. [Redacted]

(II) [Redacted]

18. [Redacted]

19. [Redacted]

(III) [Redacted]

20. [Redacted]

21. [Redacted]

22. [Redacted]

[REDACTED]

Preparing for the conclusion of informal resolution – potential options?

23. The risks for the LSB associated with any failure by the BSB to comply with the second part of the fourth undertaking are:

- Regulatory arrangements around the use of contractual terms that emerge from work to fulfil the undertaking being inappropriate.
- The LSB’s levers for tackling poor performance by the regulators being ineffective.
- The LSB’s reputation suffering as it is perceived that it is unable to address a regulator’s underperformance adequately.

24. We are undertaking preparatory work across the following areas to address the factors that may lead to a failure to comply, and the associated risks, to allow the Board to respond in a timely, proportionate and targeted manner. Clearly, one possibility is no further LSB action because we deem the BSB to have fully complied with the undertaking even if a rules change proposal is not submitted.

(I) Assessing a rule change application

25. Any rule change application would be handled as part of business as usual activity and independently of work to assess compliance with the undertaking. This is because it is possible that we may not have grounds to reject a rule change proposal even if we had compliance concerns with the undertaking and were considering further action (nb: our discretion for rules changes is limited).

26. It will be essential to maintain a clear distinction between the normal analysis and consideration of a rule change application and any additional scrutiny we may need to give any BSB application in this case for the purposes of assessing the BSB’s compliance with the undertaking (a “firewall”).

(II) [REDACTED]

27. [REDACTED]

28. [REDACTED]

(III) [REDACTED]

29. [REDACTED]

(IV) [REDACTED]

30. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

31. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

32. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(V) Communications

33. Alongside preparing the policy and enforcement response, we will develop communications plans appropriate to each of the range of main possible outcomes that allows the LSB to explain decisions that it takes. Messages will need to be carefully focused at the profession, the approved regulators and the media.

20.05.15

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Annex A

Investigation into the Bar Council: chronology and undertakings

1. On 26 October 2011 the LSB received an application for approval of an alteration to paragraph 604 of the Code of Conduct to provide that the Cab Rank Rule should not apply other than where a barrister is instructed upon the “New Contractual Terms” (or by agreement). In dealing with the application, the LSB considered whether the setting of contractual terms between barristers and those instructing them was a regulatory function. The LSB accepted the BSB’s argument that the Cab Rank Rule formed part of the BSB’s regulatory arrangements, and noted its view that there was a consequential need for certainty over the contractual terms that applied where the Rule operated. The Board’s decision was set out in its decision notice of 27 July 2012.
2. On 7 March 2013 the Bar Council issued a statement to the effect that it had designed the New Contractual Terms to provide “appropriate protection to barristers”. It also stated that the Bar Council would be undertaking further work in relation to those terms, with the Law Society, to promote “our professional interest”. This appeared to be at odds with the BSB’s view that this was a regulatory arrangement because it referred to protecting and promoting barristers’ professional interests rather than any requirements of the Legal Services Act 2007 (the Act).
3. Section 30 of the Act requires regulators to separate representative functions from their regulatory functions. Indeed this principle of separation within approved regulators is regarded as being key to achieving the regulatory objective of protecting and promoting the public interest which is contained in the Act. The LSB has made rules concerning the ways this may be done in the Internal Governance Rules 2009 (IGR).
4. On 23 May 2013, following analysis of information gathered using our powers under section 55 of the Act, the Board agreed to start a formal investigation to understand the Bar Council’s conduct in relation to the following issues:
 - a. Have acts, or a series of acts had, or likely to have, an adverse impact on protecting and promoting the public interest by undermining the principle of independent regulation?
 - b. Have acts, or a series of acts had, or likely to have, an adverse impact on supporting the constitutional principle of the rule of law to the extent that the Bar Council has breached a requirement within the IGR?
 - c. Has the Bar Council failed to comply with a requirement imposed on it by the IGR, namely the requirement at all times to act in a way which is compatible with the principle of regulatory independence and which it considers most appropriate for the purpose of meeting that principle [Rule 6(b)]?
 - d. Has the Bar Council failed to comply with a requirement imposed on it by the IGR, namely the requirement to ensure the exercise of regulatory functions is, so far as reasonably practicable, independent of any representative functions [Rule 7(c)]?
 - e. Are there any other actions by the Bar Council that emerge from the investigation that are relevant to the issue of regulatory independence?

5. A detailed investigation was undertaken which included an analysis of information provided by the Bar Council during the investigation. The investigation concluded, amongst other things, that the Bar Council had failed to comply with requirements imposed on it by the IGR and that its actions had an adverse impact on the public interest by undermining the principle of independent regulation.³
6. On 30 October 2013, the Bar Council wrote to the LSB accepting the investigation's findings and the outcomes required to remedy them; it sought informal resolution of the investigation. We were content that the response meant that informal resolution was desirable. On 20 November 2013 the LSB accepted undertakings from the Bar Council.

³ LSB. 2013. *Bar Council Investigation Report: Formal investigation into the Bar Council's involvement in the BSB application to the LSB for approval of changes to the Code of Conduct in relation to the "Cab Rank Rule"*. Available at: [http://www.legalservicesboard.org.uk/projects/pdf/LSB_investigation_into_bar_council_influencing_of_the_BSB_\(25-11-13\).pdf](http://www.legalservicesboard.org.uk/projects/pdf/LSB_investigation_into_bar_council_influencing_of_the_BSB_(25-11-13).pdf) (accessed 15 May 2015)

Annex B

The Bar Council undertakings (November 2013)

1. (a) Develop proposals to achieve the outcome that Bar Council staff and officers that provide advice or assistance to the BSB on regulatory functions will respect the principle of regulatory independence by ensuring their involvement is transparent and the risk of undue influence is on regulatory functions is minimised

(b) Seek the approval of the LSB to those proposals by 16 December 2013 and publish them by 20 December 2013; and

(c) Report to the LSB any material failure to implement and comply with the approved proposals.
2. (a) Develop proposals to achieve the outcome that Bar Council staff and officers do not attend non-public sessions of the BSB Board and its committees other than in exceptional circumstances and that any reasons for attendance is documented and made public. For the avoidance of doubt this does not preclude arranging meetings between the BSB and Bar Council to enable the Bar Council to represent or promote the interests of barristers.

(b) Seek the approval of the LSB to those proposals by 16 December 2013 and publish them by 20 December 2013; and

(c) Report to the LSB any material failure to implement and comply with the approved proposals.
3. Implement measures to ensure that the funding of the process whereby a barrister can complain about unpaid fees will only be via the Practising Certificate Fee from April 2014. This must remove the requirement that a barrister must have paid the Bar Council Member Service Fee, or any other voluntary fee, in order to complain about non-payment of fees by a solicitor or other authorised person under the rules relating to the list of defaulting solicitors and other authorised persons 2012 (approved 2 March 2013) and the scheme for complaining to the Bar Council for publicly funded matters 2012 (approved 2 March 2013). For the avoidance of doubt the Bar Council may not impose any voluntary fee, levy or percentage charge for considering whether to or adding a solicitor or other authorised person to the list of defaulting solicitors as defined in Part X of the BSB's Code of Conduct.
4. By the end of July 2014, complete and publish a review (by delegation wholly to the BSB) as to whether it is appropriate for the standard contractual terms, the related BSB Code of Conduct Cab Rank Rule provisions (including 604 (g) and 604 (h)) and definitions within part x of the BSB's Code of Conduct to remain within the BSB's regulatory arrangements. Additionally if an application to the LSB to alter the BSB's regulatory arrangements is necessary following the review, it must be made by July 2015.