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| <b>To:</b>              | Legal Services Board | <b>Agenda Item:</b> | 10            |
| <b>Date of Meeting:</b> | 28 April 2017        | <b>Item:</b>        | Paper (17) 27 |

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|--------------------------------|---|
| <b>Title:</b>                  | <b>Section 69 order to modify the functions of the General Council of the Bar</b>   |
| <b>Workstream(s):</b>          | Performance, evaluation and oversight   |
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| <b>Status:</b>                 | Official  |

**Summary:**

This paper provides the Board with a summary of the outcome of a consultation under section 70 of the Act on a Section 69 order that would modify the functions of the Bar Council.

A decision to make a recommendation on a section 69 order is a matter that is reserved to the Board under the scheme of delegations (5.4); at this stage we are not able to ask the Board to make that decision since we are still waiting clearance on the order from the Joint Committee on Statutory Instruments (JCSI). In order to meet the parliamentary timetable, we are likely to need to seek a decision before the next Board meeting.

As we may need to seek a decision out of a Board meeting and recognising that it is a long time since the Board has been asked to consider such an order, we thought it appropriate to take this opportunity for a collective discussion on the proposals and the outcome of the consultation.

We expect to seek the Board's agreement to the recommendation in early May.

**Recommendation(s):**

The Board is invited:

- (1) to note the content of the draft response document, recognising that we expect to ask you to make a decision on the final recommendation to the Lord Chancellor out of the Board meeting cycle.

**Risks and mitigations**

**Financial:** None

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|----------------------|--|
| <b>Legal:</b>        | [REDACTED]   |
| <b>Reputational:</b> | Although we are content that it would be reasonable and proportionate to proceed with the order as currently drafted, it is possible that the LSB would face criticism from respondents to our consultation document (for the reasons discussed in this paper and in the draft decision document). We will prepare supporting communications materials for a recommendation to the Lord Chancellor, with a view to the Board's decision at a later date. |
| <b>Resource:</b>     | None   |

| Consultation           | Yes   | No | Who / why? |
|------------------------|---|----|------------|
| <b>Board Members:</b>  |   | √  |            |
| <b>Consumer Panel:</b> |   | √  |            |
| <b>Others:</b>         | This paper reports on the outcome of a period for representations that the LSB was required to provide under Section 70 of the Legal Services Act 2007. |    |            |

| <b>Freedom of Information Act 2000 (Fol)</b> |  |  |
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| Para ref                                     | Fol exemption and summary  | Expires  |
| Risks and mitigations:<br><i>Legal</i>       | Section 42: information subject to legal professional privilege  |  |
| Para's 7, 11-14                              | Section 36(2)(b)(ii): information likely to inhibit the exchange of views for the purposes of deliberation | Upon the LSB recommendation to the Lord Chancellor |
| Annex A                                      | Section 22: intended for future publication  | N/A  |

## LEGAL SERVICES BOARD

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### **Section 69 order to modify the functions of the General Council of the Bar**

#### **Background**

1. In November 2014 the LSB approved a rules change application from the Bar Standards Board (BSB) which allowed it to introduce regulatory arrangements for the authorisation and regulation of non-barristers, including entities. In making that decision we were conscious that its regulatory approach was reliant on a contractual type relationship which while largely appropriate in the context of individual authorisation, may not be sustainable as it extends the range of authorised persons that it regulates.
2. The BSB recognised the additional risks that different authorised persons presented and decided that it should seek additional powers through a section 69 order which would modify the functions of the Bar Council. While these additional powers are considered necessary in their own right, the BSB was also mindful that it was at the time planning to make an application for designation as a licensing authority which if granted would result in it having a wider range of regulatory powers. Having a consistent regulatory approach across all types of persons authorised by the BSB is desirable.
3. In March 2016 the LSB granted an application from the BSB (on behalf of the Bar Council) seeking a recommendation that it be designated as a licensing authority. That recommendation was accepted by the Lord Chancellor and the Bar Council was designated as a licensing authority from 17 February 2017.

#### **The section 69 order process**

4. Section 69 of the Legal Services Act 2007 is the mechanism by which the functions of an approved regulator can be modified. This is the eighth such order that the Board has been asked to consider.<sup>1</sup>
5. Over the course of the last three years we have been working with the BSB and MOJ colleagues on the draft of an order that delivers what the BSB needs within the constraints of what is permitted under section 69.
6. Under the Act the LSB may make a recommendation to the Lord Chancellor that such an order be made. Before doing so, the LSB must publish a draft of the recommendation and order and invite representations. Publication took place on

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<sup>1</sup> Although not all ultimately proceeded to a recommendation to the Lord Chancellor, with an alternative legislative option for achieving the required changes identified for one of them.

30 August 2016, with representations on the proposed recommendation and order invited by 22 November 2016. Three representations were submitted and have been considered by us and the BSB. The BSB has also taken external legal advice.

7. [REDACTED]

### Outcome of consultation

8. Annex A is a draft response document. The proposals on which representations were invited were as follows:

- *appeals*: the power to make regulations or rules allowing for appeals to the General Regulatory Chamber of the First-tier Tribunal (**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)
- *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>2</sup>
- *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
- *disciplinary arrangements*: to allow for disciplinary arrangements to apply to all persons regulated by the Bar Council<sup>3</sup> that, among other things, may include:
  - the revocation or suspension of authorisation
  - the imposition of conditions on authorisation
  - financial penalties
  - disbarment or disqualification from specified activities
- *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

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<sup>2</sup> Bodies that are not alternative business structures for the purposes of part 5 of the Act.

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

- *compensation arrangements*: to make compensation arrangements that would apply to individual barristers and entities, and to administer those arrangements.
9. With the exception of *disciplinary* arrangements, all of these powers have been granted to other approved regulators in previous section 69 orders.
10. Paragraphs 14 to 55 of the draft response document set out in detail the representations made and the response to them which take into account the views of the BSB.

11. [REDACTED]

- [REDACTED]

- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]