

To:	Legal Services Board	
Date of Meeting:	23 May 2013	Item: Paper (13) 31

Title:	Investigation scope – Bar Council and internal governance rules	
Workstream(s):		
Author / Introduced by:	Fran Gillon, Director of Regulatory Practice fran.gillon@legalservicesboard.org.uk / 020 7271 0087	
Status:	Unclassified	

Summary:
<p>On 26 October 2011 the Legal Services Board (LSB) received an application for approval of an alteration to the BSB’s regulatory arrangements. The alteration concerned the operation of the “Cab Rank Rule” in paragraph 604 of the Code of Conduct and provided that the Rule should not apply other than where a barrister is instructed upon the “New Contractual Terms” (or by agreement). A brief outline of the history of the issue is at Annex A.</p> <p>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.</p> <p>On 7 March 2013 the Bar Council issued a statement to the effect that it had designed the New Contractual Terms to provide “<i>appropriate protection to barristers</i>”. It also stated that the Bar Council would be undertaking further work in relation to those terms, with the Law Society, to promote “<i>our professional interest</i>”.</p> <p>On the basis of this statement by the Bar Council, the LSB was concerned that the requirement to secure independent regulation under section 30 of the LSA 2007 may have been breached. We therefore issued a Notice requiring certain information from the Bar Council. Our analysis of that information raised further concerns and we issued a further Notice on 9 May seeking clarification of a number of points; the Bar Council’s response was received on 20 May.</p> <p>Having considered the additional information received on 20 May, we remain concerned and this paper therefore proposes that we should start a formal investigation into this matter.</p>
Recommendations:
<p>The Board is invited to:</p> <p>(1) note and discuss the issues raised in this paper</p>

(2) Agree to launch a formal investigation, the scope of which is set out at paragraph 9

Risks and mitigations

Financial: None

Legal: We will be seeking external legal advice throughout the investigatory phase to ensure objectivity

Reputational: This will be the first time that the LSB has launched a formal investigation. It is likely to impact relationships and co-operation with the Bar Council - and may also potentially do so with other regulators.

Resource: This work remains a significant, but thus far manageable, burden on staff, especially the senior team. Stepping up the activity level further would potentially have wider impacts.

Consultation	Yes	No	Who / why?
Board Members:	X		David Edmonds, Steve Green and Bill Moyes
Consumer Panel:		X	N/A
Others:	None		

Freedom of Information Act 2000 (Fol)

Para ref	Fol exemption and summary	Expires
7(a)-7(g), 8 and 9	Section 44 - restricted information obtained by the Board in the exercise of its functions [and therefore] must not be disclosed (s167 LSA)	

LEGAL SERVICES BOARD

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Background

1. The LSB has made rules concerning the way in which representative and regulatory functions of approved regulators must be separated. The rules state that each approved regulator must:
 - a. have in place arrangements that observe and respect the principle of regulatory independence; and
 - b. at all times 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.
2. The arrangements must in particular ensure that:
 - a. persons involved in the exercise of an Approved Regulator's regulatory functions are, in that capacity, able to make representations to, be consulted by and enter into communications with any person(s) including but not limited to the Board, the Consumer Panel, the OLC and other Approved Regulators;
 - b. the exercise of regulatory functions is not prejudiced by any representative functions or interests;
 - c. the exercise of regulatory functions is, so far as reasonably practicable, independent of any representative functions;
 - d. the Approved Regulator takes such steps as are reasonably practicable to ensure that it provides such resources as are reasonably required for or in connection with the exercise of its regulatory functions; and
 - e. the Approved Regulator makes provision as is necessary to enable persons involved in the exercise of its regulatory functions to be able to notify the Board where they consider that their independence or effectiveness is being prejudiced.
3. On 26 October 2011 we received an application for approval of an alteration to the BSB's regulatory arrangements. The alteration concerned the operation of the "Cab Rank Rule" in paragraph 604 of the Code of Conduct and provided that the Rule should not apply other than where a barrister is instructed upon the "New Contractual Terms" (or by agreement). The drafting of standard contractual terms had been the subject of discussions between the Bar Council and the Law

Society for a number of years, pre-dating the establishment of the BSB. The pre-history is summarised very briefly in the Annex.

4. 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.
5. 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*".
6. On the basis of this statement by the Bar Council, on 27 March we issued a Notice (the first Notice) under section 55 of the LSA seeking information as it appeared that the requirement to secure independent regulation may have been breached. Our initial analysis of that information is set out in paragraphs 7 and 8. This raised issues that required clarification and so we served a further section 55 Notice on 9 May .

Analysis of the response to the first Notice

7. Our analysis has raised a number of concerns about the Bar Council's and the Bar Standards Board's behaviour at both junior and senior executive as well Board level:

- a. [REDACTED]
- b. [REDACTED]
- c. [REDACTED]
- d. [REDACTED]

- e. [REDACTED]
- o [REDACTED]
- o [REDACTED]
- o [REDACTED]
- f. [REDACTED]
- g. [REDACTED]

Analysis of the response to the second Notice

8. The information provided on 20 May provides additional detail about the extent of Bar Council involvement. [REDACTED]
[REDACTED]
[REDACTED] We note these points, but consider that, taken with the nature of the evidence noted above, it does not provide anything that alters sufficiently our concerns to justify not moving to the next step of formal investigation.

Scope of investigation

9. The information shows that the Bar Council was deeply involved in the drafting of BSB Board and Committee papers as well as the rule change application to the LSB. [REDACTED]
[REDACTED]

[REDACTED] We therefore propose to start a formal investigation. Its purpose is 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 Internal Governance Rules (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.

Issues/approach

10. In analysing the information we now have (and any more that we need to obtain), our approach will be to consider, amongst other things:

- a. Whether the BSB simply contracted out a complex administrative task to an organisation with greater and more expert resources and, if so, how it considered whether this was consistent with the IGRs;
- b. Whether, and if so how, the Bar Council, in carrying out the work, considered whether this was consistent with the IGRs;
- c. Whether the Bar Council placed significant legal risk on the BSB's decision by acting as the author of a proposal on which it was one of a number of consultees;
- d. What would have been "reasonably practical" in terms of separation of representative and regulatory functions in this case;
- e. Whether there is evidence that the Bar Council was the "controlling mind" and determined the content of the application as well as processing its preparation. In particular whose view prevailed in the event of disagreement over drafting or approach;

- f. Whether there was an attempt to deceive the LSB about the source of the rule change application, given our specific query about whether standard terms were a representative matter.

Next steps

11. We will:

- a. notify the Bar Council of our decision to start a formal investigation and then publish the scope of the investigation;
- b. continue our detailed analysis of the evidence we have against the scope of the investigation and the approach set out above. We will request any additional information we need, which may include the extent of Bar Council involvement in other BSB Board papers and rule change applications;
- c. prepare a paper for the July Board setting out our findings and options what to do next.

Conclusion

Recommendations

12. The Board is invited to:

- a. note and discuss the issues raised in this paper
- b. agree to launch a formal investigation, the scope of which is set out at paragraph 9.

Annex A

1. After 8 years of negotiation, in 2008 the Bar Council and the Law Society had agreed in principle that barristers would be able to provide their services on a contractual basis and that there would be changes to the way defaulting solicitors were dealt with. By December 2008 a new pro-forma set of contractual terms had been agreed, although there remained some matters of detail. In December 2008 the Bar Council and the BSB made an application to MoJ to get approval for the proposed changes.
2. The BSB's submission to the LSB said that the submission to MoJ "was identical" apart from two matters: a revision of the wording in paragraph 604(h) and the removal of a provision in the Code to treat the new terms as default terms.
3. The Law Society withdrew its support for the proposed contractual terms a few months later and the Bar Council asked MoJ to suspend consideration of the application. The Bar Council subsequently produced what the BSB calls "simpler more streamlined" terms. These formed the basis of a further submission to MoJ in October 2009. MoJ was unable to consider the application before the transfer of its powers to the LSB.