

<b>To:</b>	Legal Services Board	
<b>Date of Meeting:</b>	10 July 2013	<b>Item:</b> Paper (13) 43

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

**Summary:**

The Board agreed on 23 May 2013 to commence a formal investigation of the Bar Council's conduct in relation to an alteration to the BSB's regulatory arrangements. This concerned the operation of the "Cab Rank Rule", in that the Rule would not apply other than where a barrister is instructed upon the "New Contractual Terms" (or by agreement).

The decision to investigate followed two information requirements to the Bar Council under section 55 of the Legal Services Act 2007 (LSA). These in turn followed a statement by the Bar Council on 7 March 2013 on its role in the New Contractual Terms.

Five heads of investigation were agreed by the Board. These primarily relate to the Internal Governance Rules (IGR) made under section 30 of the LSA, which set out requirements to be met by approved regulators to secure independent regulation.

Information gathered to date has been considered against the heads of investigation. There are, however, gaps and disparities in the information we have. As a result we are not yet able to conclude the investigation and provide a recommendation to the Board.

To address this, a further section 55 notice has been issued to the Bar Council, along with a request for information to the Law Society. The Bar Council made a first response on 28 June and we expect the remainder of the information requested on 5 July. The Law Society's response is expected on 5 July.

Our assumption at this stage is that further section 55 notices and/or information requests will not be needed. This should mean that, assuming there is sufficient evidence to make a recommendation, we will present a conclusions and recommendations paper to an extraordinary Board meeting on 24 July. As a reminder, the IGR, scope of the investigation and issues/approach are at **Annex A**, **Annex B** and **Annex C** respectively.

<b>Recommendations:</b> The Board is invited to:			
(1) note the issues discussed in this paper			
<b>Risks and mitigations</b>			
<b>Financial:</b>	None		
<b>Legal:</b>	We are sourcing external legal advice throughout the investigatory phase to give additional assurance on objectivity		
<b>Reputational:</b>	[REDACTED]		
<b>Resource:</b>	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		
<b>Consultation</b>	<b>Yes</b>	<b>No</b>	<b>Who / why?</b>
<b>Board Members:</b>	X		David Edmonds, Steve Green and Bill Moyes
<b>Consumer Panel:</b>		X	N/A
<b>Others:</b>	None		
<b>Freedom of Information Act 2000 (Fol)</b>			
<b>Para ref</b>	<b>Fol exemption and summary</b>		<b>Expires</b>
Reputational	Section 36(c) – Otherwise prejudice the effective conduct of public affairs		
8 and 10	Section 36(2)(b)(ii) – inhibit the exchange of views for the purposes of deliberation		
9 and 11	Section 44 - restricted information obtained by the Board in the exercise of its functions [and therefore] must not be disclosed (s167 LSA)		
Annex C	Section 22 – information intended for future publication		

## LEGAL SERVICES BOARD

<b>To:</b>	Legal Services Board		
<b>Date of Meeting:</b>	23 May 2013	<b>Item:</b>	Paper (13) 43

### Background

1. The LSA places duties on Approved Regulators that include promoting the regulatory objectives and having regard to best regulatory practice (section 28), and meeting the IGR put in place by the Board (section 30). An extract from the IGR are included at Annex A.
2. The Board previously agreed at its meeting on 23 May 2013 to commence a formal investigation of the Bar Council. The investigation concerns the Bar Council's conduct in relation to an alteration to the BSB's regulatory arrangements. This involved a change to the BSB Code of Conduct, which had the effect that the Cab Rank Rule only applies where a barrister is instructed on the New Contractual Terms (or by agreement).
3. The history of this change extends back over thirteen years, to negotiations between the Bar Council and the Law Society on contractual terms between 2000 and 2008. These led to an application to the Ministry of Justice (MoJ) for an alteration to BSB regulatory arrangements in December 2008. This was subsequently withdrawn when negotiations failed and the Law Society withdrew its support for the changes. A further application was made to the MoJ in October 2009, but was not considered before the transfer of responsibilities to the LSB.
4. A further (and final) application was made to the LSB in October 2011. During its consideration of the application, the LSB questioned if, and was persuaded by the BSB that, the contractual terms were a regulatory matter. Following LSB approval in July 2012, implementation of the change was subsequently delayed by several months.
5. The Board's decision in May to open an investigation followed two information requirements to the Bar Council under the LSA. These were issued as a result of concern about a statement by the Bar Council on the contractual terms on 7 March 2013, to the effect that it had designed them 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. The five heads of investigation agreed by the Board primarily relate to the IGR, but also relate to the regulatory objectives. These, the scope of investigation, and issues /approach are set out in Annex A, Annex B and Annex C respectively for information.

**Progress so far**

7. Information gathered to date has been logged chronologically and reviewed against the heads of investigation, and a narrative of events drawn from it. So far this includes 117 items (some of which run to several pieces). They involve Bar Council and BSB Standards Committee and Board agendas, papers and annexes, and minutes, plus email chains and telephone notes of discussions, both within and between the organisations.

8. The material has been considered in terms of whether or not it suggests a case under one or more of the heads of investigation, and its relative strength or weight. [REDACTED]

9. [REDACTED]

10. What the above assessment has highlighted is that clarification and/or additional information is needed on large number of points in order for us to conclude our investigation (and that the information we have so far will need to be considered against this). [REDACTED]

11. Our interest is limited to clarifying matters within documents that we hold, or seeking potentially relevant documents that are referred to in them, rather than expanding the scope of our inquiries. The information required includes simple statements, more detailed narrative, specified documents and other records. [REDACTED]

12. In light of the above, a further section 55 notice has been issued to the Bar Council, along with a request for information to the Law Society (relating to the

past breakdown in their negotiations with the Bar Council on the relevant contractual terms for barristers). In response to a request for additional time to reply, the notice to the Bar Council was modified. Information was therefore provided by the Bar Council (in relation to matters that are more administrative in nature) on 28 June. A further response from the Bar Council (on matters that are narrative in nature) is due on 5 July, along with the response from the Law Society.

13. Given the need for additional information and assessment of it, it is too early to ask ourselves the question of the strength of any case under each of the heads of investigation.

### **Next steps**

14. Once received, the information discussed above will be logged and reviewed. Our expectation at this stage is that further section 55 notices should not be needed. This should mean a Challenge group (drawn from within the LSB, including individuals who are not close to the investigation, plus external legal support as needed) will consider the work undertaken and conclusions reached in mid-July. Assuming this group is content that there is sufficient evidence to make a recommendation, we expect to present a conclusions and recommendations paper to an extraordinary Board meeting on 24 July (with the paper circulated in advance).
15. As reflected above, our intention remains that this investigation is targeted and discrete in nature. It is possible, though, that once we consider responses to the most recent section 55 notice and the information request, we may need to seek more information. If so, we will update the Board on any implications for the timetable. It is possible, however, that a thorough investigation identifies gaps in evidence and/or uncertainties. These will be drawn to your attention where relevant. The Board may therefore be asked to form a judgment on the available evidence.

### **Conclusion**

### **Recommendations**

16. The Board is invited to:
  - a. note the issues discussed in this paper

## **Annex A**

### **The Internal Governance Rules**

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.

## **Annex B**

### **Scope of investigation**

- 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.