

To:	Legal Services Board	
Date of Meeting:	15 October 2013	Item: Paper (13) 65

Title:	Investigation – 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 Bryony Sheldon James Meyrick	
Status:	Restricted	

Summary:
<p>At its September meeting, the Board considered the “minded to” findings of the LSB’s investigation into the BSB’s application for approval of an alteration to its regulatory arrangement in relation to Standard Contractual Terms and the “Cab Rank Rule”. The Board resolved that:</p> <ul style="list-style-type: none"> a) It was minded to make the findings as set out in the investigation report; b) A letter would be sent by the Executive to the Bar Council (and copied to the BSB), attaching a copy of the report, as amended in line with the minor comments from Board members, stating that the Board was minded to make the findings contained in it and was seeking informal resolution of the issues by asking for details to be provided of clear and explicit restorative action to be taken by the Bar Council (the letter is at Annex A); c) Upon hearing from the Bar Council, the Board would consider, at its meeting in October 2013, the most appropriate action to take in the circumstances; and d) The letter to the Bar Council and the investigation report are to be published <p>In summary, although the Bar Council has accepted the remedies that we proposed, it has not accepted the substance to the “minded to” findings (see letter at Annex B). Without such acceptance, we cannot have confidence in its commitment to implement the remedies. We are therefore recommending that we take formal enforcement action, whilst still being open to informal resolution (up until the final stage of the enforcement processes set out in Annexes D and E) if the Bar Council</p>

accepts the investigation findings.

Recommendations:

The Board is invited to:

- a. Consider the progress on informal resolution at paragraphs 5 to 11
- b. Consider the letter from the BSB, with which the Bar Council concurs, at Annex B to this paper
- c. Consider the views of the Executive on that letter (paragraphs 8 and 9 and Annex C)
- d. In the light of its consideration of these issues to formally make the findings set out in the investigation report (a copy of which has been sent with this paper), including that the Bar Council's actions were unreasonable
- e. Agree that it is satisfied that the tests for directing the Bar Council under section 32 of the Legal Services Act 2007 (LSA) are met and that we will follow the procedure set out in the LSA to give to the Bar Council a warning notice (and a copy of the proposed direction) that we intend to give it a direction (see process diagram and draft at Annex D)
- f. Agree that it is satisfied that the tests for censuring the Bar Council under section 35 of the LSA are met and that we will follow the procedure set out in the LSA to give a warning notice to the Bar Council that we intend to publish a statement censuring it for the acts or omissions (or series of acts or omissions) the investigation has identified (see see process diagram and draft at Annex E)
- g. Delegate to the CEO and Chairman the authority to finalise the draft warning notices.

Risks and mitigations

Financial: None

Legal: We have obtained external legal advice throughout the investigatory phase to ensure objectivity and we continue to receive external advice.

Reputational: This is 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. It is also possible that national media may report the outcome of the investigation. We will be prepared for this possibility.

Resource: This work remains a significant, but thus far manageable, burden on staff, especially the senior team.

Consultation	Yes	No	Who / why?
Board Members:	X		Steve Green
Consumer Panel:		X	N/A
Others:	None		
Freedom of Information Act 2000 (Fol)			
Para ref	Fol exemption and summary		Expires
Annex 2	Section 22 – information intended for future publication		

LEGAL SERVICES BOARD

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Background

- 1 The separation of regulation from representation is enshrined in the Legal Services Act 2007 (LSA). Parliament sought to tackle the perception that self-regulation worked in the interests of the regulated community, rather than the public. Each approved regulator is required to comply with the LSB's Internal Governance Rules (IGR), to give effect to the principle of "regulatory independence". The IGR contain both structural and behavioural obligations.
2. In May 2013, the Board commenced an investigation into the Bar Council's behaviour in relation to the BSB's development and submission of an application for approval of a rule change. Whilst the Bar Council had an interest in the subject matter of that rule change (New Contractual Terms) that pre-dated the coming into force of the LSA, the LSB has considered the extent to which the Bar Council's subsequent behaviour has complied with its obligations under the IGR and the LSA.

The Board's September meeting

3. The Board considered the report at its September meeting and agreed with the report's "minded to" findings that–
 - 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;
 - 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;
 - the Bar Council's acts (and omissions identified during the investigation), or a series of acts (or omissions identified during the investigation) had an adverse impact on protecting and promoting the public interest by undermining the principle of independent regulation;
 - the Bar Council's acts (and omissions identified during the investigation), or a series of acts (or omissions identified during the investigation) did **not**, and are **not** 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)
 - the rules made by the Bar Council about the operation of the List of Defaulting Solicitors cannot legitimately be considered to have been made for the purposes of representing or promoting the interests of

barristers and that we therefore consider that it is inappropriate for the Bar Council to only enable a barrister who has paid the voluntary Members Services Fee to complain about a solicitor;

- the Bar Council's acts (and omissions identified during the investigation), or a series of acts (or omissions identified during the investigation) were unreasonable.
4. The Board took into account the desirability of resolving this matter informally and delegated to the CEO the authority to seek resolution that would achieve the following (or better) outcomes:
- The Bar Council and the BSB develop proper processes to govern Bar Council staff and officer involvement in regulatory matters, in particular where the Council acts as an adviser, rather than a stakeholder/commentator (outcome 1)
 - Bar Council staff and officers do not attend the non-public sessions of BSB meetings (and vice versa), other than in exceptional circumstances, with any reason for attendance fully documented in the public minutes (outcome 2)
 - The requirement to pay the Members' Services Fee in order to complain about a solicitor/SRA authorised person is removed and processes are put in place to ensure that those who choose not to pay the fee for other (properly representative) services have identical access to those who do pay (outcome 3)
 - The BSB incorporates within its review of the Cab Rank Rule that it has agreed to undertake by March 2014, a reassessment of the appropriateness of including standard contractual terms in its regulatory arrangements. (This reflected our view that although the conclusions of this investigation bring into question whether the changes to the BSB's regulatory arrangements would be deemed appropriate in the absence of undue influence, it would not be proportionate in the light of other more pressing priorities.) (outcome 4)

Progress since September meeting

5. On Friday 13 September we sent a letter (Annex A) to the Bar Council and copied it to the BSB. Enclosed with the letter was a confidential version of the report. The latest version of the report has been provided with this paper. The letter detailed our findings and the desired outcomes. It emphasised that the Board considered that informal resolution may be an alternative to enforcement action, but was not an opportunity to negotiate different outcomes. It also made clear that the Board had asked for advice at its October meeting about whether the Bar Council accepted the findings in the Report and was prepared to act in the terms set out in the outcomes. The letter made clear that this would be a very material factor in its final decision on whether to pursue enforcement action.

6. Since then there have been three meetings (on 16 September, 1 October and 8 October) between the LSB Chief Executive and Legal Director, and the Bar Council Chief Executive and the BSB Director. Neither the Bar Council nor the BSB has sought fundamentally to challenge the methodology of the report. At the second meeting, the Bar Council reported that its office holders had found the investigation report tendentious and had raised concerns about the extent to which it abided by rules of evidence. There was also a suggestion that a shorter report, solely setting out conclusions and remedies, would be more appropriate. The fairness of the process, in terms of the timing of any feedback was also discussed. It was clarified that the content of the final report was not for negotiation, but that we should be made aware of any material flaws which the Bar Council and BSB considered might lead the LSB Board to reconsider its “minded to” findings.
7. The Bar Council and BSB agreed to set out their views on the report and the outcomes (including expected timings for implementation). We subsequently received from the Bar Council slightly adapted outcomes which were discussed. We also received a letter from the BSB (see Annex B) setting out concerns and additional points for our consideration. This letter also includes the adapted outcomes.
8. Our analysis of the detailed points made in the letter is at Annex C. The main points to note are:
 - a. Although both the Bar Council and BSB “have broadly accepted” the outcomes, neither body has accepted the substance of the “minded to” findings, with the Bar Council saying that it is not in a position to reach a view while the findings still have “minded to” status. When the Bar Council was asked directly on 8 October whether, if the Board confirmed the findings they would be accepted, the reply, repeated on a number of occasions, was to refer to acceptance of the outcomes, not the findings. This is unacceptable for a number of reasons. This matter came to light because of a public statement by the Bar Council that it had designed the Contractual Terms to provide “appropriate protection for barristers”. The Board’s desire to see restorative action means that it is necessary for the Bar Council to accept that something went wrong so that the remedies can be effectively applied. In addition, the commitment of either party to implement the remedies must be in doubt if they do not recognise the findings of the investigation. Further, the nature of the feedback suggests a fundamental disagreement about whether any infringement occurred at all or, even if it did, whether it was, at worst, only technical in nature. In turn, this suggests a failure to appreciate the seriousness both of the findings and of the underlying legal obligations which the IGRs are in place to ensure;
 - b. We do not accept that, just because the BSB Board considered the proposed rules changes, this undermines the investigation’s findings. The report makes clear that the involvement of Bar Council staff over long periods of time without proper control by the BSB was a significant factor. In other words, it does not necessarily follow that, even if the BSB Board as individuals made the decision properly in the light of the

facts presented to them, the process leading to the development of those particular proposals, and hence the decision, was necessarily sound;

- c. We welcome the recognition of the need to reinforce clear boundaries between regulatory and representative activity. But we do not accept the assertion that because many discussions were informal this means that the Bar Council cannot have been a controlling mind. We consider that the ability to influence adversely is more likely to be prevalent in an informal setting than in the formality surrounding Committee or Board meetings;
- d. The BSB and Bar Council are understandably concerned about the part of the investigation that considered whether there was an attempt to deceive the LSB. We have taken into account the sensitivities over drafting to make clear that we have not seen any evidence that there was such an attempt;
- e. We have always been clear that we do not wish to identify individual junior members of staff and have reviewed the report again to try to ensure that individuals cannot be identified from it. However, we can see no reason to anonymise Committee or Board members or senior members of staff.

9. In relation to the outcomes the BSB have proposed in their letter:

- On outcome 1, the Bar Council and BSB's proposed changes to the precise wording are acceptable. They have underlined that they do not see it as sufficient simply to agree the drafting of a protocol, but would want to back this up with proper management action to cascade any changes. We have similarly made clear that we will monitor proposals through the IGR process;
- On outcome 2, wording was proposed which removed the phrase "in exceptional circumstances" and they also removed reciprocal arrangement for BSB staff attending analogous BC meetings for reasons which were never clear. We have made clear to them the importance we attach to this as an operating principle and have therefore both reinserted the relevant requirements and said that the principle of attendance in exceptional circumstances should also apply to BC staff at BSB committees and to BSB staff attending analogous BC meetings;
- On outcome 3, they have accepted the principle and said that they would implement from the start of the next financial year. We have accepted this change;

On outcome 4, the BSB argued that a review of standard contractual terms by March was not feasible if there was to be due process and suggested slipping the date for both that review and the extension of the Cab Rank Rule to public access to later in the year. We made clear that this would not be acceptable, but we can accept their revised

proposition of keeping the reviews separate, with the CRR review being concluded by July.

10. Neither the meetings nor the correspondence has, in the judgement of the Executive, identified any impact on the conclusions drawn in the investigation report on which the Board's "minded to" findings were based. We are also satisfied from a legal perspective that the response did not raise any legitimate allegations of procedural unfairness with our investigation.
11. At the meeting on 8 October, it was confirmed that the Board would be made aware of the BSB's letter. Without fettering the Board's discretion, it was also made clear that the failure to accept the substance of the findings would lessen the likelihood of the Board being able to conclude that informal resolution, on the basis of the progress made on the outcomes alone, is possible. The BSB and Bar Council questioned whether this was a reasonable or proportionate stance, but, for the reasons set out in para 8a, we consider it to be both. Hence, as a response from the Bar Council accepting the findings in the investigation report and setting out arrangements to satisfactorily deliver the required remedies has not been forthcoming, we therefore consider that it is proportionate to now consider formal enforcement action.

Enforcement powers

12. The September Board meeting discussed the different options for the use of the LSB's enforcement powers. The Board considered that in the event that informal resolution does not or cannot deliver the LSB's desired outcomes, the matter was sufficiently serious that we should consider using our formal enforcement powers. We consider that the most relevant and appropriate powers are public censure – to make clear the seriousness of the failure to recognise the obligations – and directions – to ensure that the agreed outcomes are put in place, should the fact of moving towards censure lead them to resile from the commitments made in correspondence and discussion. Annexes D and E set out flow charts of how each of these processes work. In practice, informal resolution remains a possibility up until the final stage of each process.

Directions

13. Our Statement of Policy on compliance and enforcement says that we are likely to use directions when we want to ensure that specific actions are carried out by a regulator in order to rectify an act or omission that has been identified. In order to issue directions the LSA says that we must be satisfied:

(a) that an act or omission of an approved regulator (or a series of such acts or omissions) has had, or is likely to have, an adverse impact on one or more of the regulatory objectives.

This test is satisfied because the investigation found that the Bar Council's acts (and omissions identified during the investigation), or a series of acts (or omissions identified during the investigation) had, or are likely to have, an adverse impact on protecting and promoting the public interest by undermining the principle of independent regulation.

(b) that an approved regulator has failed to comply with any requirement imposed on it by or under this Act (including this section) or any other enactment

This test is satisfied because the investigation found that (a) the Bar Council failed to comply with a requirement imposed by section 30 of the LSA to meet the requirements set out in the IGR, namely the requirements 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 and to ensure the exercise of regulatory functions is, so far as reasonably practicable, independent of any representative functions.

(c) that an approved regulator (i) has failed to ensure that the exercise of its regulatory functions is not prejudiced by any of its representative functions, or (ii) has failed to ensure that decisions relating to the exercise of its regulatory functions are, so far as reasonably practicable, taken independently from decisions relating to the exercise of its representative functions.

This test is satisfied because the investigation found that (a) 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 and (b) 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

14. The Board must be satisfied “in all the circumstances of the case” that it is appropriate to direct the regulator. If it is, we can direct the regulator to take steps we consider will counter the adverse impact, mitigate its effect or prevent its occurrence. In the case of a breach of the IGR we can direct the regulator to take steps we consider will remedy the failure, mitigate its effect or prevent its recurrence. We consider that it is appropriate in all the circumstances of this case to direct the Bar Council to take steps to achieve the remedies we have set out. Because the Bar Council has not accepted the substance of our findings (and will not indicate that it would accept confirmed “minded to” findings”) we cannot presently have confidence that informal resolution will lead to effective implementation of the steps necessary to achieve those outcomes. A draft warning notice and proposed directions is at Annex D. It is noted that direction 4 refers to the BSB review of the CRR being completed by July 2014, which accords with discussion with the BSB and Bar Council on informal resolution. While this is later than as directed by the September Board, it is recommended to take account of the amount of time required to conclude the enforcement process, and of competing regulatory priorities.
15. The process at Annex D indicates that the Board has the discretion to accept oral representations. We have in place Rules which state that we will consider

a request to make these, in exceptional circumstances. It is therefore not possible to form a view in advance as to how any request should be treated.

Public censure

16. The LSA states that the LSB can censure a regulator if it is satisfied:

(a) *that an act or omission of an approved regulator (or a series of such acts or omissions) has had, or is likely to have, an adverse impact on one or more of the regulatory objectives*

This test is satisfied because the investigation found that the Bar Council's acts (and omissions identified during the investigation), or a series of acts (or omissions identified during the investigation) had an adverse impact on protecting and promoting the public interest by undermining the principle of independent regulation.

and

(b) *that it is appropriate in all the circumstances of the case (including in particular the impact of so acting on the other regulatory objectives).*

Our Statement of Policy on compliance and enforcement says that we are likely to use censure to draw particular attention to the act or omission by the regulator. It says that we would always take into account, both in using censure and in its general provision of information about enforcement proceedings, the possible perceptions that consumers, potential market entrants and those being regulated would be given, recognising that some forms of publicity may damage confidence in regulation and so lead to less satisfactory outcomes. However, the Statement says that the LSB strongly believes that one of the aims of its compliance powers is to ensure that confidence is maintained in the legal services market and that providing consumers with clear evidence that steps are being taken to address consumer detriment is part of that process. The aim of censure is to change the behaviour of the regulator.

17. We consider that it is appropriate to use our power to censure (in addition to giving directions) in order to reinforce the importance of the principle of regulatory independence and the IGRs. Although use of our formal powers is bound to attract publicity in the legal world, we consider that our emphasis on independent regulation being in the public interest is – to the extent that there is any impact at all – likely to be seen as positive, both by consumers and law businesses. Given that the BSB and Bar Council have accepted the proposed outcomes, we consider it unlikely that there will be a detrimental impact on any of the other regulatory objectives of issuing a censure notice. We have taken measures to ensure that individual junior members of staff cannot be identified from the report, but take the view that more senior members of staff as well as Board and Committee members bear ultimate responsibility for any adverse publicity about the Bar Council and/or BSB.

Discussion

18. The Board will note that the crucial differences between directions and public censure are:
- a. Public censure can only be used for an act or omission that has an adverse impact on one or more of the regulatory objectives, whereas a direction can be issued if (amongst other things) the regulator has breached the requirements of the IGR.
 - b. The LSB must provide at least 28 days notice to the approved regulator that we propose to issue a public censure and provide it with a copy of the draft notice. The LSB must consider any representations from the approved regulator (and any subsequent amendments must follow the same procedure again).
 - c. With directions, the LSB must provide a warning notice to the approved regulator with the proposed directions. It must have at least 14 days to make representations. Following this the LSB must provide a copy of the warning notice, the proposed directions and any representations to the Lord Chancellor, the OFT, the Consumer Panel, the Lord Chief Justice and any others as appropriate for advice. The approved regulator then gets to review the advice provided by the mandatory consultees and to make further representations. Following this the LSB Board must consider all this documentation and make a decision. This is therefore a significantly longer process, perhaps adding up to 2 months on the end-to-end process.
19. The processes for directions and public censure will proceed separately, meaning that they will progress according to different timetables.

Recommendation

20. The Board is invited to:
- a. Consider the progress on informal resolution at paragraphs 5 to 11
 - b. Consider the letter from the BSB, with which the Bar Council concurs, at Annex B to this paper
 - c. Consider the views of the Executive on that letter (paragraphs 8 and 9 and Annex C)
 - d. In the light of its consideration of these issues to formally make the findings set out in the investigation report (a copy of which has been sent with this paper), including that the Bar Council's actions were unreasonable
 - e. Agree that it is satisfied that the tests for directing the Bar Council under section 32 of the LSA are met and that we will follow the procedure set out in the LSA to give to the Bar Council a warning notice (and a copy of the proposed direction) that we intend to give it a direction (see process diagram and draft at Annex D)
 - f. Agree that it is satisfied that the tests for censuring the Bar Council under section 35 of the LSA are met and that we will follow the

procedure set out in the LSA to give a warning notice to the Bar Council that we intend to publish a statement censuring it for the acts or omissions (or series of acts or omissions) the investigation has identified (see see process diagram and draft at Annex E)

- g. Delegate to the CEO and Chairman the authority to finalise the draft warning notices.

Annex A: Letter to Bar Council

Stephen Crowne
Chief Executive
Bar Council
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13 September 2013

Dear Stephen,

As you know, on Wednesday 11 September the Board considered the Report 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". I attach a confidential copy of the report for your information.

The Board agreed with the Report's conclusions and is minded to find that:

- (a) That 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;
- (b) That 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; and
- (c) That the Bar Council's acts (and omissions identified during the investigation), or a series of acts (or omissions identified during the investigation) had, or are likely to have, an adverse impact on protecting and promoting the public interest by undermining the principle of independent regulation.

It also minded to find that the Bar Council's acts (and omissions identified during the investigation), or a series of acts (or omissions identified during the investigation) did not, and are not 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).

In accordance with the requirements of the Legal Services Act 2007 and its Statement of Policy on compliance and enforcement, the Board considered whether the Bar Council's actions or omissions were unreasonable and it decided that they were.

The Board considered that the Bar Council's acts and/or omissions were sufficiently serious that it would be appropriate to consider taking enforcement action. However, in accordance with the requirements of the Legal Services Act 2007 and its Statement of Policy on compliance and enforcement, the Board took into account of the desirability of resolving matters informally.

The Board has therefore delegated to me the power to discuss informal resolution with you in order to achieve the following outcomes (or ones in similar terms):


- The Bar Council and the BSB develop proper processes to govern Bar Council staff and officer involvement in regulatory matters, in particular where the Council acts as an adviser, rather than a stakeholder/commentator
- Bar Council staff and officers do not attend the non-public sessions of BSB meetings (and vice versa), other than in exceptional circumstances, with any reason for attendance fully documented in the public minutes.
- The requirement to pay the Members' Services Fee in order to complain about a solicitor/SRA authorised person is removed and processes are put in place to ensure that those who choose not to pay the fee for other (properly representative) services have identical access to those who do pay
- The BSB incorporates within its review of the Cab Rank Rule that it has agreed to undertake by March 2014, a reassessment of the appropriateness of including standard contractual terms in its regulatory arrangements. (This reflects our view that although the conclusions of this investigation bring into question whether the changes to the BSB's regulatory arrangements would be deemed appropriate in the absence of undue influence, it would not be proportionate in the light of other more pressing priorities.)

It is important to emphasise that the Board considers that informal resolution may be an alternative to enforcement action, but it is not an opportunity to negotiate different outcomes. The Board was clear that it expects to see clear and explicit action by the Bar Council to achieve these outcomes, within a short timescale. It has therefore asked for advice (to be considered at its meeting on 15 October 2013) about whether the Bar Council accepts the findings in the Report and is prepared to act in the terms described above, as this will be a very material factor in its final decision on whether to pursue enforcement action

We can discuss your views and next steps when we meet on Monday 16 September 2013.

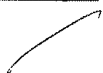
I am sending a copy of this letter and the report to Vanessa Davies at the BSB.

Yours sincerely,



Chris Kenny
Chief Executive

E chris.kenny@legalservicesboard.org.uk



Annex B – letter from the BSB



Mr Chris Kenny
Chief Executive
Legal Services Board
7th Floor
Victoria House
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London WC1B 4AD

4 October 2013

Dear Chris

Bar Council s 55 investigation – LSB report and findings

Thank you for seeing me and Stephen Crowne with your legal director on the two occasions we have now met to discuss your report and letter of 13 September 2013. Both the Bar Standards Board and Bar Council are pleased to note the LSB's commitment to resolving the matters in question informally, in accordance with statute and the LSB's Statement of Policy on compliance and enforcement. The Bar Standards Board and Bar Council share that commitment. In the circumstances, and in accordance with that objective, I have shared this letter in draft with the Bar Council and they have confirmed they are content with our response.

Following our second meeting on 1 October 2013 and as agreed between us at that meeting, I set out the matters to which the Bar Standards Board and Bar Council would expect the LSB to have regard before progressing from "minded to find" following the investigation, to formal findings, which I understand the LSB will make at its 15 October 2013 meeting.

I would wish to start by reminding the Board that the both the Bar Standards Board and Bar Council have broadly accepted the remedies proposed in your letter of 13 September, with the clarifications we discussed: I return to these in more detail at the end of this letter.

I nevertheless consider it is important to offer some context and to highlight some important conclusions which the Bar Standards Board considers are fully supported by the voluminous evidence we have supplied under s55 notices. Without these being put to the LSB for consideration before a final decision is made, there is a real risk of an unfair process and the drawing of unreasonable conclusions. That cannot be in the public interest. I have however sought to keep these points to the absolute minimum and do not propose to enter into any kind of detailed rebuttal of specific aspects of the investigation report, as any such exercise would be disproportionate and unlikely to advance the objective of arriving at an informal resolution.

The Bar Standards Board is wholly satisfied that all decisions it took in relation to the development of the standard contractual terms, and their inclusion in our regulatory arrangements, from 2009 onwards, were made independently of the Bar Council. The Board papers and minutes of Board meetings throughout disclose nothing other than independent decision making. I draw the LSB's attention, in particular, to the following matters which are clearly evidenced in the documents considered in the report:

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www.barstandardsboard.org.uk

- The appropriateness of treating the application as a regulatory matter was specifically challenged by Bar Standards Board and Committee members and was debated both in the Standards Committee and in the Board.
- The Bar Standards Board, independently and after full debate, judged that it was necessary, in order to uphold the Cab Rank Rule which was and remains a fundamental element of our regulatory arrangements in the public interest, to make the standard contractual terms part of our regulatory arrangements. The Board independently considered and rejected the alternative of drafting the Cab Rank Rule by reference to an obligation to accept "reasonable terms" on the basis this was likely to be less effective in ensuring the Cab Rank Rule was upheld. The Board likewise rejected the Bar Council's preferred option of making the contractual terms default terms. Again, Board papers and minutes confirm this.
- The rationale for that decision was clearly and transparently explained to the LSB, *inter alia* in the letter dated 11 May 2012 sent in response to the Warning Notice and at a meeting with the LSB to discuss that response, from which the Bar Council was excluded.
- It is evident from the terms of the LSB's decision that the LSB well understood that there was a "hybrid" character to the application in that: "[t]he Cab Rank Rule is clearly a regulatory arrangement and since the New Contractual Terms are inextricably linked to the Cab Rank Rule, it is logical to conclude that they are regulatory in nature and therefore subject to LSB approval, albeit that the consequence of the change has the potential to be of benefit to the profession." It was this inter-relationship which had the result that, whereas on the solicitor's side the development of standard terms was treated as a purely representative matter, on the Bar's side that development did have regulatory implications.

I note that the LSB does not appear to be suggesting that the Bar Standards Board's decided position in this regard was inconsistent with or detrimental to the regulatory objectives. In terms of the *proportionality* of the investigation and its findings, this is a very important point to which I consider the LSB should have regard.

That said, the Bar Standards Board accepts that the report identifies a need to reinforce to staff both in the Bar Council and in the Bar Standards Board that they must observe clear boundaries between areas of regulatory and representative activity. The documentation before the LSB, which covers some five years of relevant activity, includes not only formal public and private papers and minutes, but also informal email exchanges between staff within either the BSB or Bar Council, or across the BSB and the Bar Council. I accept that the latter (but not the former) evince an, at times, unstructured approach, insufficiently focussed on whether the matter in hand was to be characterised as regulatory or representative. Whilst there were (as the LSB's report fairly acknowledges) particular explanations as to why this should have been so in relation to this particular application, related to the resources, capacity and capability of both organisations at the historical points of development in question, it is plainly necessary to ensure that boundaries are correctly identified, recognised and observed going forward. We accept that those internal exchanges amongst staff at several levels could provoke concerns about regulatory independence and addressing this is something that Stephen Crowne and I had respectively put in hand even before receipt of this report (see also below, remedies).

The very informality of the exchanges on which the LSB report purports to rely for its conclusions does, however, wholly undermine the proposition of a Bar Council "controlling mind", on which the LSB depends for its proposed findings. To the contrary, the material to which I have referred above clearly demonstrates that notwithstanding the unsatisfactory nature of some of these informal exchanges at staff level, the Bar Standards Board's decisions were, as I have said, taken independently and addressed the correct questions. The issues were properly debated and none of that was controlled by the Bar Council.

The LSB report considers in some detail whether "there was an attempt to deceive the LSB." This is obviously an extremely grave proposition, calling into question as it does the personal and professional integrity of Bar Standards Board and Bar Council members and staff at various levels, both individually and collectively. The proposition must therefore be treated with the utmost caution in any consideration which may be intended for the public domain. It is in our view quite wrong to speak, as the report does for example in paragraphs, 5.22 and 5.23 of *...no evidence, ...no evidence* respectively of any deliberate attempt to deceive, but then to leave hanging in the air at para 5.24 that there *is no conclusive evidence* or at para 7.6 that *there is insufficient evidence* that the Bar Council and / or Bar Standards Board *deliberately set out to deceive the LSB*. There is no evidence, quite simply because there was no attempt to deceive. I therefore urge in the strongest possible terms that you reconsider your pursuit of this aspect of the investigation. It is entirely appropriate for the report to consider what would or would not have been reasonable courses of action for either the Bar Council or the Bar Standards Board in the internal management of the relevant work. However, the two matters – ie intent to deceive and reasonable actions or omissions - should simply not be conflated in the way they are in the report.

The final matter I would expect the LSB to consider is the obligation to ensure in any published report that the identities, and roles where that could lead to identification, of individual members of Bar Council and Bar Standards Board staff should not be disclosed, save for the exception dealt with below. Stephen Crowne and I are, as we indicated to you at the meeting, each satisfied that no member of staff in either the Bar Council or the Bar Standards Board was on any kind of frolic of their own and as such we would each expect to be accountable for their actions. Identification of staff members should therefore be limited to me as the Director of the Bar Standards Board, and the Director of Representation and Policy and / or CEO of the Bar Council as applicable.

As indicated above, the Bar Standards Board and Bar Council broadly accept the remedies the LSB is minded to require.

- i. We will be content to put into place a clear protocol to govern Bar Council Officer and staff involvement in regulatory matters. I will revert on timelines: it is, in the view of Stephen Crowne and myself, insufficient merely to articulate a set of written rules. Staff and Officers need to adopt, as they have in substantial measure already done since the matters under investigation arose, working practices and behaviours which reflect any written rules.
- ii. Arrangements in respect of Bar Council attendance at private sections of Bar Standards Board meetings were changed in July 2013 in any event, and are now consistent with the proposed requirement.
- iii. The funding of a process whereby a barrister can complain about unpaid fees will be via the Practising Certificate Fee from April 2014.
- iv. The Bar Standards Board has already undertaken to consider its policy position on the application of the Cab Rank Rule to public access barristers by March 2014. Following that consideration, we will move to consider whether the standard contractual terms need to remain within our regulatory arrangements. That consideration will take place before the end of July 2014. Agreement of any implementation timetable should either of those two stages of review lead to any proposed changes to regulatory arrangements, will necessarily follow after July 2014.

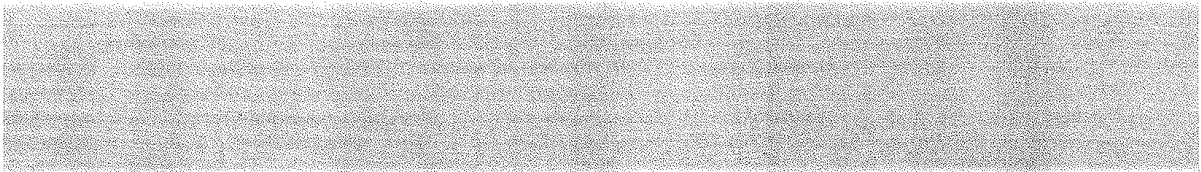
I hope that these observations have been useful to the LSB. I reserve our position on whether they are published.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Vanessa Davies', written in a cursive style.

Dr Vanessa Davies
Director, Bar Standards Board

cc Stephen Crowne, Chief Executive, Bar Council.



Annex C – analysis of the BSB’s letter

Letter from BSB dated 4 October 2013	LSB observations
<p>Mr Chris Kenny Chief Executive Legal Services Board 7th Floor Victoria House Southampton Row London WC1B 4AD 4 October 2013</p> <p>Dear Chris</p> <p>Bar Council s 55 investigation – LSB report and findings</p>	<p>Particular phrases on which we have expressed views have been highlighted in the BSB’s text. However, some comments relate to the section more generally.</p>
<p>1. Thank you for seeing me and Stephen Crowne with your legal director on the two occasions we have now met to discuss your report and letter of 13 September 2013. Both the Bar Standards Board and Bar Council are pleased to note the LSB’s commitment to resolving the matters in question informally, in accordance with statute and the LSB’s Statement of Policy on compliance and enforcement. The Bar Standards Board and Bar Council share that commitment. In the circumstances, and in accordance with that objective, I have shared this letter in draft with the Bar Council and they have confirmed they are content with our response.</p>	<p>The Bar Council confirming that it is content with a BSB response would not be sufficient. As the approved regulator, against which the investigation was conducted, a separate response would be required from the Bar Council if it was prepared to accept our findings and proposed remedies.</p>
<p>2. Following our second meeting on 1 October 2013 and as agreed between us at that meeting, I set out the matters to which the Bar Standards Board and Bar Council would expect the LSB to have regard before progressing from “minded to find” following the investigation, to formal findings, which I understand the LSB will make at its 15 October 2013 meeting.</p>	

Letter from BSB dated 4 October 2013	LSB observations
<p>3. I would wish to start by reminding the Board that the both the Bar Standards Board and Bar Council have broadly accepted the remedies proposed in your letter of 13 September, with the clarifications we discussed: I return to these in more detail at the end of this letter.</p>	
<p>4. I nevertheless consider it is important to offer some context and to highlight some important conclusions which the Bar Standards Board considers are fully supported by the voluminous evidence we have supplied under s55 notices. Without these being put to the LSB for consideration before a final decision is made, there is a real risk of an unfair process and the drawing of unreasonable conclusions. That cannot be in the public interest. I have however sought to keep these points to the absolute minimum and do not propose to enter into any kind of detailed rebuttal of specific aspects of the investigation report, as any such exercise would be disproportionate and unlikely to advance the objective of arriving at an informal resolution.</p>	<ul style="list-style-type: none"> • It is unclear what is being alluded to with regard to “unfair process” etc., but we are satisfied that this is not the case. The opportunity to comment here is distinct from representations, which are part of the Board’s enforcement process • Specific points made on context and conclusions are discussed below. Generally speaking though, barring one point on terminology used in the report, the points raised by the BSB have been previously made by the Bar Council and were addressed in our report, as considered by the Board prior to reaching its “minded to” findings • The Bar Council needs to recognise that for the process of informal resolution to be appropriate it must accept the findings in the report (and publication of it). Otherwise we cannot have confidence that agreed remedies would be delivered/effective

Letter from BSB dated 4 October 2013	LSB observations
<p>5. The Bar Standards Board is wholly satisfied that all decisions it took in relation to the development of the standard contractual terms, and their inclusion in our regulatory arrangements, from 2009 onwards, were made independently of the Bar Council. The Board papers and minutes of Board meetings throughout disclose nothing other than independent decision making. I draw the LSB's attention, in particular, to the following matters which are clearly evidenced in the documents considered in the report:</p>	<ul style="list-style-type: none"> • This seems to argue that because the BSB Board made decisions then all is fine. While the BSB may be satisfied on this, the LSB is not. The definition of regulatory functions in section 27 of the LSA includes 'any' functions in connection with the making or alteration of regulatory arrangements. This cannot only mean the end approval/governance process of approving alterations • The investigation report made the Board aware of these assertions, as made by the Bar Council, at paragraph 2.85 • Paragraph 2.89 of our report acknowledges the fact that the BSB Board and its Standards Committee made decisions but observes that "<i>...on balance, the behaviours suggest that the Bar Council exerted undue influence or control, and that the IGR were not considered or observed</i>" Additionally paragraphs 2.23 to 2.48, and the conclusions at 2.79, 2.80 and 2.87 discuss these issues further • As above, it would not be sufficient for the Bar Council to sign up to remedies while denying that there is a problem to resolve
<p>- The appropriateness of treating the application as a regulatory matter was specifically challenged by Bar Standards Board and Committee members and was debated both in the Standards Committee and in the Board.</p>	<p>This was considered in section 2 of the report, for example at paragraphs 2.11, 2.17 – 2.18, 2.28, 2.30 – 2.33, 2.66 – 2.68, 2.80, 2.83, 2.85 in particular, 2.87, 2.89 in particular, and 2.94 – 2.95,</p>

Letter from BSB dated 4 October 2013	LSB observations
<ul style="list-style-type: none"> - The Bar Standards Board, independently and after full debate, judged that it was necessary, in order to uphold the Cab Rank Rule which was and remains a fundamental element of our regulatory arrangements in the public interest, to make the standard contractual terms part of our regulatory arrangements. The Board independently considered and rejected the alternative of drafting the Cab Rank Rule by reference to an obligation to accept “reasonable terms” on the basis this was likely to be less effective in ensuring the Cab Rank Rule was upheld. The Board likewise rejected the Bar Council’s preferred option of making the contractual terms default terms. Again, Board papers and minutes confirm this. 	<p>As above, this is considered within section 2 of the report:</p> <ul style="list-style-type: none"> • The “reasonable terms” point is specifically considered at paragraphs 2.18 and 2.33 • The issue of default status of the new contractual terms is specifically considered at 2.66
<ul style="list-style-type: none"> - The rationale for that decision was clearly and transparently explained to the LSB, <i>inter alia</i> in the letter dated 11 May 2012 sent in response to the Warning Notice and at a meeting with the LSB to discuss that response, from which the Bar Council was excluded. 	<ul style="list-style-type: none"> • This is a letter that was shared with Bar Council representatives in draft form at the BSB Standards Committee meeting (alongside a document that was provided by the LSB to the BSB on a strictly confidential basis) and once again before submission to the LSB. However, we were told that there was no significant drafting by the Bar Council. The comment does not address the lack of independence shown during the process of altering BSB regulatory arrangements • According to the relevant email the Bar Council was excluded from the meeting by the BSB because “[t]he LSB already think we’re a little too close for comfort and a joint meeting on proposed regulatory changes won’t help this impression” • These points were considered at paragraphs 2.39 – 2.40, 2.42 – 2.43, 2.71 5.19 and 5.20

Letter from BSB dated 4 October 2013	LSB observations
<p>- It is evident from the terms of the LSB’s decision that the LSB well understood that there was a “hybrid” character to the application in that: “[t]he Cab Rank Rule is clearly a regulatory arrangement and since the New Contractual Terms are inextricably linked to the Cab Rank Rule, it is logical to conclude that they are regulatory in nature and therefore subject to LSB approval, albeit that the consequence of the change has the potential to be of benefit to the profession.” It was this inter-relationship which had the result that, whereas on the solicitor’s side the development of standard terms was treated as a purely representative matter, on the Bar’s side that development did have regulatory implications.</p>	<p>We do not concur with this assessment, or that it advances the BSB/Bar Council position. The LSB original view was that the setting out of guideline contractual terms is a representative function and they have no place in rules and should be voluntary. However, the BSB letter of 11 May contained many arguments about why the changes were a regulatory matter. We were persuaded by those arguments and so included the statement quoted by the BSB in the decision document. However, since the BSB argued so strongly that the matter was a regulatory function (and so not a representative function) it should have been cognisant of the requirement that the exercise of regulatory functions is independent from (as far as is reasonably practicable) and not prejudiced by representative functions. Ultimately there is no such thing as a “hybrid” regulatory function.</p>
<p>6. I note that the LSB does not appear to be suggesting that the Bar Standards Board’s decided position in this regard was inconsistent with or detrimental to the regulatory objectives. In terms of the <i>proportionality</i> of the investigation and its findings, this is a very important point to which I consider the LSB should have regard.</p>	<ul style="list-style-type: none"> • The investigation was about behaviours of the approved regulator, not the content of rules. • Regulatory independence is a statutory requirement and part of the rationale for the LSA. Any indication that it is being fettered requires investigation and if necessary enforcement. It would not be appropriate for the Board’s findings on independence to have regard to this point • The implications of the Board’s findings, however, mean that is a wider point to be addressed by one of the remedies

Letter from BSB dated 4 October 2013	LSB observations
<p>7. That said, the Bar Standards Board accepts that the report identifies a need to reinforce to staff both in the Bar Council and in the Bar Standards Board that they must observe clear boundaries between areas of regulatory and representative activity. The documentation before the LSB, which covers some five years of relevant activity, includes not only formal public and private papers and minutes, but also informal email exchanges between staff within either the BSB or Bar Council, or across the BSB and the Bar Council. I accept that the latter (but not the former) evince an, at times, unstructured approach, insufficiently focussed on whether the matter in hand was to be characterised as regulatory or representative. Whilst there were (as the LSB’s report fairly acknowledges) particular explanations as to why this should have been so in relation to this particular application, related to the resources, capacity and capability of both organisations at the historical points of development in question, it is plainly necessary to ensure that boundaries are correctly identified, recognised and observed going forward. We accept that those internal exchanges amongst staff at several levels could provoke concerns about regulatory independence and addressing this is something that Stephen Crowne and I had respectively put in hand even before receipt of this report (see also below, remedies).</p>	<ul style="list-style-type: none"> • The Bar Council’s position is on this point is unclear, emphasising the need for a response from it • This appears to be directing blame towards staff as opposed to Board members. Many of the issues are dealt with in our comments on paragraph 5 • We have also noted that the BSB Standards Committee apparently did not understand further changes to arrangements that were proposed by the Bar Council (paragraphs 2.34 and 2.68), that Bar Council staff and representatives presented to BSB Committees and Board (2.12, 2.17, 2.29 – 2.33, 2.66, 2.68, 2.80, 2.87 and 2.95). • We also observe in regard to expertise and capacity that the issue of expertise is not the subject of the investigation (2.60 and 2.93). However we do note that no attempt was made to transfer knowledge in respect of this regulatory arrangement (2.67 and 2.88) during the long period that it was considered • Additionally, our report does not support the BSB’s suggestion that there were particular explanations as to why an unstructured approach etc. “should” have been so... What it does is note that this was the case, but at the same time discusses remedial actions that could and should have been taken (paragraphs 2.9, 2.53, 2.56, 2.58, 2.60 – 2.61, 2.63 and 2.69)

Letter from BSB dated 4 October 2013	LSB observations
<p>8. The very informality of the exchanges on which the LSB report purports to rely for its conclusions does, however, wholly undermine the proposition of a Bar Council “controlling mind”, on which the LSB depends for its proposed findings. To the contrary, the material to which I have referred above clearly demonstrates that notwithstanding the unsatisfactory nature of some of these informal exchanges at staff level, the Bar Standards Board’s decisions were, as I have said, taken independently and addressed the correct questions. The issues were properly debated and none of that was controlled by the Bar Council.</p>	<ul style="list-style-type: none"> • This appears to suggest our conclusions are based on the informal nature of staff emails. This is not the case and paragraphs 2.94, 2.95 and 2.96 make this clear. Additionally, BSB Board and Committee members were clearly aware of the involvement of Bar Council representatives drafting changes to regulatory arrangements, ignoring suggestions made by the BSB and even drafting papers together (see A 3.21 to A 3.45 – particularly A3.36 A3.39) • The BSB’s comments do not, in any event, make its case. Control/influence etc. does not require formality, and informality is in fact more pernicious, potentially, in terms of undue influence. This is considered in paragraphs 2.61 – 2.69 of the report • See above comments, in particular at paragraph 5, in relation to the independence of BSB decision making

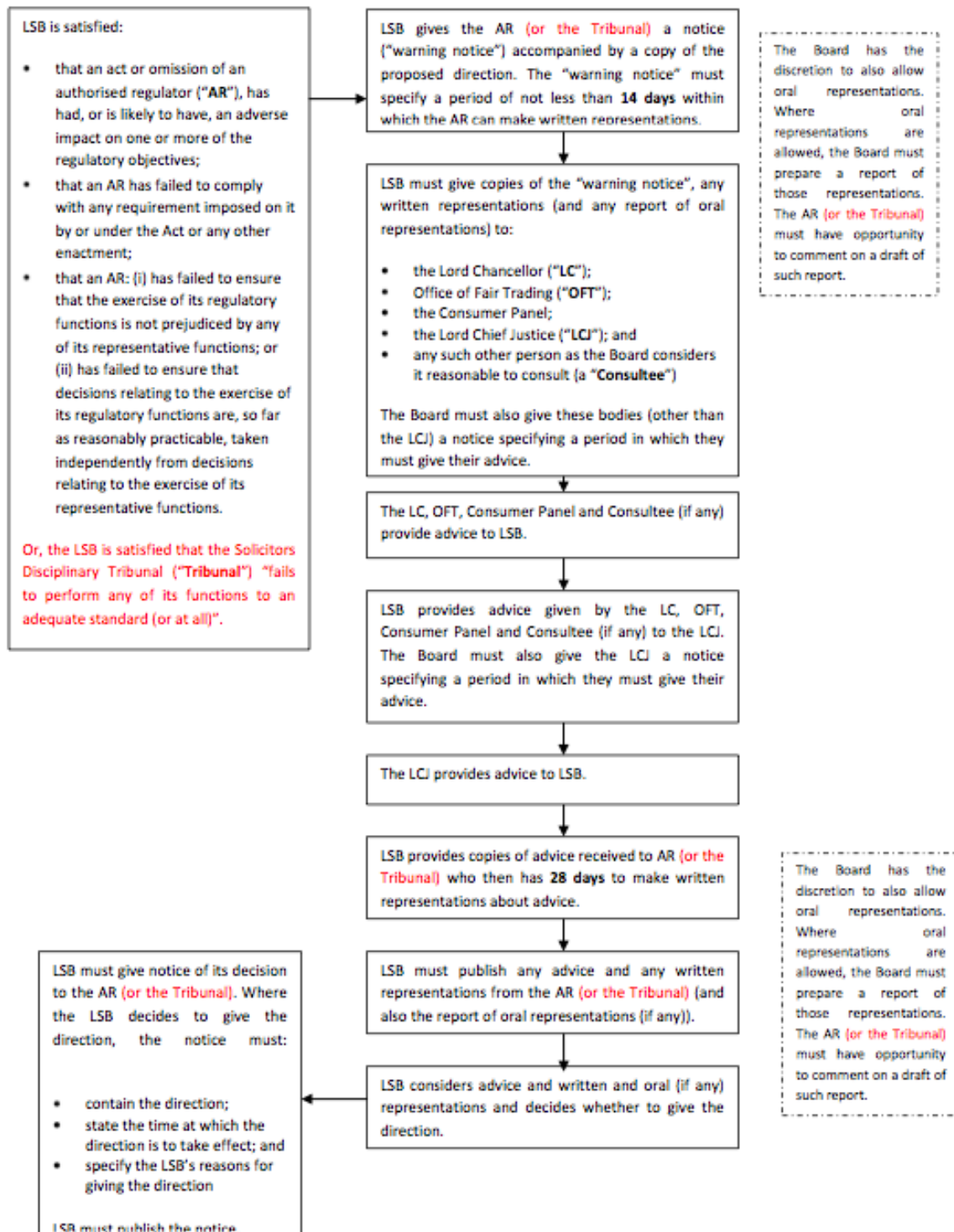
Letter from BSB dated 4 October 2013	LSB observations
<p>9. The LSB report considers in some detail whether “there was an attempt to deceive the LSB.” This is obviously an extremely grave proposition, calling into question as it does the personal and professional integrity of Bar Standards Board and Bar Council members and staff at various levels, both individually and collectively. The proposition must therefore be treated with the utmost caution in any consideration which may be intended for the public domain. It is in our view quite wrong to speak, as the report does for example in paragraphs, 5.22 and 5.23 of ...<i>no evidence</i>, ...<i>no evidence</i> respectively of any deliberate attempt to deceive, but then to leave hanging in the air at para 5.24 that there <i>is no conclusive evidence</i> or at para 7.6 that <i>there is insufficient evidence</i> that the Bar Council and / or Bar Standards Board <i>deliberately set out to deceive the LSB</i>. There is no evidence, quite simply because there was no attempt to deceive. I therefore urge in the strongest possible terms that you reconsider your pursuit of this aspect of the investigation. It is entirely appropriate for the report to consider what would or would not have been reasonable courses of action for either the Bar Council or the Bar Standards Board in the internal management of the relevant work. However, the two matters – ie intent to deceive and reasonable actions or omissions - should simply not be conflated in the way they are in the report.</p>	<ul style="list-style-type: none"> • Changes will be made to paragraphs 5.24 and 7.6 of the report to achieve consistent use of language to the effect that “<i>we have seen no evidence</i>” • It is entirely reasonable and appropriate, however, to consider this issue. If there were evidence of deliberate intent then it would have been very serious, but we have clearly stated that we have not seen any evidence. It does not therefore call into question integrity in the way suggested. • We cannot conclude that deleting references to the Bar Council together with the statement “[w]e need to make sure that this is seen as a recommendation from the BSB in the light of our regulatory objectives – not something that is that is being proposed by the Bar Council in the interests of barristers” suggests that these changes were simply a reasonable course of action by the BSB in relation to the management of the relevant work. On the contrary, if the BSB had contracted the work to the Bar Council and had been in control at every turn, then there would have been no need to make changes so that the application was seen as the BSB’s or to explain why the Bar Council undertook the consultation. It could simply say that it had commissioned the Bar Council to do this work • Moreover, it is possible and foreseeable that actions such as that discussed above could have the effect of deceiving the LSB, even if it was not deliberate/intended

Letter from BSB dated 4 October 2013	LSB observations
<p>10. The final matter I would expect the LSB to consider is the obligation to ensure in any published report that the identities, and roles where that could lead to identification, of individual members of Bar Council and Bar Standards Board staff should not be disclosed, save for the exception dealt with below. Stephen Crowne and I are, as we indicated to you at the meeting, each satisfied that no member of staff in either the Bar Council or the Bar Standards Board was on any kind of frolic of their own and as such we would each expect to be accountable for their actions. Identification of staff members should therefore be limited to me as the Director of the Bar Standards Board, and the Director of Representation and Policy and / or CEO of the Bar Council as applicable.</p>	<ul style="list-style-type: none"> It is our intention to redact the report, so that the names of individuals are not disclosed. In terms of roles, however, our position is that the titles of senior members of BSB and Bar Council Committees and Boards etc. will remain in the report
<p>11. As indicated above, the Bar Standards Board and Bar Council broadly accept the remedies the LSB is minded to require.</p>	<p>As above, agreement on remedies/informal resolution is conditional on the Bar Council accepting the findings in the report (and publication of it). Otherwise we cannot have confidence that they would be effectively delivered</p>
<p>i. We will be content to put into place a clear protocol to govern Bar Council Officer and staff involvement in regulatory matters. I will revert on timelines: it is, in the view of Stephen Crowne and myself, insufficient merely to articulate a set of written rules. Staff and Officers need to adopt, as they have in substantial measure already done since the matters under investigation arose, working practices and behaviours which reflect any written rules.</p>	<p>We are minded for the protocol to be reviewed by LSB before it can be approved</p>
<p>ii. Arrangements in respect of Bar Council attendance at private sections of Bar Standards Board meetings were changed in July 2013 in any event, and are now consistent with the proposed requirement.</p>	<p>We consider that this needs to be reciprocal in nature (BSB attendance at Bar Council meetings) and extended to committee meetings</p>
<p>iii. The funding of a process whereby a barrister can complain about unpaid fees will be via the Practising Certificate Fee from April 2014.</p>	

Letter from BSB dated 4 October 2013	LSB observations
<p>iv. The Bar Standards Board has already undertaken to consider its policy position on the application of the Cab Rank Rule to public access barristers by March 2014. Following that consideration, we will move to consider whether the standard contractual terms need to remain within our regulatory arrangements. That consideration will take place before the end of July 2014. Agreement of any implementation timetable should either of those two stages of review lead to any proposed changes to regulatory arrangements, will necessarily follow after July 2014.</p>	<p>We will expect a published document on the consideration and outcome of any review</p>
<p>I hope that these observations have been useful to the LSB. I reserve our position on whether they are published.</p>	
<p>Yours sincerely</p> <p>Dr Vanessa Davies Director, Bar Standards Board</p> <p>cc Stephen Crowne, Chief Executive, Bar Council.</p>	

Annex D: Flow chart of Directions process and example text of Directions notice

Directions (Section 32)



Example text of a Directions notice

To: The General Council of the Bar (“the Bar Council”)

Warning Notice of proposed direction under section 32 of the Legal Services Act 2007 (the Act) issued to the Bar Council

1. Further to Schedule 7 to the Act, the LSB hereby gives this Warning Notice that it proposes to give the Bar Council a direction in the form of the accompanying draft, at Annex 1 to this Notice.
2. In relation to the Bar Standards Board’s application to the LSB for approval of changes to the Code of Conduct in relation to the Cab Rank Rule (submitted to the LSB on 27 October 2011 and approved on 27 July 2012), the LSB has found, for the reasons set out in its Report¹ at Annex 2 to this Notice, the LSB is satisfied that –
 - A series of acts and omissions by the Bar Council have had an adverse impact on the regulatory objective of protecting and promoting the public interest by undermining the principle of independent regulation;
 - The Bar Council has failed to comply with the requirement imposed upon it under s30 of the Act to meet the requirements of the Internal Governance Rules in that it –
 - a. failed at all times to act in a way which is compatible with the principle of regulatory independence (rule 6(b)); and,
 - b. failed to ensure the exercise of regulatory functions is, so far as reasonably practicable, independent of any representative functions(rule 7(b)); and
 - The Bar Council has failed to ensure that –
 - a. the exercise of its regulatory functions by the Bar Standards Board (BSB) is not prejudiced by any of its representative functions; and
 - b. that decisions relating to the exercise of its regulatory functions by the BSB are so far as reasonably practicable taken independently from decisions relating to the exercise of its representative functions.
3. For the reasons set out in its Report at Annex B to this Notice, the LSB is satisfied that it is appropriate to direct the Bar Council to take the steps set out in Annex 1 to –
 - Counter the adverse impact, mitigate its effect and prevent the recurrence of the adverse impact on the regulatory objective; and

¹ 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”

- Remedy the failure, mitigate its effect and prevent the recurrence of the failure to comply and the failure to ensure.
4. In accordance with its Statement of Policy on Compliance and Enforcement, the LSB considers that the acts and omissions of the Bar Council were unreasonable, for the reasons set out in the Report referred to above.
 5. Written representations with respect to the proposed direction may be made before 5pm on [] day [] of November 2013 to the LSB at Victoria House, Southampton Row, London, WC1B 4AD. In accordance with the LSB's "Enforcement Processes: Rules on written and oral representations", any written representations should be sent by electronic mail to contactus@legalservicesboard.org.uk, in the form of Word or pdf documents. Any request for authorisation to make oral representations must be received by the LSB by 5pm on [] day [] of October 2013

Annex 1: Proposed direction under s32 of the Act

The Bar Council is directed to -

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 on regulatory functions is minimised;

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

(c) Report to the LSB any material failure to implement and comply with the approved proposals.
3. By XX, 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.

The meaning of “regulatory functions” and “representative functions” is defined by section 27 of the Act.

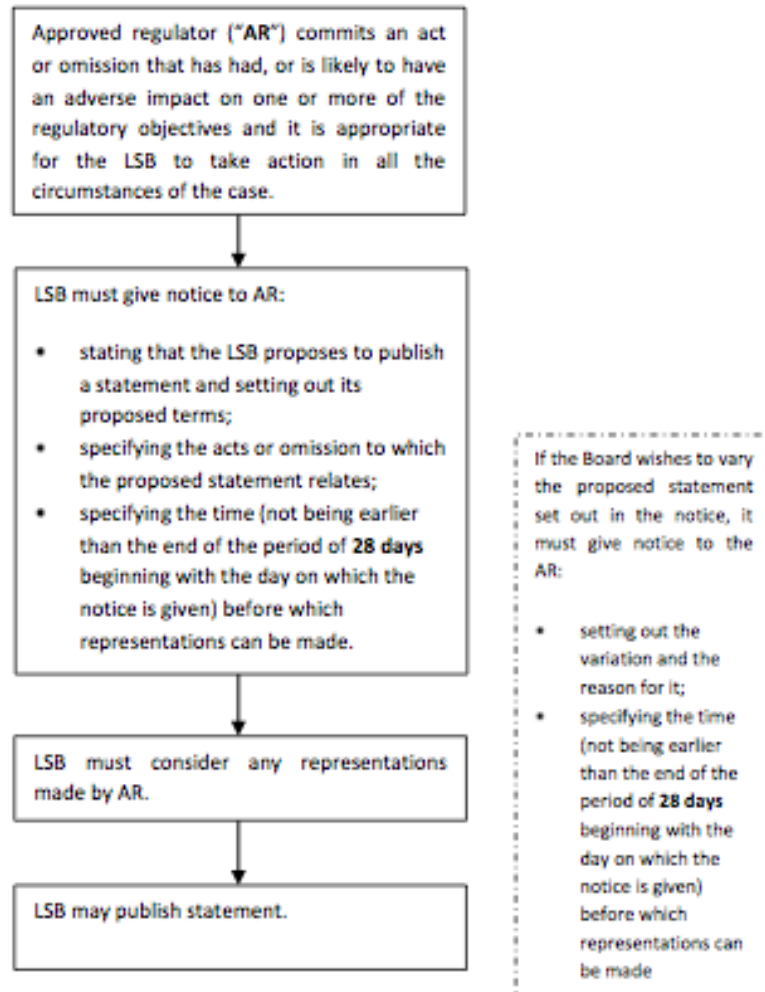
These directions take effect on []

Annex 2: The LSB’s Report

[REDACTED]

Annex E: Flow chart of public censure process and example text of Public Censure notice

Public censure (Section 35)



Example text of Public Censure notice

To: The General Council of the Bar (“the Bar Council”)

Censure Notice under section 36 of the Legal Services Act 2007 (the Act) issued to the Bar Council

6. Further to section 36(1) of the Act, the Legal Services Board (LSB) proposes to publish a statement censuring the Bar Council for a series of acts and omissions, in the following terms –

A series of acts and omissions by the Bar Council have had an adverse impact on the regulatory objective of protecting and promoting the public interest by undermining the principle of independent regulation and the LSB considers it is appropriate in all the circumstances of the case to publish this statement censuring the Bar Council

7. The acts and omissions to which the proposed statement relates are specified in the LSB’s Report² annexed to this Notice, which concerns the Bar Standards Board’s application to the LSB for approval of changes to the Code of Conduct in relation to the Cab Rank Rule (submitted to the LSB on 27 October 2011 and approved on 27 July 2012).
8. The LSB considers that, in all the circumstances of the case, it is appropriate to publish a statement of censure under section 35 of the Act.
9. In accordance with its Statement of Policy on Compliance and Enforcement, the LSB considers that the acts and omissions of the Bar Council were unreasonable, for the reasons set out in the Report referred to above.
10. Any representations with respect to the proposed statement may be made in writing before 5pm on [] day [] of November 2013. Representations should be sent by electronic mail to contactus@legalservicesboard.org.uk, in the form of Word or pdf documents.

² 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”