

To:	Legal Services Board	
Date of Meeting:	11 September 2013	Item: Paper (13) 57

Title:	Investigation– Bar Council and internal governance rules	
Workstream(s):		
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Status:	Restricted	

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). 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>Section 30 of Legal Services Act (the Act) requires regulators to separate representative functions from their regulatory functions. Indeed this principle of separation within approved regulators is regarded as being key to achieving the objective of protecting and promoting the public interest which is contained in the Act.</p> <p>The Legal Services Board has made rules concerning the ways this may be done in the Internal Governance Rules 2009.</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>”. This appeared to be at odds with the BSB’s view that this was a regulatory arrangement because it referred to protecting barristers’ and promoting professional interest rather than any requirements of the Act.</p>

On 23 May 2013, following analysis of information gathered using our powers under section 55 of the Legal Services Act 2007 (LSA), the Board agreed to start a formal investigation to understand the Bar Council's conduct in relation to the following issues:

- a. Have acts, or a series of acts had, or likely to have, an adverse impact on protecting and promoting the public interest by undermining the principle of independent regulation
- b. Have acts, or a series of acts had, or likely to have, an adverse impact on supporting the constitutional principle of the rule of law to the extent that the Bar Council has breached a requirement within the 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.

A detailed investigation has been undertaken which included an analysis of information provided by the Bar Council during the investigation. A copy of what the investigation team considered (at that point) to be the most relevant facts and matters was shared with the Bar Council on 22nd July 2013. The Bar Council's comments, plus subsequent information received, have been taken into account in finalising the Report and reaching our conclusions, however the facts and matters annex in the report is not an agreed document.

Our report is attached at Annex A.

This paper explains our approach to the investigation, sets out a "roadmap" of the investigation report and discusses next steps and recommendations.

Recommendations:

The Board is invited to:

1. Discuss the analysis of the investigation set out in the report
2. Discuss whether you are "minded to" make the findings (in sections 2-5 of the Report), which are:

- (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
 - (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.
3. Discuss whether you agree with the "minded to" finding 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)
 4. Discuss whether you agree with the conclusion that we do not consider that the rules made by the Bar Council about the operation of the List of Defaulting Solicitors can 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.
 5. Discuss whether you agree that the Bar Council's actions were unreasonable
 6. Discuss whether you agree that we should seek to achieve the following 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
 - 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.)

7. Discuss whether you agree that it is desirable to try to resolve the matter informally to achieve those outcomes

(8) Subject to the above:

- a. agrees to issue a copy of the report to the Bar Council
- b. delegates to the Chief Executive the power to discuss informal resolution with the Bar Council to achieve the desired outcomes (or ones in similar terms)
- c. notes that there will be a report about progress towards an informal resolution with the Bar Council and next steps at the October meeting
- d. Agrees to advise the Bar Council that this cover paper will be published without redactions with the Board papers for this meeting in mid October

Risks and mitigations

Financial: None

Legal: We have obtained external legal advice throughout the investigatory phase to ensure objectivity

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.

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 and Anneliese Day
Consumer Panel:		X	N/A
Others:	None		

Freedom of Information Act 2000 (Fol)

Para ref	Fol exemption and summary	Expires
Annex A	s22 – intended for future publication	N/A

LEGAL SERVICES BOARD

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Introduction

1. The separation of regulation from representation is enshrined in the Legal Services Act 2007. 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. 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 Act, the LSB has considered the extent to which the Bar Council's subsequent behaviour has complied with its obligations under the IGR and the Act.
2. As a result of our investigation, we are minded to conclude that the Bar Council has –
 - failed at all times to act in a way which is compatible with the principle of regulatory independence;
 - failed to ensure the exercise of regulatory functions is, so far as reasonably practicable, independent of any representative functions; and
 - acted in ways likely to have an adverse impact on protecting and promoting the public interest by undermining the principle of independent regulation.

The investigation Report

3. The Report is structured in the following way:
 - a. Section 1 sets out the background to, and scope of, the investigation;
 - b. Sections 2-5 set out our analysis and "minded to" findings. In addition to the heads of investigation we consider that it is relevant to consider not just what the Bar Council has done, but also what it has not done; in other words its omissions as well as its acts. We also consider two additional issues in section 6:
 - whether the operation of the list of defaulting solicitors is a regulatory arrangements and whether the way in which the Bar Council currently operates it is appropriate; and

- the attendance of Bar Council attendees at private sessions of BSB meetings.
- c. Section 7 considers, in the light of these “minded to” findings, whether the Bar Council’s actions were unreasonable.
- d. Annex 1 lists Bar Council and BSB representatives and their roles
- e. Annex 2 explains the historical content of negotiations between the Bar Council and the Law Society on the subject of contractual terms and applications that were made to the MoJ in 2008 and 2009, before the LSB was created. It contains facts and matters relevant to events prior to the introduction of the IGR;
- f. Annex 3 sets out a detailed summary of the main evidence (the facts and matters) that we have analysed to inform the investigation. The information has been drawn from, among other things, that received from the Bar Council and the Law Society in response to requests under section 55 of the LSA. The information in the Annex refers to events after the introduction of the IGR. It contains no analysis or findings. The key relevant facts concern:
 - Events (from March 2010 to October 2010) surrounding a consultation by the Bar Council in April 2010 on changes to the contractual terms and the BSB’s regulatory arrangements;
 - Meetings of the BSB’s Board and Standards Committee (from October 2010 to May 2011). The meeting in October 2010 considered the outcome of the April 2010 consultation. That meeting and subsequent ones discussed proposed changes to the contractual terms and to the BSB’s regulatory arrangements. The facts and matters include information about whether the Bar Council or the BSB drafted and presented the papers, as well as the nature of some of the discussions at the meetings. A summary of the meetings and papers is in a table at after paragraph 107 of the Annex;
 - The rule change application to the LSB. The facts and matters include information about whether the Bar Council or the BSB drafted the application as well as changes that were made to it during its development and prior to its submission to the LSB;
 - The LSB and the application, including meetings with both Bar Council and BSB staff;
 - Events during the LSB’s consideration of the rule change application, including events surrounding the Bar Council’s advice to the LSB after a Warning Notice was issued, the BSB’s representations on the advice the LSB received and subsequent changes to the rule change application;

- Implementation and subsequent developments including the Bar Council and BSB's roles;
- Omissions – where we have been unable to establish evidence to support some statements made to us during the course of the investigation.

What happens next?

Informal resolution

4. The report (at section 7) sets out why we consider that the Bar Council's actions were unreasonable. It does this because we consider that these issues are sufficiently serious that use of our enforcement powers may be an appropriate proportionate and targeted response. Our Statement of Policy on compliance and enforcement complies with the requirements of the LSA by recognising that we should not exercise any of our enforcement functions unless we consider that the act or omission of a regulator was unreasonable. The Statement of Policy also takes account of the desirability of resolving these sorts of matters informally, as set out in section 49(4)(a) of the Act.
5. We consider that it is desirable to seek to resolve this matter informally. Based on our analysis and the issues identified, and taking into account the importance of regulatory independence and the resources available to the Bar Council, we believe that a proportionate response to the findings we are minded to make would involve achievement of the following 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
 - 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.)

6. If the Bar Council accepts our investigation's findings it may be possible to implement measures to achieve the outcomes relatively quickly. Although we will seek to get agreement on informal resolution as soon as possible, the practicalities of Board paper deadlines and the likelihood that the Bar Council will also need to go through some sort of internal processes may mean that final agreement is unlikely by the October Board meeting but it should be clear by the November meeting whether informal resolution is possible.
7. But our approach to informal resolution is that all the outcomes are to be achieved in a clear, timely and transparent manner; it is not an opportunity to negotiate totally different outcomes. Additionally, we consider it essential that our own actions are transparent and that our report into the investigation should be published in full once it is finalised. In the meantime, we consider that this cover paper should be published as normal (without the current redactions) with the other Board papers in mid-October. Our final report can make findings and set out any agreed informal resolution, but it cannot act as an informal statement of censure.
8. Alternatives to informal resolution are set out in Annex B to this paper.
9. The Board should note that the team is continuing to check the referencing of the document, which may lead to minor typographical changes and the inclusion of some additional quotes in the main body of the report, drawn from the facts and matters set out in Annexes 2 and 3. The substance of the document accurately reflects the team's assessment of the evidence it had before it. While it is unlikely to be required, some additional references to that evidence might also be added to the document. The Bar Council will have an opportunity to comment on the substance of the "minded to" findings before publication of the report, and in particular the facts and matters set out in Annex 3.