

Internal Governance and Practising Fee Rules – Supplementary Consultation

Bar Standards Board's response

Introduction

1. The Bar Standards Board (BSB) welcomes the opportunity to comment on the LSB's supplementary consultation on Internal Governance and Practising Fee Rules.
2. The BSB agrees with the new structure of principles, rules and guidance. This approach appears to create greater clarity and flexibility in the arrangements and is therefore welcome. The BSB also broadly agrees with the content of the principles, rules and guidance and therefore only believes it necessary to comment on a few discrete points.

Definition of 'lay person'

3. The BSB notes that the LSB proposes to define a 'lay person' as it is defined in the Legal Services Act 2007 ('the Act'), Schedule 1, paragraphs 2(4) and (5). These provisions prohibit anyone who, before the appointed day, is a barrister to be considered a 'lay person'. The LSB will be aware that individuals are called to the Bar (and therefore become barristers) after they have successfully completed the Bar Vocational Course (or Bar Professional Training Course from 1 September 2009) but before they have completed pupillage. A significant number of people have obtained the academic degree of 'barrister', but have not undertaken pupillage and are therefore not entitled to practise as barristers.
4. The BSB believes that individuals who have been called to the Bar, but have never been entitled to practise as a barrister, should not be prohibited from being classified as a 'lay person'. There are many people who were called to the Bar but then pursued a career in public, financial or academic life. Many people complete the degree without ever *intending* to practise as a barrister. It would be very unfortunate to exclude such individuals from being able to be lay members of a regulatory board.
5. The BSB would therefore prefer a definition of 'lay person' which takes this into account: 'lay person' could be defined as someone who is not, nor ever has been, a practising lawyer. This definition would allow individuals who have been called to the Bar but have never practised, nor been entitled to practise, to be classified as lay members.
6. The BSB notes that in the LSB's document "*Regulatory Independence: Response to Consultation*", the LSB concluded (page 22, final bullet point) that "*it would be helpful for the LSB to define what is meant by a non-lawyer (and will seek to do so using the Legal Services Act's definition of 'lay person' although approved regulators should be free to define what 'lawyer' means in this context for themselves*". If the LSB accepts

the BSB's proposed definition of 'lay person' in paragraph 5 above, it would then follow that the approved regulators should be free to define 'lawyer' for themselves.

7. Whilst the BSB notes that the LSB has not mandated that the Chair of the regulatory boards be a lay person, the significance of the definition arises in the context of shifting towards a lay majority board on regulatory boards (see below).

Composition of regulatory boards

8. The BSB reaffirms its submission to the LSB's original consultation on regulatory independence, which stated: *"The BSB favours a majority of non-lawyers and intends to move to a majority of non-lawyers when it is able to do so, but the prime concern is ensuring that it always has the highest quality members. The BSB does not agree, however, with the LSB's suggestion that the IGRs should require that regulatory boards should be constituted with an in-built majority of non-lawyers."*
9. The BSB notes that there is nothing in the Act which requires regulatory boards to have a lay majority, nor anything to suggest that the LSB has the power to compel regulatory boards to have a lay majority. The BSB therefore requests that the LSB clarify the legal basis on which it has the power to impose such a rule. Additionally, the BSB would be grateful for more clarity from the LSB as to how imposing a requirement of a lay majority on regulatory boards advances the regulatory objectives.
10. There would be practical difficulties for the BSB if the LSB imposes a requirement for regulatory boards to consist of a majority of lay members, especially if a time limit is put on the shift towards a lay majority. The LSB will be aware that the BSB's main board consists of 15 people – eight of the members are barristers and seven are lay members. However, one of the members that the BSB considers to be lay was in fact called to the Bar many years ago but never practised nor intended to practise as a barrister, but instead pursued a career in academic life. If the LSB maintains its proposed definition of 'lay person', this member would be classified as a barrister and therefore the composition will be nine barrister members and six lay members.
11. The LSB should be aware that it might take the BSB until early 2012 to rebalance its main board so that there is a lay majority, especially if the LSB adopts the definition of 'lay person' used in the Act. The BSB has already completed its recruitment and appointment process for 2010 and has recruited three new members – one lay and two barrister members. These appointments were made to fill three vacancies on the BSB's board whilst retaining the current balance of lay and barrister members and the necessary experience and expertise in relevant areas. The next opportunity to recruit additional lay members will be for the start of 2011. In order to ensure continuity of knowledge and skills on the board and to maintain the confidence of the profession, the BSB would like to phase-in the shift towards a lay majority over two recruitment years.

12. The alternative would be for the BSB to enlarge its main regulatory board and/or to ask current barrister members to stand down before the end of their terms to create vacancies for new lay members. Either option, if implemented immediately (as opposed to being phased-in over time), would create a very serious risk of destabilising the BSB's main board by losing key members who have the necessary knowledge, experience and skills, or by diluting the board with inexperienced lay members. Some current lay members of the BSB have indicated that it took them a significant amount of time to gain the knowledge and experience of the regulatory issues facing the profession in order to be able to contribute in a meaningful way to the BSB's work. The BSB would therefore hope that the LSB accepts that it is in the interests of the public and the profession to allow the BSB until early 2012 to shift towards a lay majority on its main board.

Definition of 'applicable persons'

13. The BSB is grateful that the LSB has agreed to amend its original Practising Fee Rules to allow the Practising Certificate Fee to be used for the regulation of non-practising barristers. However, the BSB submits that the definition of 'applicable persons' should be amended to remove the words "by virtue of current or previous membership of the Approved Regulator".

14. Because barristers are called to the Bar by one of the four Inns of Court on successful completion of the Bar Vocational Course (or Bar Professional Training Course from 1 September 2009), there are many non-practising barristers who are not, nor ever have been, members of the Bar Council. Nonetheless, the BSB does have jurisdiction over anyone who is currently a member of the Bar, regardless of whether they pay the voluntary Member Services Fee. The BSB therefore suggests that the definition of 'applicable persons' instead read as "*[including] 'relevant authorised persons' as defined in Section 51(8) of the Act but extends also to other persons over which the Approved Regulator has regulatory powers*".

Permitted purposes

15. The BSB interprets the permitted purposes at Rule 6 of the LSB's proposed rules and s51(4) of the Act to include staff costs (including, for example, a levy to raise funds to cover a pension deficit) as implicit in the permitted purposes. It also interprets the permitted purposes to include the ability of the Approved Regulator to raise reserve funds to act as a contingency fund that can be used for unexpected regulatory needs (including incidental costs, such as those related to staffing issues) that might arise in future years.

16. The BSB would also like the LSB to develop a mechanism for Approved Regulators to apply to the LSB for the permitted purposes to be expanded, as the regulatory landscape may evolve in the future and unexpected costs could arise.

Conclusions

17. The BSB are happy to meet with the LSB to discuss the contents of this response if the LSB believes that a meeting would be helpful.

18. The BSB now intends to work closely with the Bar Council in order to make the necessary amendments to its Constitution, Standing Orders and internal policies to ensure that they are in line with the IGRs and that the BSB and Bar Council are able to submit the necessary dual-self certification to the LSB by the deadline of 30 April 2010.

Bar Standards Board
22 October 2009