

The Bar Council Response to the Legal Services Board Supplementary Consultation on Internal Governance and Practising Fee Rules

Introduction

The Bar Council welcomes the opportunity to comment on the Legal Services Board's (LSB) supplementary consultation on the proposed rules to be made under sections 30 and 51 of the Legal Services Act (LSA) 2007. This response focuses on 'Annex A - Draft Rules' of the paper and addresses matters in the order in which they are raised.

Internal Governance Rules

A. Definitions

We have no observations to make with regard to 'Definitions' save that pertaining to 'Lay Person'. We endorse both the Bar Standards Board's (BSB) and Law Society's responses in suggesting the definition offered is too narrow. We agree with the Law Society's suggestion that an individual who has not practised as a lawyer in the previous ten years should be regarded as a 'Lay Person'.

Schedule to Internal Governance Rules

Principle 1: Governance - Rule A

In amplification of the Law Society's point, we believe it should be made clear that the 'body' delegated to perform the regulatory functions is the regulatory branch or arm of the Approved Regulator (AR) and is not a separate legal entity.

Principle 1: Governance – Rule C

As indicated in our responses to the consultation on Regulatory Independence, we consider that by stating that regulatory boards must have a lay majority the LSB is attributing to the LSA 2007 an intention that does not exist. It is not best practice to seek to impose an artificial structure that prejudices the regulatory arm's ability to select the best person for the job. The composition of the regulatory board is a matter for the reasonable judgement of the regulatory arm which may decide whether a lay majority will best enable it to fulfil its regulatory objectives. There is no legal basis in the Act for this requirement and to impose it exceeds the LSB's statutory jurisdiction.

Principle 2: Appointments etc – Rule C Guidance

The guidance that the regulatory board should determine its own remuneration is out of line with best practice. Since June 2007, the remuneration of BSB members and certain other of our most senior appointments has been determined by the Bar Council Emoluments

Committee, which is a sub group of the Finance Committee. The composition of the Emoluments Committee is the Treasurer, the Chairman of the Bar Council, the Chair of the BSB and two lay members. This better accords with the principles in the Combined Code than does the guidance. There is a further related point with regard to the operating principles of an 'agreed budget' that is elaborated upon under Principle 3 below.

Principle 2: Appointments etc - Rule D and Guidance

We disagree with the rule that the concurrence of the LSB should be obtained prior to the dismissal of a member of a regulatory board. There could be instances, which fall under the broad definition of gross misconduct, where the legal obligations of the AR as employer outweigh issues of independence. Decisions of this nature are matters which legitimately fall within the AR's own sphere of competence. However, we would agree with wording of guidance that required the AR to notify the LSB privately in advance and to give due consideration to any representations made.

Principle 2: Appointments etc - Rule E and Guidance

There is no objection to Rule E but the guidance goes too far and inhibits the 'best person for the job' remit. Accordingly, we support the Law Society's response. Our experience suggests that there is the mutual benefit, associated with the cross fertilisation of ideas, to be had from allowing persons to move from holding a representative responsibility to a regulatory responsibility and vice versa. This has proved to be the case to date to the obvious advantage of the BSB.

Principle 3: Strategy and Resources etc – Principle, Rules A and B and Guidance

In our response to the consultation on 'Regulatory Independence' we made the point that Parliament has conferred upon the AR the responsibility for ensuring that its regulatory arm receives adequate funding but made this subject to a test of reasonable practicality. This necessarily means that that AR has discretion and must exercise judgment. Its decision can be challenged but only on 'Wednesbury' or other acknowledged principles of administrative law. Implicit within the acceptance that the regulatory arm does not have the authority to set its own budget and require the AR to hand over the required sum is the fact that it also cannot decide upon a strategy in isolation from the resource implications of that choice for the AR. This should be explicit in the rules rather than left to the guidance. Equally, having been allocated resources to undertake a particular strategy, it would be inappropriate for the regulatory arm to assume that the sums provided are thereafter ring fenced to be used as seen fit regardless of the original budgetary purpose. It is of fundamental importance that the latter point is acknowledged in both Principle 3 and the associated rules. Consequently, while it is entirely appropriate for the regulatory arm to have effective control over the management of resources allocated, reference should be made to the fact that they must be applied for the purposes provided. Virement is an elementary budgetary discipline that has universal application; it is not an independence issue. Accordingly, it is recommended that both the third bullet point of Rule A and Rule B itself are deleted.

We endorse the remarks made by the Law Society in relation to the guidance on Rule A. The Bar Council bears the statutory obligations as single employer of all staff. Any suggestion

that the regulatory arm could determine pay and conditions for its staff without the concurrence of the AR is unacceptable. Conversely, in exercising its responsibilities as employer the AR should consult with the regulatory arm but has no obligation to obtain concurrence over issues for which the regulatory arm has no responsibility in law. It should also be noted that with regard to the line management of regulatory staff, as the Bar Council is the employer there are certain issues e.g. in relation to the disciplinary and grievance process that may have to be dealt with by the most senior employee of the AR, namely the Chief Executive.

Notwithstanding the foregoing remarks we would stress that in practice the Bar Council and BSB manage these issues effectively through a process of close co-operation and consultation.

Principle 3: Strategy and Resources etc - Rule D and Guidance

There are few, if any 'non financial resources' and it is recommended that the words 'non-financial' be deleted from Rule D. With regard to the guidance, the suggestion that the right of the regulatory arm to obtain services from sources other than the AR should be constrained only by the formal budgetary process is too simplistic. This right should not be exercised without prior adherence to an AR's functional dispute resolution process. As the Law Society have observed the regulatory arm always has right of appeal to the LSB.

Principle 4: Oversight etc – Principle, Rules A and B and Guidance

Again, in responding to the consultation on 'Regulatory Independence', we have pointed out the implications of the statement at paragraph 3.27 of that paper namely 'Delegation of functions cannot divest a representative-led approved regulator of its responsibilities under the Act'. In broad terms, we identified two important and continuing obligations; firstly, to protect the regulatory arm from prejudice to its independence and, secondly, to ensure its proper performance. If the safeguards to the good working practices of the regulatory arm are not met, it is the AR which is liable under the Act. Equally, if the regulatory arm fails then it is the AR which is subject to censure, directions or fines under LSA 2007 sections 32-44. The Principle should acknowledge this point. In terms of practicalities, the Bar Council envisages it being necessary for the elected Chairman/Vice Chairman/Treasurer (or nominees) of the AR to undertake a bifurcated role of both acting for the representational side of the body and performing the duties of the AR in relation to its regulatory role. As the Bar Council is also a single employer, a bifurcated responsibility also rests with the Chief Executive. The Bar Council is working with the BSB to revise our Constitution and Standing Orders to reflect these points.

Practising Fee Rules

A. Definitions

We endorse the observations made by the BSB in relation to the definition of 'applicable persons'.

C. The Permitted Purposes

We agree with the BSB's observation's regarding the interpretation of the permitted purposes and this is supported by well established custom and practice. However, for the avoidance of doubt, as it constitutes the largest single element in any AR's budget, paragraph 5 should be amended to read 'Monies raised through practising fees may be applied only for *the delivery, which may include associated staff and support costs*, of one or more of the permitted purposes'.

We agree with the Law Society's suggestion that work undertaken with a view to improving access to justice should be a permitted purpose. This is best achieved by amending the wording of paragraph 6(e) to read 'the promotion of the protection by law of human rights and fundamental freedoms *and the statutory objective of promoting access to justice*'.

While much of the following is implicit within s.51(4) of the LSA 2007 (as repeated in paragraph 6 of the Consultation paper), we recommend that the permitted purposes explicitly also provide for the following:

- The right to seek funding from the authorised persons of any relevant pension costs, including deficit funding and closure costs.
- The right to seek all the costs associated with the provision of the services to enable the regulatory arm to provide, so far as is practicably necessary, regulatory services in the public interest
- The right to seek all costs associated with the AR role in commenting on and assisting in the preparation, presentation and passing of legislation, or other such rules or guidance, that affects the conduct of any authorised person
- The right to seek from the authorised persons such sums as equates with and maintains a reserve to deal with future foreseen (relocation of business premises) or unforeseen (post disaster business continuity) costs. It is good and sensible financial husbandry for an AR to have reasonable reserves in order to sustain the ability to carry out the permitted purposes, and most notably regulatory activity, without having to make an abrupt and sudden call on the profession for the resources.
- The right to seek from the authorised persons all costs associated with entity regulation

Conclusion

The Bar Council will be pleased to meet with the LSB to discuss any aspect of this response.

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