

BAR STANDARDS BOARD

REGULATING BARRISTERS

Legal Services Board Consultation on Internal Governance Rules.

Introduction.

1. The Bar Standards Board welcomes the opportunity to respond to the LSB Consultation, *Reviewing the Internal Governance Rules (IGRs)*.
2. The Board has given careful consideration to a detailed analysis of how the current IGRs are operating and has identified a small number of areas in respect of which it will be seeking improvements internally through agreement with the Applicable Approved Regulator (AAR), the General Council of the Bar. This is premised on the assumption that whatever the final outcome of the Consultation, it would be some time before any more substantive changes to be introduced by the LSB would come into effect. It is therefore important that we aim to achieve the highest levels of compliance with the current Principles and Rules.
3. The summary position of the BSB is that the current IGRs are generally working adequately in relation to independence of regulatory policy making and decision taking. There remain some specific areas in which the BSB has identified issues with how the IGRs are operating currently; the most complex (to resolve) of these goes primarily to the BSB's *effectiveness* as a regulator rather than to its *independence*. The BSB intends to address all of these areas bilaterally with the AAR, prior to any changes to the IGRs the LSB may propose or impose. Some progress has already been made.
4. The BSB broadly agrees with the LSB's analysis of the legal position as set out in its consultation document and specifically that legal separation of representative and regulatory bodies cannot be *required* by the LSB under the current legislation. The BSB recognises that new legislation, which might provide a better platform from which to fulfill the regulatory objectives, will not be forthcoming in the short to medium term. The BSB nevertheless considers that further clarity and constraint on the role of an AAR in relation to its regulatory body would allow both the regulatory and representative bodies to be more effective and accountable in their different respective roles.
5. The questions in the LSB Consultation document are addressed in the order in which they appear.

Q1: We welcome evidence on (i) the general nature, frequency and impact of disagreements on regulatory independence matters, and (ii) how the IGR are used and their effectiveness in moderating such disagreements.

6. **BSB response:** Since the 2013 LSB investigation of the Bar Council and BSB, and the introduction of the Protocol for ensuring regulatory independence which resulted from that investigation, we have had few concerns or disagreements directly impinging on regulatory independence matters concerning policy development or decision taking. The BSB has had no cause formally to report any matter of concern to the LSB: none of the 30 or so instances referred to in the consultation paper has involved the BSB.

7. The IGRs, since the demise of the dual self-certification (DSC) exercise in 2013, sit in the background and are very rarely directly referenced. Whilst there have been relatively few disagreements, the effectiveness of the IGRs remains untested and especially so without the DSC exercise. The BSB therefore undertook internally a comprehensive analysis of each Principle, Rule and Guidance against current practice at the BSB / Bar Council, in order to inform this consultation response.
8. This indicated several areas of possible concern which might contribute to public perception of a lack of regulatory independence and that the profession is still largely self-regulating. As indicated in para 3 above, the BSB is already in discussion with the Bar Council to address each of these areas.

Q2: What are the benefits and costs to stakeholders of operating under the existing IGR framework?

9. **BSB response:** The governance settlement between the BSB and Bar Council under the existing IGRs has some possible benefits for both sides in, for example, providing mechanisms for practical joint management of the AAR and frontline regulator especially given the fact that the latter (BSB) has not been constituted as a legal entity in its own right. Where there are shared services, economies of scale *may* bring advantages.
10. The costs to the BSB are in poor use of senior leadership time, especially through duplication of effort and “over governance”, and in insufficient control of and accountability for the quality and standard of shared services which are in the line of command of the AAR. Where these do not perform, or are not invested in, to the standard that the regulator seeks, the costs to the regulator in terms of reduced effectiveness are high and the BSB has virtually no redress: without a separate legal identity it is impossible to contract for those services elsewhere without the concurrence and support of the AAR.
11. For stakeholders, the joint arrangements, which in the present case also extend as far as shared premises and occupation of adjacent floors, contribute to a perception that the regulatory body is not independent of the representative body.

Q3. Do you agree with option 1: no change to the IGR? Why or why not?

12. **BSB Response:** We do not agree there should be no changes. Our internal analysis shows that the current drafting of Principles and Rules *can* conceivably sustain the set of arrangements which the BSB would wish to see in place. However, the Guidance would need to be re-drafted to make more clear what were acceptable interpretations of the Principles and Rules. Mechanisms for monitoring compliance in particular would also need to be reviewed if there were no change to the current IGRs (see also below.)

Q4. What information do AARs need to receive from their regulatory body, and why? To what extent can these needs be met through transparency (and vice-versa), thereby removing the need for further engagement?

13. **BSB Response:** We consider that the arrangements for accountability and performance monitoring which e.g. Parliament might expect from an executive agency, or a sponsoring department might ask for in an arms' length body, or the Charity Commission from a large charity, should be the model. The regulatory Boards are justiciable entities and public law accountabilities also apply and should remain. These needs can largely be met through transparency requirements.

14. The BSB already offers very high levels of transparency in respect of this type of information, of its own motion for many years, and latterly through sign-up to LSB principles on transparency. Our business and strategic plans are consulted on and reported against, to a high standard, and comprehensive information is available to the AAR and the wider public on a quarterly basis. We also report and consult regularly on risk and on supervision and enforcement activity.
15. Where there is only one legal entity, the frontline regulator – BSB – might need to seek higher levels of transparency from the AAR than are currently in place e.g. on the AAR's use of s51 funds, and on other activity which, if poorly executed, could present a financial, reputational or legal risk to the BSB.

Q5. Do you want more intervention by the LSB in disputes between AARs and regulatory bodies? If so, what form should this intervention take?

16. **BSB Response:** No. The LSB should be the last resort and called on only as an immediate pre-cursor to LSB enforcement action if the regulatory body has reason to believe the AAR is undermining its pursuit of the statutory ROs or otherwise constraining its independence and effectiveness. The LSB should adopt public law judicial review principles in formulating its own approach if it thinks either side has acted unacceptably.

Q6 Do you agree with option 2a: making incremental changes to the IGR? Why or why not?

17. **BSB Response:** Incremental change might be a mechanism through which to revise Guidance on the current IGRs (see para 13 above); it would need also to include revised mechanisms for monitoring compliance to be effective.

Q7. What incremental changes should the LSB prioritise, and why?

18. **BSB Response:** see above response to Q 6.

Q8. What do you anticipate the impact of your proposed change(s) would be, and why?

19. **BSB Response:** An AAR might be concerned about loss of current control and ownership of the regulatory body which might result. There could also be impacts on the AAR if they were to lose the benefit of the regulatory body shouldering the majority of the shared services costs. The front line regulator might be exposed to greater direct and indirect resource costs. Better compliance monitoring mechanisms, as long as they were “right – touch” would be likely to have positive impacts though assurance to the public of the independence of regulation. In turn this would enhance the reputation of the profession.

Q9. Do you agree with option 2b: making more extensive changes to the IGR?

20. **BSB Response:** we are not necessarily opposed to more extensive changes, but without the power of the LSB to impose our preferred position of separate legal entities, we do not think more extensive changes are necessarily needed, as long as Guidance is reformulated and adequate monitoring mechanisms are put in place.

Q10. What new obligations would you recommend the LSB prioritises, and why?

21. **BSB Response:** Two new obligations are in our view called for. The AAR must allow the regulatory body to determine to its own satisfaction the level of effectiveness and operational independence through internal governance which it seeks, taking into consideration also the LSB's performance standards framework. In our own case, this would mean giving the BSB control over its own Constitution, for example. Secondly, given there is only one legal entity, there should be an obligation on the AAR to make available information on its own activity and performance so that the frontline regulator can be confident in managing risks. Where the frontline regulator is concerned that an omission (or commission) by the AAR presents unacceptable levels of legal, financial and / or reputational risk for the regulatory body because it is an integral part of the AAR legally, there should be a mechanism for the regulatory body to flag its concerns about the AAR with the LSB.

Q11. What do you anticipate the impact of your proposed change/s would be, and why?

22. **BSB Response:** we anticipate a positive impact on the effectiveness of regulatory and representative bodies through greater focus on mutual accountability. Greater clarity of role for each body should result, and this would be likely to improve the reputation of the both with the public and the profession.

Q12. Do you agree that the definition of AAR should be revised? Why or why not? If so, how do you think the definition should be revised, and why?

23. **BSB Response:** It is difficult to see how the definition could be substantively changed without changes to the LSA07, which are not currently envisaged. However, we think it is unfortunate that the current definition appears to have allowed bodies which exercise both representative and regulatory functions to "escape" the IGRs and this should be rectified. A different definition could be based on a simple principle: where a body regulates any reserved legal activity it must have governance arrangements in place which separate that regulation entirely from its representative activity, to the satisfaction of the regulatory body and the LSB.

Q13. What do you anticipate the impact of revising the AAR definition would be, and why?

24. **BSB Response:** this depends on the nature of the revision. If as above, this would not have a significant impact on the BSB. A change would create a more level playing field between the bodies active in the sector and provide the public with assurance about independence of the regulation of reserved legal services activity irrespective of the nature of the provider.

Q14. Do you agree that the definition of regulatory independence should be revised? Why or why not? If so, how do you think the definition should be revised, and why?

25. **BSB Response:** The current definition is narrow in its scope but nonetheless has also proved to be susceptible to a variety of interpretations. It relies considerably on relative and unspecific terms e.g. "*undue influence and control*"; "*proportionate to the circumstances*"; etc. This may be unhelpful as it tends to focus on "soft" power rather than "harder" structural protections. Currently, achieving satisfactory interpretations can rely heavily on the personalities and approaches of incumbents (office holders or executives) at any one time: different individuals may seek to exercise more or less influence and control and different individuals may have more or less susceptibility to influence and

control. There is also a fundamental problem where there is only one legal entity with regard to “influence and control”. This is most obviously and simply exemplified in the fact that the salaries and emoluments of everyone on the regulatory body are paid by the same body that represents the interests of the profession being regulated. The governance arrangements currently in place risk giving the representative “side” an automatic upper hand in settling these. In most other arenas this would be considered very unusual and an obvious undermining of independence.

26. The definition of independence could be made more objective, with the responsibility for achieving it, and of being satisfied of its achievement, shifting from the AAR to the regulatory body.

Q15. Do you agree with option 2c: a new ‘gateways’ approach to the IGR? Why, or why not?

27. **BSB Response:** The potential for clarity and objectivity in this approach seems helpful, though it should be noted that the BSB and Bar Council have many of these “gateways” in place through custom and practice. Codification could assist in transparency and in preventing “creep” in any direction and could mitigate the risks to independence and effectiveness that can emanate from the lack of continuity and stability in AAR governance as compared to front line regulator governance (for example, in the present case, AAR office holders are typically in post only for one year but front line regulatory board membership lasts up to six years.)

Q16. What gateways (i.e. permissible channels for information and assurance to flow between regulatory bodies and their AARs in the normal course of events) do you think would be needed, and why?

28. **BSB Response:** Standard organisational performance and risk reporting, typical of public bodies, at 12 month intervals would suffice. This however needs to be in **both** directions whilst there is only one legal entity for the reasons set out in paragraph 21.

Q17. Do you think independent standards or benchmarks could be used to indicate when AARs are able to seek additional assurance? If so, what are these, and why?

29. **BSB Response.** In principle, an agreed standard set of “triggers” for an AAR to seek additional assurance, may be helpful. Consistent with our earlier responses, we would expect any additional assurance mechanisms to operate in both directions. It would be preferable for those benchmarks to be agreed by individual AARs/ regulatory bodies so that they could be tailored to specific circumstances.

Q18. What action do you think an AAR should be entitled to take when seeking additional assurance in the circumstances described above, and why?

30. **BSB Response:** This rather depends on the specifics of the circumstances, but in any event action could only be in accordance with previously agreed standards or protocols. These would need to be consistent with the principles in the LSA relating to the LSB’s own role and not be any more onerous or intrusive than those.

Q19. What do you anticipate the impact of the ‘gateways’ approach would be, and why?

31. **BSB Response:** There would be relatively little impact on the BSB, though greater clarity and efficiency in reporting will be helpful. The approach could lead to a yet stronger and

more accountable regulatory Board and higher levels of transparency for the public and the profession, which would be positive.

Q20. What, if any, alternative approach to reviewing the IGR do you suggest the LSB should consider, and why? What impact do you think that would have, and why?

32. **BSB Response.** Given the acknowledged starting points i.e. no prospect of legislative change and the LSB being unable to require full legal separation of the AARs and the regulatory bodies, alternative options are limited. We do not entirely reject the possibility of “tailored” IGRs but have considerable concern that such a possibility would offer the opportunity for atavistic and retrograde positions to be adopted by an AAR. This would not be in the public interest and could make the legal services regulatory landscape even more confusing and hard to navigate for consumers than it already is.

Q21. Do you agree with reintroduction of Dual Self-Certification (DSC) to assure compliance with the IGR? If so, what form should this take and why? What do you anticipate the impact of DSC would be, and why?

33. **BSB Response:** Yes. The DSC exercise focused the AAR especially on its obligations for ensuring compliance and good practice, and gave the frontline regulator a lever to pull in ensuring transparent and effective governance in the public interest, as well as fostering delivery of shared services at a standard adequate for effectiveness. It should be restored but perhaps take place biennially, with a formal route for flagging concerns to LSB in the interim.

Q22. Do you agree with IGR compliance becoming part of regulatory performance assessments? If so, why? What do you anticipate would be the impact of IGR compliance becoming part of regulatory performance assessments, and why?

34. **BSB Response.** Yes. Given the frontline regulators are in notable instances not wholly autonomous bodies, no assessment of effectiveness is complete without such a review of compliance. This would provide a necessary check and balance on the statutory situation. The LSB’s new performance assessment framework allows for targeted, risk based approaches which would necessarily mean that the IGR compliance exercise would be targeted and risk based, making it therefore more likely to be proportionate.

Q 23. Do you agree with the existing option for proactive reporting of non-compliance? If so, why? What do you anticipate the impact of this would be, and why?

35. **BSB Response:** Yes, the presence of this potential mechanism is helpful, albeit we would always expect to use it as a last resort once internal resolution of non-compliance had been exhausted. It may seldom be drawn on if the regulatory Board is competent and, for example, had included assurance on IGR compliance as part of its own internal audit arrangements.

Q24. Do you agree with third party assurance? If so, why? What do you anticipate the impact of this would be, and why?

36. **BSB Response:** We are concerned that third party assurance may add little value to the assurance processes that a regulatory Board already has in place, and could impose more cost. The BSB, for example, has a number of different mechanisms for “external” involvement in its assurance arrangements and treats the LSB’s role in assurance as that of a third party. As long as a regulatory body’s own processes already include sufficient

elements of third party assurance, and in the context of the role the LSB plays in relation to regulatory performance, there should be no need for further third party involvement.

Q25. What, if any, alternative approaches to assuring compliance with the IGR do you suggest the LSB should consider, and why? What do you anticipate the impact of these would be, and why?

37. **BSB Response:** We have no further approaches to suggest.

38. **Concluding remarks:** The IGR consultation has provided a welcome and overdue opportunity for the BSB to review compliance with the current Principles and Rules. We have been able to negotiate and agree with the AAR how to rectify one area of technical non-compliance we uncovered, and are moving now to discuss amendments to our Constitution and related governance arrangements to ensure a greater degree of consistency with the Principles and Rules in connection with, for example, composition of and appointments to the Board. We are also working on a new set of governance arrangements in respect of shared services in order to achieve the levels of control and effectiveness we seek, in line with the public and LSB expectation of regulatory performance.

**Bar Standards Board
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