



## **Bar Council response to the Legal Services Board consultation “Reviewing the Internal Governance Rules”**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board consultation paper entitled “Reviewing the Internal Governance Rules.”<sup>1</sup>
2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

### **Introduction**

#### The Internal Governance Rules – their purpose, form and limits

4. The approach that the LSB adopted in the IGRs was to set out a series of principles aimed at defining and giving effect, in practice, to the principle of regulatory independence. The body of the Rules includes a working definition of regulatory independence and states broad duties which all approved regulators must carry out. The Schedule goes on to set out more granular requirements which applicable approved regulators (AARs) must fulfil in four categories. While the Schedule is more prescriptive (and justifiably so, given that it applies to approved

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<sup>1</sup> Legal Services Board, “[Reviewing the Internal Governance Rules](#)” (2017).

regulators involved in both representative and regulatory functions), it nonetheless accords AARs and their regulatory bodies discretion and flexibility as to how to comply with both the letter and the spirit of the Rules and the Act.

5. As the issues outlined on pages 10-11 of the IGR consultation demonstrate, rules have to be applied by humans. Relationship difficulties, such as failures to communicate properly, or marked differences in personal perspectives, can cause independence issues that are not problems with the Rules so much as with their application. Amending the Rules (for instance making them more prescriptive) can only mitigate these to a certain extent (and also raises proportionality considerations). Instead, if there are specific relationship difficulties experienced by approved regulators, they should be addressed as such before being treated as a deficiency with the Rules.

#### The Bar Council's experience under the IGRs

6. The Bar Council is an AAR for the purposes of the IGRs. Since 2006, the regulatory functions of the Bar Council have been delegated to and exercised by the independent Bar Standards Board.

7. The BSB's independence is enshrined in its Constitution. Independence is also achieved in practice through the Bar Council and BSB's working arrangements. The BSB has control of its budget (which is subject to overall Bar Council approval on the advice of a joint Finance Committee). Many services are shared between the two organisations (which the LSB has recognised as offering economies of scale<sup>2</sup>), and these are moderated by Service Level Agreements. Internal dialogue about the relationship between the Bar Council and BSB is facilitated by a Chairs' Committee composed of the highest officers of both organisations.

8. The 2013 investigation by the LSB into the Bar Council and BSB served as a learning experience. The Protocol on Regulatory Independence, created in response to the investigation, governs interactions between the Bar Council and BSB so that they do not result in representative persons influencing the exercise of regulatory functions. This Protocol is supplemented with guidance to staff that is frequently reviewed. All Bar Council and BSB staff are trained on the operation of the protocol on joining the organisation and we hold refresher training sessions for all staff.

9. As the LSB has recognised, the Bar Council continues to play an important oversight role as the body designated as approved regulator under the 2007 Act, and we have legitimate functions under the regulatory objectives. The LSB's investigation

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<sup>2</sup> Legal Services Board, "[Regulatory Independence](#)" Consultation Paper (2009), p.20.

stated that “the Bar Council/BSB form of separation ought to be capable of upholding the principle of regulatory independence”<sup>3</sup> and enable high quality regulation in the public interest, and we believe that it does.

### General thoughts on the consultation

10. We note that the consultation is by nature diagnostic. The LSB is asking stakeholders for evidence rather than itself offering evidence, beyond anecdotal points that are listed without any indication of scope or severity. We recognise that confidentiality may prevent publication of further details. Moreover, the anecdotes in the consultation paper serve as starting points for discussion to see if there is, in fact, a problem. Our position, informed by our experience operating under the IGRs, is that the existing arrangements work well. If the LSB identifies specific, significant problems, the method of addressing them proportionately will depend on their scope, and whether they are inherent to the IGR setup or are simply dysfunctions specific to individual ARs. The structural setup and working relationship between the Bar Council and BSB currently serve effectively to secure regulatory independence, and we are concerned that revising the Rules wholesale or adding greater prescription or formality would undo all this and reverse years of good practice.

11. It is also unclear to us whether the 30 issues really relate to the IGRs, or even to compliance with the Act; the commentary in paragraph 24 of the consultation paper suggests that many may simply involve desires (particularly on the part of some regulatory bodies) not to be subject to the structure laid down by the Act. ‘Issues’ of this sort must necessarily be excluded from the list of 30, as they start from a premise which the IGRs rightly cannot recognise or impose, as the LSB accepts.

**Question 1: 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.**

12. We are not aware of there having been any significant disagreements with the BSB on regulatory independence matters. Where a question of regulatory independence arises, the BSB is constitutionally empowered to determine it, and arrangements within the Bar Council/BSB, such as the Chairs’ Committee and a culture of respectful and open communication, moderated by the Protocol, facilitate resolution of such questions in a manner consistent with the IGRs. The IGRs enable these arrangements, but it has not been necessary to make use of the IGRs directly in this context.

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<sup>3</sup> Legal Services Board, “[Bar Council Investigation Report](#)” (2013), p. 21.

13. We will listen keenly to any evidence gathered from other ARs in response to this consultation, and will endeavour to use it to inform a further response to the second part of this question, if and when we are made aware of that evidence.

**Question 2: What are the benefits and costs to stakeholders of operating under the existing IGR framework?**

14. The existing IGR framework's principle-based approach strikes a balance between regulatory certainty and flexibility which has enabled the Bar Council and BSB to achieve regulatory independence structurally and in practice by methods best suited to their particular context and needs. There was an initial cost in terms of the time and resources needed to set the arrangements between the Bar Council and the BSB, but the arrangements now operate in an efficient, proportionate and low-cost way, and we do not perceive that the IGRs generate any unnecessary or undue cost or uncertainty.

15. Moreover, settled arrangements, in a settled framework, developing over time as the Bar Council and BSB learn from mutual experience, are the approach likely to result in the lowest cost and greatest efficiency. We also agree with the LSB (paragraph 42) that the current approach is outcomes-focused, which is as it should be in this context.

16. As the LSB noted, one benefit of our current arrangements is the economy of scale offered by shared services. The LSB has also recognised that "regular and frank two-way communication" between the BSB and Bar Council is entirely legitimate and healthy,<sup>4</sup> and the existing framework enables this while still dictating that it respect the BSB's independence.

**Question 3: Do you agree with option 1: no change to the IGR? Why or why not?**

17. From our own experience, we would favour no change to the IGRs.

18. Without knowing more about the experience of other AARs and their regulatory bodies, we are unable to say whether any changes to the IGRs as they affect those other AARs might or might not be desirable; nor are we able to make suggestions that reflect the experience of others. This is a core difficulty with the current consultation, so we propose to add some further explanation.

19. The LSB is asking, at this stage, whether regulatory bodies have experienced difficulties with the IGRs as currently drafted, but has not itself provided us with the evidence or any analysis of the failings of the IGRs. Although the LSB says it has

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<sup>4</sup> LSB 2009 consultation, *supra* n. 2, at p. 23.

identified some 30 independence issues, we do not have enough information to assess whether any of those issues reveal a problem with the IGRs or whether any problem may lie elsewhere or, indeed, whether some of the 'issues' are more than a desire in some quarters to have a regulatory framework different from that laid down by the Act. We appreciate that the suggested issues may be confidential; but it would be wrong to propose changes to the IGRs without the Bar Council and BSB knowing the issues which are said to be driving any change.

20. The Bar Council has not experienced any ongoing difficulties with the IGRs as currently drafted. If the LSB is able to provide greater evidence of deficiencies with the current drafting of the rules in addition to further analysis of the case for change, then we are open to reconsidering our position. If, in response to this consultation, the LSB decides that there may be merit in changing the rules, then there should be further conversations with the AARs and regulatory bodies about the implications of any proposed changes. This should precede any further consultation on the substance of the rules. Any significant changes will necessarily cause disruption to the way that regulatory bodies and AARs interact, with attendant costs and uncertain impacts. Not only would there need to be sufficient perceived advantages to any changes, but these would need to outweigh the disadvantages of making a change.

21. The consultation paper sets out several possible changes under option 1 that could be made that do not involve changing the substance of the IGR themselves. We shall address each of these in turn:

- a. "More transparency on a voluntary basis by regulatory bodies": We cannot see any problems with this; but equally, it requires no consultation from the LSB, or the commitment of any significant resources by the LSB or anyone else. Transparency is already part of the regulatory framework under s.28(3)(a) of the Act.
- b. "LSB facilitates discussions between ARs and regulatory bodies": The LSB's enforcement role encompasses IGR compliance. Its enforcement approach already seeks to prioritise informal resolution where possible, and we can see the potential for the LSB to facilitate discussions in situations where formal enforcement action is inappropriate or premature, or where there are relationship difficulties that do not amount to enforcement issues. We would, however, expect ARs and regulatory bodies to resolve their difficulties without the LSB. Under our own arrangements, the Chairs' Committee provides an effective mechanism for doing so.
- c. "Increased frequency of assurance work": It is not clear what 'assurance work' is envisaged; we have read it as referring to assurance of compliance with the IGRs. This would be more resource intensive for all parties, and we see no need

for this, except where it may be an appropriate and proportionate response to specific issues relating to specific AARs or regulatory bodies. In that latter event, it should be available and used, subject to compliance with s.3(3) of the Act.

- d. *“Increased awareness of LSB oversight role and its implications”*: We see no harm, and possibly some benefit, in the LSB explaining what oversight it exercises, and in ensuring that the results are communicated to the relevant AR: indeed, we suggest that whatever a regulatory body provides to the LSB by way of assurance ought in any event to be provided to the relevant AR at the same time. So far as the ‘implications’ are concerned, if this means no more than encouraging ARs and their regulatory bodies to cooperate and to take account of what the LSB will in any event require, then that too might have some benefits.

22. In relation to the last of these points, we have broader observations about Annex B. We would agree that the AAR and the LSB may need assurance on some of the same matters, and that each may need assurance at different times. We would add that the assurance required by the AAR and the LSB is also likely to differ in several respects, and may need to be at a different level, both generally and on specific issues.

23. We suggest that it would be the wrong approach simply to look at what the LSB requires, and ask for the AAR to ‘build’ on that *“rather than replicating it”*, if and to the extent that this leads to the requirements of the LSB being given primacy over those of the AAR. That would not accord with the Act. It could also lead to the AAR being side-lined inappropriately. On the other hand, if, in the proper exercise of its statutory functions, the LSB requires assurance on particular matters, then that assurance ought to be provided both to the LSB and to the AAR.

24. If the LSB and the AAR both require assurance on the same matters, then we suggest that any timing issues ought, in the first instance, to be discussed and if possible agreed between the LSB, the AAR, and those exercising the relevant regulatory functions, bearing in mind the extent of the burden involved. If the burden is limited, or if assurance ought reasonably to be available on a rolling basis (e.g. through periodic statistics), then timing may not be an issue in any event. If more burdensome assurance is genuinely needed at different times, and no compromise can be achieved, then duplication will be unavoidable.

25. What the introductory section of Annex B recognises, however, is that AARs may require additional assurance and information, over and above that required by the LSB. We suggest that this is not just a possibility, but is inevitable. This is for two main reasons. First, the nature and level of the oversight role is different between the LSB and the AAR: for example, it is in the AAR’s interests that problems should not

develop that might lead to an inability by both the AAR and the regulatory body to provide sufficient assurance to the LSB in due course. Second, the AAR can be expected to have additional concerns, the nature of which will vary depending on, for example, the structure of the AAR and the regulatory body, the legal, financial and practical relationship between the AAR and the regulatory body, and the regulatory and operational risks of the combined organisation. Those examples are not exhaustive. The needs for assurance and information are also likely to vary over time, and to be context-sensitive, including where specific issues arise.

26. We would add this, however. It is in the end practising barristers, and thus their clients, who bear the costs of any proper and reasonable assurance requirements placed on the BSB, whether by the Bar Council or by the LSB. It is not in the interests of the Bar, or the public, for there to be unnecessary duplication, and the Bar Council would wish to avoid this so far as we reasonably can. Pragmatically, the Bar Council has so far not sought separate assurance on those matters on which the LSB has sought assurance, and has thus avoided any duplication, although it would seem appropriate for the material provided to the LSB to be provided at the same time to the Bar Council as a matter of course.

**Question 4: 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?**

27. We should state upfront that this is potentially a very broad question indeed: far too broad to admit of a comprehensive answer. The information that is needed will in any event depend on the particular circumstances.

28. Our oversight role as approved regulator under the Act means we need a variety of information from the regulatory body which can include: budgetary and financial information in order to provide it with reasonable resources and also ensure value for money; performance information to gain assurance of adequate performance by the BSB of its regulatory functions; and more broadly, information that enables us to identify any risks or potential liabilities to the organisation.

29. In addition to the information that we require for our oversight function, we consider that efficiencies can be made, and the public interest (including consumer interests) served, through sharing information that enables both the regulatory body and the AAR both to make their respective contributions to the regulatory objectives, and in some respects to assist the AAR to pursue activities that fall within the “permitted purposes” as set out in s.51 of the Act. There will be certain types of information collected (for example, diversity data that is acquired through surveys of the profession) that assist both the regulatory body and the AAR fulfil their functions that support the regulatory objectives in the Act; and information as to, for example,

gaps in training may enable the AAR better to serve both the profession and the public. Assuming information of this sort is collected in such a way to meet data protection requirements, there are likely to be benefits to both parts of the organisation if this type of information can be shared.

30. With respect to the second part of the question, we would not wish to hamper constructive dialogue between the regulatory body and AAR by constructing artificial barriers that prevent legitimate information flow whilst maintaining regulatory independence. The driver behind this question seems to be that interaction between regulatory bodies and AARs ought to be reduced. We see that as positively undesirable. As long as regulatory independence is maintained, we do not see that reduced interaction *per se* ought to be the end objective: quite the opposite. The crucial issue is the character of the interaction, which should always maintain regulatory independence and not result in any undue influence.

**Question 5: Do you want more intervention by the LSB in disputes between AARs and regulatory bodies? If so, what form should this intervention take?**

31. Without knowing the evidence said to exist in relation to other AARs, we can answer this only from our own perspective. From that perspective, the answer is no; no intervention is needed. We repeat what we have already said regarding any issues that may have been experienced by other AARs.

32. We do not consider that there needs to be *more* intervention by the LSB than is available currently. Our view is that the facility to involve the LSB in disputes ought to be there where necessary as a last resort where it has not been possible for the AR and AAR to resolve a dispute between them. We do not envisage that this would result in an expansion of the LSB's role since this type of intervention would only be conceived of in a few exceptional cases.

33. If any intervention were to take place, however, it would be important for the LSB both to be, and be seen to be, impartial as between the AR and the regulatory body. There is a real risk that the LSB would at least be seen as likely to favour regulatory bodies in such a situation (even if that were not actually the case), which is neither healthy nor likely to facilitate resolution of disputes in a balanced, cooperative way. Addressing any such perception might usefully form part of the LSB's strategic plan.

34. So far as resources are concerned, we would suggest that if intervention in a particular situation is genuinely essential, then it ought to take priority over other activity undertaken by the LSB, given that oversight is a core role for the LSB, and should not – nor be allowed to – generate a need for additional resources for the LSB.

35. As regards the LSB's concern in paragraph 51 about the potential for robust exchanges, we would be assisted by a better understanding of what the LSB fears. A greater recognition that there is scope for differences of view about the breadth of the LSB's role might also aid communication.

**Question 6: Do you agree with option 2a: making incremental changes to the IGR? Why or why not?**

36. We repeat what we have already said about our own experience and our difficulty in responding to the experience of others. Our own experience leads us to reject option 2a (subject to what we say in answer to question 10 below). If, however, the responses to this consultation reveal particular difficulties faced by other ARs which show a lack of clarity in the IGRs, and this lack of clarity can only be addressed by amending them, then incremental alterations may be the most proportionate approach.

**Question 7: What incremental changes should the LSB prioritise, and why?**

37. The approach suggested by the LSB in para 56 of the consultation, namely, to focus on clarifying existing obligations to address known issues, in principle makes sense, but without an understanding of any experience of others that might justify a change, we have no suggestions for modification to the IGRs themselves.

38. Before any changes are made, we would want to know exactly what is proposed. The LSB would need to take care to ensure that changes pursued as minor adjustments did not impose new obligations.

39. We would not have any objection to the Schedule's presentation being changed to correspond to that of the LSB's other rules, so long as the content itself is not thereby altered. We do not regard this as necessary, however.

**Question 8: What do you anticipate the impact of your proposed change(s) would be, and why?**

40. We have not proposed any changes.

**Question 9: Do you agree with option 2b: making more extensive changes to the IGR? Why or why not?**

41. No, for the reasons already given.

42. From our perspective, the existing IGR framework is fit for purpose (as is suggested in paragraph 55 of the consultation paper), and we have seen no evidence

that leads us to believe that the IGRs require extensive changes. If the experience of other ARs clearly demonstrates significant problems that can only be addressed by specific new obligations, then we would expect the LSB to identify those problems and to consult on what if any obligations are necessary to address them.

43. We would oppose the two new obligations suggested at para 61. Indeed, we would suggest that the Act does not permit obligations of this kind to form part of IGRs.

44. The Bar Council gives annual breakdowns to the LSB of how it spends income raised from the Bar's practising certificate fee (PCF). However, to require separate invoices or breakdowns would impose significant administrative burdens on AARs while offering no discernible benefit for protecting regulators' independence or ensuring they have reasonable resources.

45. The IGRs are intended to secure that an AR "take such steps as are reasonably practicable to ensure that it provides such resources as are reasonably required for or in connection with the exercise of its regulatory functions." We believe that a mandatory requirement for ARs to consider requests for separate commissioning by their regulatory bodies of existing shared services goes beyond what the IGRs may legitimately prescribe. The Act imposes no obligations as to the form which resources must take. As the LSB explicitly recognised, shared services are an entirely proper (and economical) method of providing many resources. Moreover, a rule of this kind risks getting in the way of constructive and collaborative problem-solving between an AR and its regulatory body. There is no reason why shared services should compromise regulatory independence, especially if there is proper communication between the two bodies to ensure those services are working in a way that smoothly facilitates regulatory activities. Under Bar Council Standing Orders, issues concerning resources to the BSB are to be resolved by agreement where possible, and in the last resort by the joint Finance Committee. Separate commissioning can easily be discussed in this manner; however, a rule to that effect would constitute interference that may not be lawful and is likely to be counter-productive.

46. Furthermore, we are concerned about the suggestion of incorporating "developments in best regulatory practice". The LSB does not identify these developments. If such 'best practice' were added to the mandatory rules, we would have concerns at the very least about the IGRs becoming too dense and over-burdened by detail and rendered inflexible and less able to cater for necessary or legitimate differences between different AARs and their regulatory bodies. It also seems to us that this is more likely to cut across the basic structure and purpose of the IGRs (principles, rules and guidance, designed to achieve the outcomes stipulated by the Act), even if its inclusion were permissible under s.30 of the Act (which may be questionable), as well as adding costs for no clear benefits.

47. Even if it might be permissible and beneficial, the inclusion of best practice is inherently more likely to be suited to guidance – which is already catered for by the IGRs – rather than obligations.

**Question 10: What new obligations would you recommend the LSB prioritises, and why?**

48. As highlighted earlier in our response, we are not recommending changes to the IGRs. However, we think there are several issues that could be usefully addressed in the Guidance column of the Rules. If, as the LSB states in para 62, there has been uncertainty and tension about how much information an AR is entitled to expect from a regulatory body, then this could be clarified by a new provision in the guidance which brings balance to this dynamic. Such a provision would acknowledge the AAR's legitimate need for oversight information and assurance, and recognise that the AAR's oversight arrangements may impose an obligation on the regulatory body to comply with reasonable requests for such information and assurance. Examples might be where the AAR reasonably requires assurance of performance, or information relating to finances, or to risks or liabilities which might affect the AAR. Equally, the guidance would provide that AARs should not make requests that are excessive or disproportionate, including in terms of their frequency or the resources required to answer them. A generally phrased principle would allow for flexibility of application according to AARs' specific contexts.

**Question 11: What do you anticipate the impact of those proposed new obligations would be, and why?**

49. We have not proposed any new obligations. If, however, the approach we suggested in our answer to question 10 were adopted, we envisage that it would have the impact of addressing difficulties around information requests, and would do so in a way that accords with s.3(3) and s.28(3) of the Act. AARs and regulatory bodies which already take this kind of approach are unlikely to be affected materially; those that have disputes may find that this helps resolve them. However, as we do not have a full understanding of the experiences of other ARs, our view on this is necessarily tentative.

**Question 12: 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?**

50. We agree that the IGRs need to be flexible enough to accommodate for the circumstances of each AR's work and allow for context-specific approaches to realising regulatory independence. However, they need to direct consistent outcomes

and they also need to be consistent in terms of the regulatory burden they impose on ARs.

51. We are not clear what the LSB is suggesting as regards the AAR definition in paragraph 64(i), or how this is seen as satisfying the requirements of s.30 of the Act. Tailored agreements with ARs could result in regulatory inconsistency. We also wonder what such agreements would look like. Would they be subtle variations on the existing IGRs? Or would the concept of regulatory independence essentially be up for negotiation each and every time? To what extent would they truly be ‘agreements’, and how would an inability to agree be dealt with? The LSB’s position under the Act is markedly different to that of the Financial Reporting Council under its parent regulations. Section 30 requires the LSB to make a set of rules, and implicit in the concept of rules is that they apply universally. While we can see that tailored agreements might have the benefit – at least for the Bar Council and the BSB – of not being overburdened unnecessarily by obligations or arrangements that have their origin and purpose in difficulties experienced by others, we are not convinced that this is the right – or a permissible – response. There is room for ARs to adopt tailored solutions for securing compliance with the Act and IGRs (one example is our own independence protocol with the BSB); however they have to be judged against a common standard, namely, a set of generally applicable IGRs.

52. As for the ‘primary reason’ criterion in the existing AAR definition, we can see how this might be proportionate where bodies excluded therefrom (regulators whose members are primarily providing non-legal services) are only regulating probate. If they were to start regulating other activities such as advocacy, we think the fact that those bodies are primarily involved in other industries would not justify their exemption from the full force of the IGRs (and indeed the Lord Chancellor appears to have taken this view). All entrants into the legal services market should have to abide by the same standards. The costs this imposes are a factor to be taken into account when deciding to enter into competition in the field.

**Question 13: What do you anticipate the impact of revising the AAR definition would be, and why?**

53. The impact of tailored agreements is likely to be a heightened risk of regulatory inconsistency. We are not able to anticipate the impact of extending the Schedule’s requirements to all ARs. There are currently six AARs to which the Schedule applies, and so any burden this imposes would not be an unusual one.

**Question 14: 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?**

54. We can see that there may be a case for removing or revising the definition of “undue influence” set out in section 2 of the IGRs. We are not sure that the current definition assists significantly in understanding the concept of undue influence. Moreover, we believe the “undue influence or control” is clear enough by itself and does not need expanding upon.

**Question 15: Do you agree with option 2c: a new ‘gateways’ approach to the IGR? Why, or why not?**

55. No, for several reasons. First, the consultation suggests that, under option 2c, ‘gateways’ would be (per paragraph 75 of the consultation) “the only permissible channels for information and assurance to flow between regulatory bodies and their AARs in the normal course of events.”

56. It is not entirely clear what the jargon of ‘gateways’ really refers to: are these meant to be channels of communication (as suggested in some places), or limits on the type and extent of information that may be required (as paragraph 76 suggests), or both? More clarity would be helpful, particularly in order to be able to judge the practical implications of this suggestion.

57. Either way, this option would seem to constrain the sensible communication flow between AAR and regulatory body that is both permitted under the Act and beneficial. It has the potential to discourage cooperation that may be in the interest of both bodies to further the regulatory objectives. It also risks creating burdensome processes that could be difficult to implement in practice.

58. When discussing the role of the AAR in its 2009 consultation on the IGRs, the LSB stated that “regular and frank two-way communication between the regulatory arm and the representative body” should not be prevented “where the representative body has a perfectly legitimate interest in the regulation of its members.”<sup>5</sup> The Bar Council does seek or is provided with other assurance and information (i) as and when required, (ii) as and when specific issues arise, and (iii) through the operation of its existing governance arrangements. This also happens through other channels, such as through regular engagement between the Chief Executive and the Director General of the BSB, through joint governance committees, and through attendance at the open parts of the BSB Board meetings. In doing so, it seeks at all times to take a reasonable and proportionate approach, respecting regulatory independence. The ‘gateways’

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<sup>5</sup> LSB 2009 consultation, *supra* n. 2 at p.23.

approach seems designed to curtail this. It could hamper the oversight role of the AAR and risks creating inflexible arrangements that prove to be hugely bureaucratic, costly and time-consuming to implement.

59. It is also unclear to us how this approach would:

- 1) address the matters covered by the existing IGRs;
- 2) be said to accord with s.3(3) of the Act;
- 3) cater adequately for all eventualities;
- 4) respect and cater for the differences between different AARs and regulatory bodies;
- 5) reduce the likelihood of disagreements about the scope of requests for information (it is more likely simply to re-frame them in the language of the gateway); or
- 6) cater for the breadth of legitimate requests for information beyond assurance as to the effectiveness of the regulatory body's performance of the AAR's regulatory functions (such as those we outlined in answer to question 10).

60. It would also involve a significant change in approach, and a step away from a focus on outcomes, without sufficient justification. We also question whether s.30 of the Act permits such constraints.

61. There may also be two different proposals within option 2c. We have already addressed one of them: the constriction of information flows, which we would oppose.

62. The other is to give AARs greater assurance, and forewarning, through imposing new duties on their regulatory bodies: paragraph 73 of the consultation paper. This could be achieved through the existing IGRs, if particular circumstances indicated that such an obligation were needed, as part of what we suggested in answer to question 10. We would not see it as justifying a separate option 2c.

63. We are unconvinced by paragraph 78 of the consultation paper, which fails to explain how option 2c would have any impact on the ability of AARs to pursue policy positions. Option 2c is not directed at policy, but at information. Our policy engagement with the BSB is subject to the straightforward mechanism of our Protocol, and we would not regard it as constrained in any way that would be assisted by option 2c. We do not agree with paragraph 78. We are also concerned that it would be liable to lead to conflict, or to a greater degree of conflict, than currently exists.

64. We also disagree with the suggestion that option 2c would target action at areas of highest risk. Rather, it would go well beyond the suggested aim, would run counter to the principles in s.3(3) of the Act, and appears to be focused on the circumstances

of much larger bodies than many AARs and regulatory bodies, such as the Bar Council and the BSB. The reference in paragraph 79 to other sectors also fails to take account of the significant differences between the regulatory structures in other sectors and those required by the Act.

**Question 16: 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?**

65. As highlighted in our answer to question 15, we do not think that this approach is right or workable, nor is it clear whether this question is really asking about *channels* for information or restrictions on types of information.

**Question 17: 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?**

66. We think this would be very difficult, even at the level that would in any event be catered for much more appropriately and more effectively by our suggestion in answer to question 10, especially for AARs and regulatory bodies of the size of the Bar Council and the BSB.

**Question 18: What action do you think an AAR should be entitled to take when seeking additional assurance in the circumstances described above, and why?**

67. This is very difficult to answer in isolation. We would agree with the LSB that this would depend on the circumstances, and that there is a range of action that might be taken, depending on those circumstances and the degree, significance and potential consequences of any failure or inadequacy. It would also depend on whether the issue related to assurance or to information, and the nature of the issue itself. The complexity and wide range of circumstances are further reasons for doubting both the suitability of this approach and the justification for it.

**Question 19: What do you anticipate the impact of the 'gateways' approach would be, and why?**

68. We repeat our answer to question 15 above.

**Question 20: 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?**

69. We do not have any additional suggestions in this regard.

**Question 21: Do you agree with reintroduction of 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?**

70. DSC appears to have served a useful assurance role during the period immediately after the IGRs were introduced, wherein ARs worked towards compliance with them. The consultation paper notes that DSC's utility diminished as time went by. We therefore cannot see the benefit of reintroducing it. As the LSB points out, it does not encourage AARs and regulatory bodies to reach agreement, and so it is unlikely to help resolve any disputes. The time and cost burden it would impose is not warranted.

**Question 22: 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?**

71. We are sceptical about this. Any new performance standards on independence would either be so prescriptive that they do not allow for variation between ARs, or so broad that they simply replicate the IGRs. Indeed, that tension is at the heart of this consultation. Our view is that IGR compliance should be handled through targeted action – be it by addressing difficulties or disagreements experienced by particular AARs or regulatory bodies, or (where there is evidence of a breach) by use of enforcement powers.

**Question 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?**

72. This requirement exists in the current Rules, and we see value in it as a means of encouraging joint resolution of any significant independence issues. A joint certification of non-compliance means the AAR and regulatory body will have both considered whatever issue has arisen and attempted to find a way of resolving it.

**Question 24: Do you agree with third party assurance? If so, why? What do you anticipate the impact of this would be, and why?**

73. At present we are sceptical about this suggestion. We are not sure what value a third party would bring to securing compliance beyond the LSB-driven or AAR-led methods suggested above. We are concerned that this approach could have quite substantial cost and resource implications and may not represent good value for money. We are also unconvinced about its effectiveness and practicality, and can see a serious risk of generating unnecessary work which achieves little of benefit.

**Question 25: 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?**

74. We have none to suggest based on our own experience.

**Bar Council**  
**Monday 12 February**

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