



Bar Council supplementary response to the Legal Services Board's review of the Internal Governance Rules

1. This is a supplementary response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board (LSB) consultation "Reviewing the Internal Governance Rules". It should be read in conjunction with the Bar Council's initial response.¹ The LSB has given consultees a window for additional comment, in light of its report on the investigation of the Law Society (TLS) and Solicitors' Regulation Authority (SRA), and we make our additional comments here.
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 (BSB).

The Bar Council's comments on the investigation

4. In our original response to the review of the Internal Governance Rules (IGRs), we expressed the view that the current IGRs serve as an effective framework for securing regulatory independence. None of the points raised in the LSB consultation paper gave us reason to doubt this, and we considered that in the absence of any

¹ [Bar Council response to Legal Services Board consultation](#) "Reviewing the Internal Governance Rules", February 2018.

concrete evidence of specific problems with the rules, changes to the system were unwarranted.

5. We have considered the LSB's investigation report through this lens, inquiring whether the breaches of the IGRs reveal some limitation of the rules, or any aspect of them which makes it inevitable that they will be breached or that regulatory independence will be compromised. We do not find that here. First, the investigation did not find that the independence of the SRA's regulatory functions was impaired, either by the actions or arrangements of TLS or as an inherent part of the "B+" soft separation model created by the Legal Services Act 2007 (LSA). Rather, the investigation shows that regulatory independence can properly be secured under the LSA regime. Second, the IGRs were breached but none of those breaches call into question whether the rules themselves work. On the contrary, the investigation shows that the IGRs *do* work.

6. The breach of Rule 2B of the Schedule to the IGR is an instance of non-compliance with a clear and express requirement of the rules. As for the breaches of Part 4 of the IGR Schedule relating to TLS oversight, we note that while the LSB reiterates its observations about a lack of clarity about the residual role of the approved regulator (AR), nothing in the investigation calls into question what the AR may legitimately do by way of oversight of the regulatory body. Rather, it only criticises the complexity of TLS's arrangements and its lack of internal coordination and communication in carrying out that oversight, which led to unnecessary duplicated demands for information on the SRA.

7. The investigation report sets out (at para 236) a number of general concerns about the interpretation and application of the IGRs. These follow on from the issues that have been flagged in the consultation and we set out our observations on each of them below:

- *"the relationship between Rule 6 and Rule 8 of the IGR could and should be stated more clearly. The need for both of these provisions relates to the requirement for Rule 6 to apply to all ARs and for Rule 8 to apply only to AARs"*

We agree that this could be rephrased to provide greater clarity.

- *"The requirements within the Schedule could be more clearly set out so that our expectations of the applicable ARs are easily understood. The current framework of principles, rules and guidance which are presented in a table format causes unnecessary complexity"*

We agree that the Schedule could be reformatted for greater comprehensibility.

- *“the definition of the ‘principle of regulatory independence’ in the IGR may not best reflect the aim of ensuring regulatory independence”*

We think that this is clear from the substance of the rules and specifically Rule 6(b) that provides that Approved Regulators must “at all times act in a way which is compatible with the principle of regulatory independence.”

- *“the definition of the ‘principle of regulatory independence’ is not straightforward. It contains words which are further defined including ‘undue influence’; words which are open to subjective interpretation such as ‘relative strength and position of the parties involved’ and ‘pressure exercised otherwise than in due proportion to the surrounding circumstances’ and unclear terms such as ‘material effect’ or ‘likely to have material effect’. This has the potential to introduce confusion and can cause an unnecessary degree of complexity”*

As highlighted in our consultation response, “[w]e 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”.²

8. We note from the report that there have been relationship difficulties between TLS and the SRA, and that this is part of the reason their situation has ended up in enforcement proceedings. Rules and mechanisms for enforcing them are required where cooperation fails, and the fact that the IGRs captured the issues between TLS and the SRA shows that they are serving the purpose expected of rules. To the extent that disagreement about TLS’s role as AR contributed to the impugned complexity of its oversight arrangements, this could conceivably be addressed by the suggestion we made in our initial response (answer to Q10), namely, adding to the Guidance column of the IGRs a provision reflecting the AR’s need for reasonable oversight information.

9. There are, in any event, practical lessons to be drawn from the investigation, notably the importance of training staff and board members on the practical implications of regulatory independence. We also wonder whether some of the impugned aspects of TLS’s arrangements could have been addressed through assurance by the LSB short of an investigation, for instance as a continuation of the IGR compliance work the LSB conducted from 2010 to 2012. A letter from the LSB to TLS dated 28 September 2012 pointed to a similar complexity and lack of clarity in the oversight arrangements, and concluded that “further monitoring is a proportionate way to seek ongoing assurance that the design and practical operation of the current

² Supra note 1 at para 54.

arrangements do not pose a more general risk”.³ That monitoring, by way of notices to provide information (under section 55 of the LSA), ceased in early 2014. If concerns subsequently only arose in 2016, we query whether a formal investigation was the most proportionate or cost-effective means of resolving practical problems with the arrangements, especially when the LSB considered that progress had been made.

10. Overall, we consider that the investigation has borne out the effectiveness of the IGRs in practice, and on that basis we maintain our position that no changes need be made to them.

Bar Council
15 June 2018

For further information please contact
Natalie Darby, Head of Policy, Regulatory Issues and Law Reform
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 020 7611 1311
Email: NDarby@BarCouncil.org.uk

³ [Letter from Chris Kenny to Des Hudson](#) of 28 September 2012.