



## **Bar Council response to the Legal Services Board's Consultation: Chairs of Regulatory Bodies**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Legal Services Board's consultation paper on Chairs of Regulatory Bodies<sup>1</sup>.
2. The Bar Council represents over 15,000 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').

### **Overview**

4. The Legal Services Board ('LSB') proposes in the consultation paper an amendment to the Internal Governance Rules ('IGRs') made by the LSB pursuant to section 30 the Legal Services Act 2007. The proposed amendment would require that the chairmen of the regulatory boards of "applicable approved regulators" (i.e. the chairmen of the BSB, the Solicitors Regulation Authority ('SRA') and others) be "lay" persons, as that term is defined the Legal Services Act 2007. However:
  - a. The LSB has no power in law to make the proposed change.
  - b. Even if the LSB did have the power to make the proposed change:
    - i. The consultation paper identifies no evidence in support of the proposed change.

---

<sup>1</sup>[http://www.legalservicesboard.org.uk/what\\_we\\_do/consultations/pdf/lsb\\_consultation\\_on\\_lay\\_chairs\\_08\\_10\\_13.pdf](http://www.legalservicesboard.org.uk/what_we_do/consultations/pdf/lsb_consultation_on_lay_chairs_08_10_13.pdf)

- ii. The proposed change is undesirable because it would constitute an unwarranted interference by the LSB with the independence of the regulatory boards.

5. For these reasons, the answer to Question 1 in the consultation paper is “No”, and the other Questions are consequently inapplicable.

### **The LSB’s Powers**

6. The IGRs are made under section 30 of the Legal Services Act 2007. This provides as follows:

*(1) The Board must make rules (“internal governance rules”) setting out requirements to be met by approved regulators for the purpose of ensuring:*

*(a) that the exercise of an approved regulator’s regulatory functions is not prejudiced by its representative functions, and*

*(b) that decisions relating to the exercise of an approved regulator’s regulatory functions are so far as reasonably practicable taken independently from decisions relating to the exercise of its representative functions.*

*(2) The internal governance rules must require each approved regulator to have in place arrangements which ensure:*

*(a) that the persons involved in the exercise of its regulatory functions are, in that capacity, able to make representations to, be consulted by and enter into communications with the Board, the Consumer Panel, the OLC and other approved regulators, and*

*(b) that the exercise by those persons of those powers is not prejudiced by the approved regulator’s representative functions and is, so far as reasonably practicable, independent from the exercise of those functions.*

*(3) The internal governance rules must also require each approved regulator:*

*(a) to 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;*

*(b) to make such provision as is necessary to enable persons involved in the exercise of its regulatory functions to be able to notify the Board where they consider that their independence or effectiveness is being prejudiced.*

7. None of the provisions of section 30 empowers the LSB, either expressly or by necessary implication, to make rules which determine who may or may not chair the body

established by an approved regulator for the purpose of carrying out its regulatory functions.

8. It is not the LSB's role under the Act to choose the members or chairmen of regulatory boards such as the BSB or the SRA. The choice of chairmen of such boards can be and (in the case of the BSB) is made on the basis of choosing the best person for the job. Section 30 gives the LSB no power to require the choice of anyone other than the best person for the job, or to insist on adherence to its own "judgment" over that of the frontline regulators in this regard.

### **The proposed change is unsupported by evidence and undesirable**

9. Even if the LSB had power in law to make the proposed change, there is no basis for making the proposed change, and good reason not to make it.

10. Pursuant to section 3(3) of the Act, the LSB must have regard to the principles under which regulatory activity should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.

11. The consultation paper is contrary to those principles:

- a. There is no transparency, since no evidence for the proposed change has been identified.
- b. There is no proportionality, since no need for the proposed change has been identified.
- c. The proposed change is targeted at a case in which no action is needed.

12. There is an assertion in paragraph 2 of the consultation paper that "*the approved regulators are still tied too closely to their individual branches of the profession*". This sweeping generalisation is not supported by any evidence. That is not appropriate for a regulatory body. The absence of details means that consultees are precluded from commenting on the LSB's reasons. As stated above, there is no transparency.

13. The assertion is said to be derived from the LSB's experience, but it is contrary to the Bar Council's experience, which is that the BSB and the SRA exercise independent judgment.

14. Our experience suggests that, if there is an issue in relation to the independence of the BSB, the SRA et al., it is that they face undue influence from the LSB. We refer in this respect to our submission to the review of legal regulation, a copy of which is attached.

15. The consultation paper is another example of this phenomenon. It is apparent from paragraphs 2 and 3 that the LSB sees the proposed change as a means of getting the BSB, SRA et al to do more of what the LSB wants, rather than exercising their own independent judgment. This is not a sound reason for rule-making by the LSB. The LSB should instead respect the right and duty of the regulatory boards to exercise their own independent judgment, rather than merely following the dictates of the LSB.

16. The LSB states in paragraph 18 of the consultation paper that it is not commenting on the commitment to good regulation of the individual chairmen of the BSB, SRA et al. In those circumstances, it is difficult to see how it is alleged that the proposed change would make any difference.

17. The absence of empirical evidence is acknowledged by the LSB in paragraph 5 of the consultation paper. It is a matter of regret that the LSB should have seen fit to publish, and therefore to have caused the approved regulators to expend time and money on responding to, a consultation paper which the LSB acknowledges to be unsupported by empirical evidence.

18. In the absence of any empirical evidence, the generalities expressed elsewhere in the consultation paper are of no force.

19. Worse than that, parts of the consultation paper are positively misleading. The LSB argues in paragraph 23 that knowledge of the current and potential future patterns of practice of the relevant regulated community: (a) should not be the only component of a regulatory board's skill set; and (b) should not be given unique priority in determining board composition or leadership.

20. But no-one has suggested that (a) or (b) are or should be the case. They are certainly not the case in relation to the BSB. The proposed change is therefore being justified on a false basis.

21. Similarly, in paragraph 24 of the consultation paper it is suggested that *"better balanced boards would emerge if more of the chairs had leadership experience in a risk based regulatory context rather than professional experience of self regulation as a member of the profession. The ability to address questions of board composition, balance and performance is more likely to have been tested in people with a broader background than a purely legal one"*. In the case of the BSB – and, we suggest, quite rightly – the power to appoint members of the Board does not rest with the chairman of the Board, but rather with a balanced panel of individuals tasked specifically with appointing members of the Board (including its chairman) on Nolan principles, applying the competencies required from time to time. There is also no evidence – contrary to another suggestion in paragraph 24 – that either the BSB or the selection panel has confused breadth of background with breadth of skills and knowledge.

22. Paragraph 24 of the consultation paper argues for the merits of chairmen with *"leadership experience in a risk-based regulatory context"*. The chairman of the LSB no doubt has such experience, and it is understandable that the LSB should want other bodies to have chairmen like theirs. No doubt they feel comfortable with what they know. But that is not a good reason for regulation (and the proposed change would not in any event require the appointment of chairmen with *"leadership experience in a risk-based regulatory context"*, but merely chairmen who meet the Act's definition of a "lay" person).

23. Surprisingly, there is no analysis in the consultation paper of the definition of "lay" person in the Act. That definition excludes many, such as the current chairman of the BSB, who might reasonably be viewed as lay individuals. A person who, say, qualified as a

Scottish solicitor in 1983 but never practised as such and instead followed a distinguished career for 30 years in industry, accountancy, the civil service or whatever would not count as a “lay” person and would, if the proposed change came into effect, be disqualified from the post of chairman of the BSB. This would be purely arbitrary.

## **Conclusion**

24. The LSB’s consultation paper is unsupported by any empirical evidence and the number of posts to which it applies is so small that the LSB must have appreciated that it would be seen as a comment on the performance of individual chairmen. If the LSB had an issue with the performance of any one (or more) of those chairmen, then that issue could be addressed. But the LSB has expressly disavowed this (in paragraph 18 of the consultation paper). In those circumstances, we would have hoped that good sense, as well as the principles of good regulation, would have prevailed.

**Bar Council**

**19 November 2013**

*For further information please contact  
Charlotte Hudson, Head of Executive Office  
The General Council of the Bar of England and Wales  
289-293 High Holborn, London WC1V 7HZ  
Direct line: 020 7611 1465  
Email: [CHudson@BarCouncil.org.uk](mailto:CHudson@BarCouncil.org.uk)*