

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

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20 September 2010

Dear David

Internal Governance Rules – Initial Assessment Summary – Bar Standards Board response

Thank you for the Initial Assessment Summary received from the Legal Services Board on 15 July 2010. Since that time it was extremely helpful to meet with you on 23 August to discuss the issues with subsequent meetings between staff members from our respective organisations. We welcome the opportunity to be working in such a positive way with you. The Initial Assessment Summary raised queries regarding several issues and sought additional information. Many of the information requests were dealt with in the interim response provided on 1 September 2010 following useful discussion between our staff members. It is yet another step forward in the very good working relationship that we share with the Legal Services Board.

The outstanding matters relate to the areas of lay majorities on the Board and Committees. The Board considered this issue carefully at its meeting on 16 September 2010 and responds as follows:

The BSB's approach

The BSB committed itself some years ago to the principle of having a lay majority. Indeed, as previously indicated, the BSB will have a lay majority by 1 January 2012 on its current timetable. In the Board's view, the only point on which the BSB and LSB differ is the timetable within which a lay majority may be achieved.

The BSB is also committed to high quality regulation of the barristers' profession in line with the regulatory objectives. The Board is actively pursuing a carefully thought out structural reform agenda as well as seeking to establish the norms for a new regulator – codification of coherent rules, supervision, an education regime to preserve high standards and so on. To

do all this, the Board sets itself high standards in its own appointments. In line with the Nolan principles, we appoint on merit and to meet the perceived needs of the organisation.

We are worried that these two commitments may conflict. If we move to a lay majority with the speed the LSB wants, we may impede the bigger objective of high quality regulation. This would be really troubling because it could undermine the status and reputation of the BSB at this early stage in its life.

In reaching this assessment the Board is very conscious that it has never divided along a barrister–lay fault line. Decisions are made on the facts of the case and judged against the regulatory objectives. The Board meetings are in the main open to the public, and its open session minutes and papers are available on the BSB website, which is an important indicator of public accountability.

Lay Majority on the Board

It may help to explain this issue in some detail.

The BSB has particular difficulties that must be considered when determining whether a transition period until January 2012 is justifiable. I was recruited as a lay chair and am not and have never been a practising barrister. I do not have any greater vested interest in the Bar than any lay member would have. However, the use of the definitions of the Legal Services Act 2007 (which are wider than the general European definition) in the subsequent Internal Governance Rules mean that I am now considered a barrister for the purposes of calculating how the Board is comprised. As a result of this legal definition, as a matter of law, the Board has 6 lay people and 9 "barristers", whereas, the original intention of the Bar Council when establishing the BSB was to have 8 barristers and 7 lay people. The change in definition means that the corrective measures needed to produce a lay majority on the board are acute for the BSB

To achieve compliance by 31 October 2010, the BSB could either inflate the lay membership of the Board by 4 members, or terminate prematurely the contracts of 4 existing barrister members, or combine these two measures. Artificially increasing (or reducing) the size of the BSB Board risks prejudicing the BSB's work and the regulatory objectives, in the Board's view. The BSB considers that it would be unreasonable to terminate any barrister member's term of office when they are performing well and adding value to the Board. Removing barristers who assist in this work on an arbitrary basis does not seem reasonable and would possibly be in breach of current agreements.

Critically, it would have a disproportionately adverse effect on the work being undertaken. The BSB simply cannot afford to lose up to 4 of its barrister members, both in terms of accumulated regulatory experience and ongoing workload. If it were required to do so, this would create a serious risk that the BSB's work would be slowed or impaired. Several streams of significant work are ongoing, in which barrister members play a key role, including the transition to the Legal Ombudsman, revision of the Code of Conduct and Practising Rules (necessary to support the changes in working structures), Quality Assurance for Advocates and, very importantly, the LSA reforms regarding moving to alternative business structures. There is also heavy involvement from Board members in the education reviews, which are also necessary to ensure that the regulatory framework for barristers is working effectively and efficiently in the new environment facilitated by the Legal Services Act. The next 18 months are key, in terms of implementation of the Legal Services Act reforms. A major change of personnel and in particular, removal of a large number of barrister members would place the BSB and its work programme at significant risk.

Recruitment

The Board is undertaking a recruitment round at present. This will result in new members being appointed by the end of 2010 in order to take office at the beginning of 2011.

It would, in theory, be possible to increase the number of people appointed during this round to achieve a lay majority by the end of the year, if the applications were of sufficient quality and quantity. However, this would mean an additional 4 members, bringing the Board size to 19, with no less than 8 new members starting at the beginning of 2011. It is the Board's view that requiring such a significant influx of new board members immediately would impact on the overall efficacy of the Board while these new recruits are inducted and get up to speed. In our experience, it takes about a year before a new lay member is working fully. Increasing Board numbers to 19, or so, in order to achieve a lay majority quickly would make for a very large operating structure which is not good practice and is likely to prove difficult to administer. Indeed the Board has specifically considered its present size and is of the firm view that the size is appropriate, so this is not the BSB's desired solution.

However, the BSB has also considered how the current vacancies may best be filled. There are four vacancies at the end of 2010. These vacancies are being advertised at present. Two of the vacancies arise from lay members leaving the Board, and it is intended that they will be replaced with new lay members. Two other vacancies arise from barrister members finishing their terms. One is the current Complaints Committee Chair. Another is the Board's only employed barrister member. In selecting new Board members it will be necessary to make sure that the Board's skill set is not reduced.

The Bar Standards Board has a very good track record with the Legal Services Ombudsman. The matters considered by the Complaints Committee require different and quite specialised skill sets in order to deal with complaints. Experience suggests that the replacement for the Chair of the Complaints Committee needs to be a barrister. The Board will also be very anxious to retain employed barrister expertise if at all possible as we move towards entity regulation, because it is likely to be a growing constituency within the Bar. It is certainly a segment of the Bar which, to judge from contributions at Bar Council meetings, very much wishes to be represented on top Bar bodies. This is because of the real consequences it sees for its members arising from the reforms we are all engaged in implementing. There could be dangers in leaving this part of the Bar unrepresented altogether on our Board. Employed barristers also often have organisational and management skills that are of significant benefit to the Board so they have added value in that sense.

The selection panel will of course look for the best people available - based on merit and best fit for the skills and expertise needed by the Board. It is most important that all appointments are of high calibre people given the demanding issues facing the Board. However, in the circumstances, the Board is prepared to attempt to select a lay person as the Committee Chair or in place of the employed barrister on the Board. While this does mean the potential loss of a significant expertise and "voice" at the boardroom table, in the spirit of attempting to offer a sensible working solution, the Board is prepared to recruit with the commitment to getting a lay majority very much in mind. If there are insufficient appointable candidates for the four positions then they will have to remain vacant until re-advertised. This will not achieve a lay majority immediately but, leaving the status of the chair aside, will mean that the Board is evenly balanced in its composition between barrister and lay members. The Board intends to give itself every opportunity to ensure that it is able to choose proper candidates of high calibre. It has been decided that the closing date for applications for Board appointment will be extended to 15 October 2010 in order to maximise our chances of effecting change.

Beyond that, a further two barrister members retire at the end of 2011. This will coincide with the completion of several key areas of work or where significant progress will already have been made, making the impact of losing experienced and knowledgeable Board members more manageable. For instance, entity regulation will be significantly advanced, the education reviews will be completed and well into implementation, the Code Review will be completed and practising rules issued and any new Authorisation to Practice regime will be determined. A lay majority will be assured by the end of 2011 by replacing these positions with lay members if necessary.

In addition, any unexpected vacancies arise from barrister members leaving the Board before the end of 2011 will be replaced with lay members, quality of applications permitting.

Lay Majorities on Committees

Turning to lay majorities on sub-committees, the BSB notes that the IGRs do not contain any provisions relating to the composition of committees, nor did the LSB consult on whether they should. This issue has not been raised or canvassed in any previous correspondence or discussions. The BSB does not share the LSB's view that the public interest requires a blanket imposition of a requirement to have lay majorities on its committees. The regulatory committees are supervised by and responsible to the main Board which, by January 2012 at the latest, will have a lay majority.

The BSB believes that recruitment to its regulatory committees should continue to be made on the basis of merit against identified skills and requirements for each committee. It believes that regulatory decisions taken by these committees will, as its experience shows, be taken objectively by the members of those committees in the best interests of the regulatory objectives. There are many advantages from the substantial involvement of the regulated community in the regulation of a profession (as was recognised in the Clementi Review), for example in terms of experience and the substantial cost savings (particularly so in regulation of the Bar where there is a long tradition of pro bono support for regulatory activities).

The BSB is currently reviewing its governance arrangements with new Standing Orders being developed. All aspects of operation are being reassessed as part of this. The draft Standing Orders have not yet been considered by the Board. Once new Standing Orders are in place a Governance Handbook will also be developed. Delegation schemes will form part of that work.

At present, except where clear delegations have been made, committees make recommendations to the Board. These recommendations are not merely accepted without consideration. They are properly scrutinised, as the minutes of meetings (available on the BSB website) show.

Lay quorum

Again, the BSB notes that the question of mandating a quorum requirement of a lay majority of those present was not consulted upon by the LSB and does not form part of the IGRs. The BSB does not believe that requiring a lay majority at each meeting is necessary. It is not aware of any evidence or suggestion that the regulatory objectives are put at risk by the absence of such a requirement. Having such a requirement would mean that meetings could not take place if a lay majority were not present. Alternatively, it could produce the result that barrister members of the Board would be asked to leave a meeting in order to generate the required lay majority for the quorum. The Board does not see any support for that in the regulatory objectives and is concerned that it may be required to have a rule in

place that could have the opposite effect of preventing the Board from making decisions that further the regulatory objectives.

The BSB can only repeat that its experience is that issues simply do not divide down lay/barrister lines. Members do not see themselves as mandated to represent a particular faction, but as bringing their experience from different professional backgrounds to bear on the problems before them. Our experience is that on all matters of debate a range of views is expressed. Lay and barrister members can agree or disagree at opposite ends of a question. Having a lay majority present at meetings does not automatically assist in ensuring that the public interest is best served. If a full range of views is not available then issues can be (and have been) deferred to ensure a proper debate. Having a free ranging debate, involving able and competent members has proved to be effective. Adequate safeguards against a 'rogue' meeting exist in the simple expedient of the lay majority being able to reverse any decision taken at the 'rogue' meeting on the next occasion.

We understand that the Bar Council will be responding to you separately on all the issues raised in the Initial Assessment Summary.

In conclusion, the BSB wishes to restate its commitment to moving to a lay majority, as well as having proper oversight and control of its committees. By making a genuine attempt to move towards a lay majority at the end of 2010 with a firm commitment to move to a lay majority by the end of 2011 the Board is attempting to balance its desire to change with its corresponding desire to ensure that the changes required by the LSA are properly overseen and completed. We would be very happy to meet further and discuss this with you at Chair or Board level, or for our Senior Management Teams to do so, if that would be helpful to you. We are also genuinely committed to continuing our positive and constructive working relationships. As I think we all agree, it is most important that we resolve these issues so that we are able to devote our time and attention to the vital work of properly implementing the Act.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ruth Deech', written in a cursive style.

The Baroness Deech DBE
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