

## **Regulatory Independence Certificate initial assessment summary - Bar Council (BC) / Bar Standards Board (BSB) submission**

### **Introduction**

1. The Legal Services Board's (LSB's) Internal Governance Rules came into effect on 1 January 2010 and applicable approved regulators (AARs) were required to self-assess their compliance with the rules by the end of April 2010. In areas where it had not proved possible to achieve compliance by that date AARs were asked to provide an action plan that would deliver compliance by no later than 31 October 2010.
2. We have now completed an initial analysis of your arrangements against the substance of the IGRs and the implementation timetable. This is the summary report of our initial analysis. The assessment highlights areas of concern and areas where we do not feel that we have sufficient information to assess compliance. It also sets out the actions that are now required. Where we have asked for further submissions these should be returned by Friday 27 August. This will allow the LSB Board to make final decisions at its end of September meeting and respond to you in October.
3. We may ask for any combination of the following:
  - an action plan for reaching compliance
  - confirmation of whether risks that we have highlighted are recognised and the extent of the risks (and details of how the risks will be mitigated)
  - provision of further information.
4. In areas where we have not highlighted concerns our review of the information provided has concluded that your structures are likely to be compliant with the IGRs but of course on-going compliance with the principles, rules and the spirit of independent regulation will be required in practice

### **Documents provided**

5. The BC/BSB submission consisted of:
  - A completed certificate
  - The Bar Council constitution
  - The Bar Council Standing Orders (BCSO)
  - The Bar Standards Board constitution.

### **Overall conclusion**

6. The Bar Council has made significant progress in establishing an independent regulatory function and the information provided indicates that the internal governance arrangements that have been put in place are likely to be able to deliver compliance with the IGRs.

7. However, there remains a lack of commitment to move to a lay majority on the BSB until the end of the current Board terms. We are also concerned that the quorum rules appear not to restrict any decisions being made in the absence of a lay majority and about the role of regulatory committees which could be seen as being dominated by the provider interest.
8. We also concerns about the selection requirements for the BSB chair given that either the chair or vice chair must be a practising barrister and a minor concern about the constitutional text in relation to the selection of board members more generally.
9. We require further information about the governance arrangements around accessing resources, shared services and oversight arrangements in order to assess compliance and also the criteria for disciplining and dismissing BSB members.

### **Issues / areas of concern**

***Principle 1, Governance, nothing in an AAR's arrangements should impair the independence or effectiveness of the performance of its regulatory functions. IGR, Rule C, majority of regulated boards are lay persons***

10. The BSB does not currently have a lay majority (6 lay, 9 non-lay).
11. Paragraph 2 of the BSB constitution sets out the composition of the Board of the BSB as follows:
  - (i) 15 members, including a chair and vice-chair
  - (ii) One of the chair and vice chair (but not both) shall be a practising barrister
  - (iii) BSB to consist of 7 practising barristers and 8 lay (as defined in LSA 2007) persons
  - (iv) All appointments made by an Appointments Panel (scope and responsibilities set out in Schedule A of the constitution)
12. . The current composition of the Board is:
  - A non-lay chair
  - A practising barrister vice chairman
  - 7 non-lay members (excluding the chair and vice chair or 9 in total)
  - 6 lay members
13. The certificate recognises non-compliance and paragraphs 2 and 3 of the BSB Constitution requires a lay majority on the BSB Board. However, paragraph 20 (commencement and transitional provisions) state that paragraphs 2 and 3 shall not take effect until 1 January 2012. The transitional provisions (paragraph 20(2)(b)) state that appointments to take effect before that date shall observe the following:
  - (i) Any replacement chairman shall be a lay person
  - (ii) Any replacement for a lay person shall be a lay person
  - (iii) Any replacement for a practising barrister shall be a practising barrister, save that (except in the case of the Vice-Chairman) up to two practising barristers may be replaced by lay persons

14. Therefore, paragraph 20(2)(b)(iii) of the transitional provisions in the Constitution would allow for a lay majority to be achieved before the provisions come into force but there is no specific undertaking to do so.
15. No assessment of the level of risk that non-compliance poses has been provided or a justification for not complying sooner than January 2012.
16. The quorum rules (BSB Constitution, paragraph 16) do not appear to require a lay majority at any meeting. Therefore it is possible for any decision to be taken in future meetings with professional representatives in majority (though there would need to be two lay representatives to meet the quorum rules).
17. We understand that BSB has six formal regulatory committees of which five have a barrister majority. The IGR requiring lay majorities for regulatory boards may not explicitly extend to these groups but there is an appreciable risk that the spirit and perception of independence is compromised if a significant proportion of the advice provided to the BSB comes from groups which could be seen as being dominated by the provider interest (to the relative exclusion of the consumer voice).

#### **LSB ASSESSMENT**

**Compliance:** **Non-compliant**

**Response:** *BC/BSB to provide for LSB consideration an action plan for delivering compliance by no later than 31 October 2010 or provide for LSB consideration a full justification for why it might be reasonable to move to a lay majority more slowly alongside a detailed plan for becoming compliant. BC / BSB to confirm whether they recognise the risk of professional dominated regulatory committees, the extent of the risk that they perceive and provide information about how the risk will be mitigated. BC/BSB to provide details of the activities undertaken by such committees and groups, the role that they play in regulation, their delegations and decision making authorities, reporting lines and the composition and appointment process followed.*

*BC/ BSB to confirm whether they recognise the risk highlighted around quorum rules and if so explain how this will be managed.*

**Principle 1, Governance, IGR, C. the selection and appointment of a chair is not restricted by virtue of any legal qualification that persons may or may not hold**

18. The BSB constitution requires that the Board includes a Chair and Vice Chair “one (but not both) of whom shall be a practising barrister” (paragraph 2). Therefore, in order to meet these requirements, the Appointments Panel would seemingly only be able to consider a practising barrister for chair if the vacancy arose at a time when the vice-Chairman was a lay member and vice versa.

#### **LSB ASSESSMENT**

**Compliance:** **Appreciable risk, with likelihood of future non-compliance**

**Risk:** *It is likely that at a future point the Appointments Panel will have to restrict the selection and appointment by virtue of any legal qualification that persons may or may not hold.*

**Response:** *BC/BSB to confirm whether they recognise this risk and if so how it will be managed.*

**Principle 2, Appointments: IGR, A appointments to the regulatory board are made on the basis of selection on merit.**

19. Paragraph A12 of Schedule A of the BSB constitution requires appointments by way of open competition and A13 requires that the Appointments Panel “shall have regard” to the desirability of securing a board “who between them have experience or knowledge of an appropriate range of relevant fields and any particular requirements identified by BSB.”

#### **LSB ASSESSMENT**

**Compliance:** **Appreciable risk**

*Risk: The appointments process is in keeping with the principle and requires open competition. However, there is no specific requirement for selection on merit. There is a risk that this is considered permissive and does not require appointment on merit as the overriding factor, especially when termed with the potential to restrict selection based on appropriate range of relevant fields.*

*Response: This is currently of limited concern but LSB would like to be kept informed of how the new appointments process that the certificate reports will “be tested” in 2010 operates in practice.*

**Principle 2, Appointments C: Decisions in respect of the remuneration, appraisal, reappointment and discipline of persons appointed to regulatory boards must respect the principle of independence... D: No person appointed to a regulatory board can be dismissed (save in exceptional circumstances) without the concurrence of the LSB**

20. Schedule A to the BSB Constitution states (in A21) the circumstances in which a person shall cease to be a BSB member, including (A21(7)) if “he is dismissed by the Bar Council”. This potentially provides broad scope for those with responsibility for representative functions to dismiss regulatory board members. No further detail of the criteria for appraisal and dismissal or processes that must be followed has been provided although the certificate does report that further criteria may be set by the BSB in its own standing orders (which are entirely within BSB control).

21. The requirement to seek concurrence of the LSB (save exceptional circumstances) is explicitly contained in the BCSO paragraph 10b but it is not explicitly referenced Schedule A of the BSB constitution.

#### **LSB ASSESSMENT**

**Compliance:** **Insufficient information to assess compliance**

**Response:** BC/ BSB to provide further information about the appraisal and disciplinary process for BSB members. BC/ BSB to confirm that concurrence from the LSB is required to be and will be sought in any case of dismissal (save exceptional circumstances) and that BCSO 10b is pervasive.

**Principle 3, Strategy and Resources etc Subject only to the oversight permitted ...persons performing regulatory functions must have the freedom to define a strategy for the performance of those functions and work to implement that strategy free of representative control or undue influence.**

22. Paragraph 57c(i) of BCSO indicates that the shared services are provided to the BSB by the BC including accommodation, IT services and the services of Bar Council employees managed by the Director of Central Services. There is no information to indicate whether service level agreements are in place for these shared services. Paragraph 57c.(iii) of BCSO indicates that one of the shared services is “services of Bar Council employees managed by the Director of Central Services”. It is not clear which functions are being delivered by these resources or where authorities lie.
23. Paragraph 13 of the BSB Constitution gives BSB power to do all that it needs for performance of its duties, though there is no specific reference to budget. Paragraph 50 h. of BCSO gives the Finance and Audit Committee of the Bar Council responsibility for producing and keeping under review a Finance Manual setting out (among other things) procedures for the authorisation of expenditure and other financial controls. Para 59 of BCSO provides that the procedures for preparing the annual BSB budget shall be set out in the Finance Manual.
24. No information has been provided to assess whether the procedures in the Finance Manual restrict BSB’s freedom to access resources in year (within the confines of agreed annual budget).
25. IGR guidance states that subject only to the formal budgetary approval process and the operation of its dispute resolution mechanisms, an AAR’s arrangements should not prevent those performing regulatory functions, where they believe that their independence and/or effectiveness is compromised or prejudiced, from obtaining required services otherwise than through the AAR. The certificate reports that there is no prohibition of this but it is unclear whether this is specified in formal arrangements.

#### **LSB ASSESSMENT**

**Compliance:** **Further information required to assess compliance**

**Response:** BC/ BSB to provide further information in relation to the areas of ambiguity set out below.

*In particular –*

**\* Protocols / service level agreements:** are these in place for all shared services and if so BC/BSB to provide LSB with copies

*\* **Services under the control of the Director of Central Services:** BC/BSB to provide details of the regulatory provided by BC employees managed by the Director of Central Services and the management and reporting arrangements etc.*

*\* **Finance Manual:** BC/BSB to provide details of the procedures for the authorisation of expenditure and other financial controls and for setting the budget.*

*\* **Alternative service providers:** BC/BSB to confirm whether arrangements prevent the BSB to seek other service providers where services are currently shared with or provided by the BC if they believe that their independence and/or effectiveness is compromised or justified*

**Principle 4: Oversight and monitoring by the AAR ...of persons performing its regulatory functions must not impair the independence or effectiveness of the performance of those functions.**

26. Paragraphs 11(7) and 11(8) of the BSB constitution set out what the BSB must do to enable the BC to meet its oversight and monitoring obligations. This is broad including to co-operate with Bar Council and to provide any information and documents which Bar Council may reasonably request. From a governance perspective it is appropriate that the parent organisation must ensure that activities are compliant with the regulatory objectives and provisions of the Legal Service Act and that spending is reasonable. However, safeguards should protect that this does not lead to unnecessary interference, influence or disruption. With regards resource, once an AAR has agreed the budget for the regulatory board it is anticipated that the AAR would normally focus spending reviews on whether the regulatory board's activities will take expenditure beyond the agreed budget or presents unexpected resource requirements. The oversight arrangements provide minimal detail information and reporting requirements or the framework of operation including for BC action upon receipt.

27. In addition, paragraph 18 provides that the Chairman of the BC (or his nominee) may, except where the BSB resolves that any meeting should be held in private, attend and speak at any meeting of the BSB but may not vote. Paragraph 11(7)(c) requires the BSB to comply with any reasonable request by the BC Chairman (or his nominee) to attend any meeting of any committee, sub-committee, panel or working party. The LSB is concerned that there could be potential for discussions to be fettered or decisions influenced by the routine attendance of the Chairman of the Bar Council or nominee to routinely attend any regulatory meeting.

#### **LSB ASSESSMENT**

**Compliance:** **Further information required to assess compliance**

**Response:** BC/BSB to clarify the criteria for settling information, reporting and monitoring requirements and how information is scrutinised, risk assessed and how it is determined what action is taken.

BC/BSB to confirm whether they recognise a potential risk around the chair of the BC routinely attending meetings, the extent of the risk and how this risk is and will be managed for example through criteria around the issues that the BSB will discuss in private meetings.

**12 July 2010**