Solicitors Regulation Authority

SRA response

Legal Services Board (LSB) supplementary consultation on proposed Internal Governance Rules

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Introduction

Read the Legal Services Board (LSB) Supplementary consultation on proposed Internal Governance Rules (PDF 20 pages, 323KB)
[https://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/2019/LSB_consultation_Proposed_Internal_Governance_Rules_02

The Solicitors Regulation Authority ("SRA") is the regulator of solicitors and law firms in England and Wales, protecting consumers and supporting the rule of law and the administration of justice. The SRA does this by overseeing all education and training requirements necessary to practise as a solicitor, licensing individuals and firms to practise, setting the standards of the profession and regulating and enforcing compliance against these standards.

We responded to the Legal Services Board (LSB)'s earlier consultations on its proposals for reforming its framework for regulatory independence published in November 2017 and November 2018. Our comments on this targeted consultation, which proposes amendments to the draft Internal Governance Rules (IGRs) consulted on in November 2018, should be read in conjunction with those earlier responses.

Summary

The consultation focuses on the overarching duty at current Rule 1. This prohibits approved regulators' (ARs') representative functions and interests from influencing regulatory decision-making.

The proposal is to replace this with an obligation to ensure that such decisions are not prejudiced. The consultation also proposes consequential amendments to rules 4 (Regulatory Autonomy), 8 (Appointments and Terminations) and 10 (Regulatory Body Budget), and the supplementary guidance to the rules.

We agree that the current phrasing is too wide and that it is reasonable that the representative functions should be able to try to influence issues such as regulatory policy just as third parties can. We also believe that trying to constrain lobbying activity to formal consultation does not reflect the wide range of lobbying activities that are open to third parties and should therefore be revised.

We think the IGRs should instead refer to 'improper influence'. This keeps the focus on the 'how' of influencing activity and makes it clear that representative functions can legitimately lobby on behalf of their constituency so long as they do not use the governance and related arrangements to do so.

Therefore, in summary, we do not agree with the proposed amendment to Rule 1. Moving to the proposed model risks prohibiting only improper attempts to influence decisions where there is proof of an adverse prejudicial outcome. That would mean that the regulator would have to show that the improper influence – perhaps exerted though governance, budgetary or staff or non-executive meetings, or other aspects of shared arrangements that third parties would not enjoy - did indeed prejudice the outcome. It may be that no prejudice has been suffered, or that this is complex, subjective or contentious – however there is inherent mischief in trying to exert improper influence and that can be readily demonstrated, should it ever occur.

Instead we suggest that any influence should be proper, i.e. open, transparent and arm's length. That would support public and professional confidence in both transparent governance and genuine good faith between the parties.

In our view, it would also be in the interests of the representative functions of the ARs which will want to be able to openly demonstrate their effectiveness to their constituency in just the same way as any third-party interest can do.

In addition to our concerns about Rule 1, we also consider that the consequential changes to rules 4, 8 and 10 are drafted too widely, albeit as above, we think the idea that lobbying activity should be constrained to formal consultation is too narrow. We would suggest instead the following alternative wording which the LSB may wish to consider:

Rule 1

Each approved regulator has an overarching duty to ensure that it does not seek to exert improper influence over decisions relating to the exercise of its regulatory functions as a result of any representative functions or interests it may have.

Rules 4, 8 and 10:

The approved regulator with a residual role:

a. may only seek to influence these determinations in a way that is open, transparent and arm's length...

Discussion

As we set out above, this targeted consultation seeks to propose amendments to the draft IGRs consulted on in November 2018. These replace the concept of influence with prejudice in the overarching duty at Rule 1 (and make consequential amendments to subsequent rules and guidance). Rule 1 currently prohibits ARs' representative functions and interests from influencing regulatory decision-making. The amendment would comprise an obligation to ensure that such decisions are not prejudiced.

The proposals are in response to concerns expressed by stakeholders that the previous wording prevented the legitimate exercise of representative functions by an AR, and that ARs would be left in a worse position than third party stakeholders in terms of their ability to influence decisions of the regulatory body.

We recognise the importance of the role of effective representation, and indeed highlighted in our response to the November 2018 consultation the need for the representative arm of the AR to be free to carry out lobbying and other roles on behalf of its members, without being constrained by concerns about crossing boundaries established for the AR within the IGRs.

However, we do not believe the proposed changes provide sufficient safeguard against interference with regulatory independence. Rather than focus on prejudice, with the focus on showing that an outcome had indeed been prejudiced, we suggest simply changing the language to 'improper influence'.

Nor do we agree with the suggestion that these are necessary for the rules to remain within the scope of section 30 of the Legal Services Act (LSA).

Section 30(1) of the LSA requires the LSB to make rules with the aim 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.

This permits the LSB to do more than repeat the wording at (a) above. It allows it to create a legal framework and to design requirements that it considers will both prevent prejudice and facilitate independent regulatory decision-making.

In our view, making it clear that ARs must not exercise improper influence to further their representative interests would fall squarely within those aims. We believe that prohibiting improper attempts to influence decisions will provide greater protection for regulatory independence than the narrow concept of prejudice can achieve. That is in part because the focus on prejudice shifts the consideration to the regulatory outcome, rather than the AR's actions or motivations. The regulator would have to show that the improper influence – perhaps exerted though governance, budgetary or staff or non-executive meetings, or other aspects of shared arrangements that third parties would not enjoy - did indeed prejudice the outcome.

The key point is that AR representative bodies have a relationship with the AR's regulatory arm within the same entity. The relationship is not the same, and is not seen as the same, as with a third-party stakeholder that is completely separate and structurally independent. As the consultation itself highlights, the AR's role in relation to delegation, governance and assurance, provides communication channels, pressures and influences that are unique. That means the representative body has to be particularly careful about how it seeks to influence – the channel and method matters, not simply the outcome.

Public and professional confidence in both regulator and representative body requires real clarity on the roles, responsibilities and interests between the roles of the two parts of the AR. It is also important that the profession is clear on the roles of each part of the organisation and the standing of, for example, any communication. Therefore, we believe that the effect of the IGRs should be to prohibit attempts to improperly influence regulatory decision-making in a way that goes beyond open and arm's length lobbying.

We do however agree that sub-rules 4 and 10 should not narrow any AR lobbying to formal consultation. Many third parties properly seek to influence on key issues and indeed their views, if they have foundation, may ultimately lead to formal consultation and change.

Conclusion

We do not agree with the proposed amendment to Rule 1 and believe that the wording should capture the concept of improper influence, as described above.

Further we do not agree that the changes to Rules 4, 8 and 10 should be adopted in the new IGRs. In particular, we believe the suggested wording, that an AR "may only seek to influence these determinations in the exercise of its representative functions" is wide and ambiguous and would not effectively restrict any attempts to exercise improper influence.

We would suggest instead the following alternative wording for the LSB to consider:

Rule 1

Each approved regulator has an overarching duty to ensure that it does not seek to exert improper influence over decisions relating to the exercise of its regulatory functions as a result of any representative functions or interests it may have.

Rules 4, 8 and 10:

The approved regulator with a residual role:

a. may only seek to influence these determinations in a way that is open, transparent and arm’s length...