To:	Legal Services Board		
Date of Meeting:	29 January 2014	**Item:**	Paper (14) 02

Title:	Chairs of regulatory bodies
Workstream:	
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Status:	Unclassified

Summary:

The paper summarises responses to consultation, and the main points raised by respondents. The Board is invited to choose from four options to move forward.

Recommendation(s):

The Board is invited to:

(1) Note points raised by respondents to consultation

(2) Note advice provided by external counsel

(3) Choose from four options to move forward

(4) Delegate clearance of a final decision document to a sub-committee of David Edmonds, Chris Kenny, Barbara Saunders and Andrew Whittaker

Risks and mitigations	
Financial:	None at this stage. External legal advice has been taken
Legal:	[redacted]
Reputational:	The proposal is unpopular with legal regulators and representative bodies, making up 14 out of 17 respondents. Some stakeholders will view it as the LSB exceeding its powers and/or being overly prescriptive. Equally, deciding to continue with the original proposals could signal that the LSB is willing and able to take unpopular decisions if we deem them necessary to secure the regulatory objectives
Resource:	None at this stage

Consultation	**Yes**	**No**	**Who / why?**
Board Members:	**x**		Barbara Saunders, Andrew Whittaker, Bill Moyes, Ed Nally
Consumer Panel:	**x**		The Panel provided a consultation response outlining their views

Others:	

Freedom of Information Act 2000 (FoI)		
Para ref	**FoI exemption and summary**	**Expires**
Risks and mitigation: Legal, 26, Annex B	Section 42 - information is subject to legal professional privilege	

LEGAL SERVICES BOARD

To:	Legal Services Board		
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Chairs of regulatory bodies

Executive Summary

1. The Board decided in September to consult on making a change to the Internal Governance Rules (IGR) that would require one of the lay members to be chair of the boards of the applicable approved regulators. 17 responses were received. Most legal regulators and representative bodies were opposed to the proposal, but both the consumer groups that responded were in favour.

2. The bases for this proposal are:

    - Day to day interaction with approved regulators
    - Four years' experience of carrying out the dual self certification process
    - Four years' experience of dealing with rule change applications
    - Knowledge gained from our regulatory standards work[1]

3. The LSB's investigation into the Bar Council's breach of the IGR has now concluded. As that investigation did not directly relate to the professional status of the chair of the Bar Standards Board (BSB) nor highlight any issues related to her status it should not form any part of the Board's decision on this proposal to change the IGR.

4. The key arguments respondents made against the proposal were that:

    - It is discriminatory: the only criterion for the role of chair should be that it is the best person for the job. Appointments should be non-discriminatory in terms of professional qualification/ background
    - LSB lacks the necessary powers: section 30 of the Legal Services Act 2007 (the Act) does not give the LSB the power to make rules to determine who chairs the boards
    - There is a lack of evidence: as both lay and professional chairs now exist evidence should be available regarding their relative performance

5. We do not consider that the proposed change impinges on the principle of appointment by merit. Lay status is already accepted as a criterion for over half of the appointments to the regulatory boards. We are not suggesting removing a

[1] See LSB Board paper (13)59 on chairs of regulatory bodies at paragraph 10

professional board member and adding a lay member, but rather that selecting the chair could be part of the package surrounding the lay majority.

6. We consider that section 30 not only provides a valid legal basis for the proposed change to the IGR, but the four points above offer sufficient evidence for doing so[2].

7. However, the fact that many of the points made in consultation can be rebutted is not necessarily sufficient reason of itself for the Board to proceed and members will wish to have a broader debate on the pros and cons.

8. The Board has, broadly speaking, four options to choose from to move forward:

    - Proceed with proposed change to the IGR
    - Consider restructuring the appointments and reappointments processes used by the regulators through a change to the IGR
    - Issue guidance on the appointments and reappointments processes used by the regulators under section 162 of the Act
    - Do nothing

Background

9. In agreeing the outcome of the IGR dual self-certification process in its meeting in July 2013, the Board noted continuing concerns about the level of potential cultural, rather than structural, capture of regulators. The Board's vision for long term reform of the regulatory structure was laid out in September 2013 in its *Blueprint for Reforming Legal Services Regulation*[3]. This centred on regulation that is fully independent of both the representative bodies *and* the profession. We consider that overly strong ties to the history, culture and rules of professional self regulation can act as a significant drag on the better regulation principles and therefore put the regulatory objectives at risk. In particular, this manifests in the form of inappropriate barriers to entry which may negatively impact on the objective of promoting competition in legal services in order to improve innovation, value, consumer choice and therefore access to justice. In order to guard against this risk by making incremental short term changes under the current framework, in September the Board decided to consult on making a change to the IGR that would require one of the lay members to be chair of the boards of the applicable approved regulators (AARs).

10. The Board felt that the time was right to make a further push for greater independence among the regulators for a number of reasons:

[2] See advice from counsel, annex B, para 55-57

[3] http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/a_blueprint_for_reforming_legal_services_regulation_lsb_09092013.pdf

- Increasing recognition by the Board that independence from the profession is as important as independence from the professional body;
- The clearly diminishing utility of the IGR self-certification exercise as a check on undue 'soft' influence on regulators;
- New BSB and Solicitors Regulation Authority (SRA) chair appointments being due in the course of 2014 so that any decision to change would need to be made relatively quickly to secure impact in the medium-term in the most high-profile regulators;
- The LSB's desire to ensure complete independence of regulation from the profession as set out in our submission to the Ministry of Justice (MoJ)'s call for evidence – the change proposed may be as far as it is able to progress in the absence of primary legislation;
- Concerns emerging through the regulatory effectiveness process about the inconsistent quality of board processes and scrutiny in the front-line regulators

11. The Executive considers that lay chairs could play a valuable part alongside the other work of the LSB in tipping the balance of behaviour in favour of greater independence. The consultation on the proposed change to the IGR closed on 19 November 2013.

Responses to consultation

12. 18 responses were received. A summary of the responses is attached at annex A. The majority of representative bodies and regulators of the legal profession (12 respondents) were opposed to the change. The two consumer bodies[4] that submitted responses and the Association of Chartered Certified Accountants (ACCA)[5] were in favour of the proposed change. There was also one respondent who asked for anonymity.

13. The SRA[6] did not strongly voice either opposition or approval of the proposed change, but instead suggested the LSB should focus on the independence and robustness of the appointments process for the chair and members of regulatory boards. They felt this was where the LSB's efforts would be most useful. Our understanding is that no vote was taken in the SRA discussion, which divided on lay and professional lines.

14. The Council for Licensed Conveyancers (CLC)[7] agreed that currently practising authorised persons should be prevented from holding the role of chair. However, they felt the definition of lay in the Act was unnecessarily restrictive as it excluded

[4] The Legal Services Consumer Panel and Which?. The Panel's response is addressed in more detail below at paragraph 27
[5] [add link when on website]
[6] [add link when on website]
[7] [add link when on website]

a candidate with a legal qualification (who has never practised or is no longer practising), regardless of whether they have all the other skill sets, experience and specialist knowledge sought by the regulator. As an alternative they suggested a more broadly defined notion of 'independent', including requirements that the individual:

I. is independent
   i. of the management of the regulator
   ii. of the regulated community
   iii. of interested parties and

II. is not currently
   i. a practising Authorised Person nor
   ii. a member of an LSA professional/ representative body[8].

15. The CLC also suggested that it may be appropriate to prescribe the minimum period a candidate must have not been practising or a member of a professional body. They also argued that, in line with their own arrangements, the presumption should be in favour of appointing a lay chair unless the person who is clearly the best candidate for the role has been a practising lawyer.

Respondents' objections

16. The key arguments made against the proposal were that:

- **It is discriminatory**: the only criterion for the role of chair should be that it is the best person for the job. Appointments should be non-discriminatory in terms of professional qualification/ background
- **LSB lacks the necessary powers**: section 30 of the Act does not give the LSB the power, either expressly or impliedly, to make rules to determine who chairs the boards
- **There is a lack of evidence** (and so the proposal fails to meet the better regulation principles): as both lay and professional chairs now exist evidence should be available regarding their relative performance

Discriminatory

17. Lay status is already required for over half of the appointments to the regulatory boards. We are not suggesting changing the number of people on each board to whom lay is an applicable criterion. We are strengthening a decision that has already been taken by suggesting that the chair should be selected from the lay quota, which is the majority of the board. The same outcome as the proposed

[8] This definition is different from that of lay given in the Act. It would therefore be inconsistent with the definition used in the IGR and in relation to the chairs of the LSB and the Office for Legal Complaints

change could be achieved by amending the IGR to state that one of the lay people of each board must also be the chair. This would simply show that selecting the chair must be part of the package surrounding the lay majority, rather than appearing to remove a professional person and add a lay person.

18. We do not consider that the proposed change impinges on the principle of appointment by merit. Lay status is already accepted as a criterion for over half of the appointments to the regulatory boards[9].

LSB lacks legal powers

19. The consultation response from the Honourable Society of Lincoln's Inn stated:

> [Lincoln's Inn] does not accept that the LSB has the 'vires' to make the change on which it is consulting and envisages that any attempt to make the change may invite a challenge in the administrative courts[10].

20. We disagree with this analysis, and consider that section 30 provides a valid legal basis for the proposed change to the IGR. There does not appear to be any difference in vires terms between the existing rule mandating lay majorities, on which litigation was threatened in consultation but never materialised, and the proposed rule on lay chairs[11].

Lack of evidence

21. We outlined the bases for our proposal at paragraph 16 of the consultation document. They were:

- Day to day interaction with approved regulators
- Almost four years experience of carrying out the dual self certification process
- Almost four years experience of dealing with rule change applications
- Knowledge gained from our regulatory standards work[12]
- Learning gleaned from the ongoing Bar Council investigation

22. Moving forward we have dismissed point five, relating to the now concluded investigation into the Bar Council. As that investigation did not relate to the professional status of the BSB chair or uncover any issues related to her status, it should not form any part of the Board's decision on this proposal to change the IGR. However, we consider that points one to four continue to be valid[13].

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[9] See annex B, advice from counsel, paras 65-67
[10] [add link when on website]
[11] See annex B, advice from counsel, paras 55-57
[12] See LSB Board paper (13)59 on chairs of regulatory bodies at paragraph 10
[13] See annex B, advice from counsel, paras 58-61

23. It is unclear what more evidence respondents feel the LSB should have to support its proposal. Direct evidence of a causal link between professional chairs and the independence of regulators' decisions could never reasonably be expected to exist as it would be impossible to find a 'control' situation in which the LSB could observe the outcome of a decision a regulator may have made if a lay person had held the chair. It is also perfectly possible to envisage a situation in which a lay chair was also subject to "professional capture" to a greater or lesser degree. In spite of this, we consider it logical that if (for example) a professional body denounced a policy as being disastrous for its branch of the profession, a chair who was also a member of that profession could reasonably be expected to be more likely influenced, either consciously or unconsciously, by professional considerations than a lay person in the same position may be.

24. The LSB was tasked by Parliament to make rules regarding the independence of legal services regulation. Parliament did not specify that the LSB could not make rules unless it found specific examples of insufficient independence. We believe that the evidence that we have gained from our experience is sufficient to take a reasoned judgement in favour of introducing lay chairs[14].

25. Respondents suggested that the current IGR had not been in force long enough to justify the proposed change. Counsel's attention was drawn to the suggestion that the current IGR needed longer to 'bed in'. We believe that our experience to date provides adequate experience of approved regulators' behaviour and counsel supported our view that four years' experience of applying the IGR could not be considered an irrationally short length of time to decide to take this further step towards independence.

Risk

26. [redacted]

[14] See annex B, advice from counsel, paras 58-61

Options

27. In light of the responses received to consultation the Executive judges that there are four different options for the Board to consider:

I. Proceed with proposed change to the IGR to require lay chairs of the boards of the AARs (favoured by consumer group respondents)

28. We continue to believe that, in many cases, one inevitable effect of membership of a profession will be to influence behaviour when chairing a regulator and, given the importance of the chair and the greater time and staff support s/he has to shape discussion and consider issues, this influence could be disproportionately important. While the majority of consultation responses were against the proposed change, no evidence that such bias could not arise was supplied to support their arguments. We believe that there could be reputational risk in abandoning a proposal in the face of no evidence to the contrary.

29. YouGov research found that, although of concern to some, this was not a high priority for a representative sample of the public[15]. However, public perception is not the primary motivation for this proposal. We consider there is a clear problem of a lack of independence. The Consumer Panel is strongly in favour of this option and would question any deviation from it. The Panel gives five key reasons for its standpoint, which the Executive supports:

- This could further strengthen the independence of regulation from the profession – a key theme of the Simplification Review responses.
- Chairs have a key influence on the strategic direction, culture and operation of their organisations and are often its public face
- Boards operate in an environment where conservative attitudes towards legal services as a market persist and there has been resistance to the idea that consumers should be put at the heart of regulation – lay chairs would help to counter this culture

[15] Between 17-19 December 2013 a representative sample of 2,113 adults was asked: 'at present, the person who chairs a body which authorizes, sets rules and enforces the regulation of lawyers can either be someone who is professionally qualified as a lawyer or a lay person (i.e. someone who is not and has never been part of the legal profession). Would you have MORE or LESS confidence in the bodies that regulate lawyers if only lay people could chair their boards?'. They answered:

Much more confidence	7%
More confidence	16%
Neither more or less confidence	38%
Less confidence	17%
Much less confidence	7%
Don't know	15%

- The chair has a formative influence on key decisions. Decisions by boards may be made with good intentions, but inevitably they are shaped by attitudes and beliefs stemming from the professional backgrounds of their members. Decisions to support measures that protect a profession from competition can be made subconsciously;
- Lay chairs could bolster public confidence that regulation is working in their interests, in an environment where low public trust of lawyers is partly due to a perception they are a law unto themselves and complaints would not be considered fairly[16].

30. As highlighted above, we are not suggesting changing the number of people on each board to whom lay is an applicable criterion. We are suggesting is that the chair should be selected from the lay quota, which is the majority of the board. We consider that the proposed change would be less prescriptive than either options two or three, as the regulators would be left to select their chair in any manner in line with best practice that they saw fit.

31. The Executive considers that a decision document could be prepared by the middle of February 2014, allowing for external review ahead of a Board decision. We therefore expect that both the final decision document and the proposed change to the IGR, which would take immediate effect, could be published at the end of February.

II. Consider restructuring the appointments and reappointments processes used by the regulators through a change to the IGR (favoured by the SRA)

32. A number of respondents highlighted that they saw the appointments and reappointments process as being the point where the LSB could most usefully concentrate its efforts. In its response the SRA stated:

> The root of the risk lies in the process of the appointments to boards. The current guidance in the Internal Governance Rules... and the LSB's letter of 2 December 2008... is permissive and general. In particular, the process can be run by the professional body (albeit with the involvement of the regulator), and there is no requirement that the selection panel should have people with consumer or wider regulatory experience. In principle, the appointments panels for AARs could be dominated by people from the representative body or the regulated profession. And, while the guidance in the letter of 2 December 2008 requires consultation with the regulator about the arrangements, the final say on the competencies for the board and the appointments process can rest with the professional body, not the regulatory organisation.

[16] [add link when on website]

33. The SRA continued by suggesting that giving the regulatory organisations, rather than the approved regulators, responsibility for designing the competencies and appointments process would better serve the independence and robustness of the regulatory boards. They argued that this could be achieved through amendments to the IGR.

34. Any consideration of the appointments process could also investigate the possibility of requiring chairs, and possibly other board members, to be chosen on the basis of their ability to secure the independence of regulatory functions from representative ones. This would not mandate lay chairs, but it would establish the ability to secure independence from representative functions as a key criterion for appointment. It could also be used as the criterion for performance assessment. This path could avoid any problem of a conflict with appointment on merit, by establishing the criteria to be used in that type of appointments process.

35. This option would require the LSB to consult again. Our broad reasoning would be based upon that to be given in the decision document for lay chairs. As this work would arise out of an existing consultation we consider that an accelerated six week consultation period could be used. However, in addition to this, time would be needed for policy development and arranging for Board signoff. For these reasons, it would not be possible to secure a change to the IGR regarding the appointments process before the recruitment for the next chairs of the SRA and BSB begins[17]. Both organisations are keen to get the process underway at the end of February or very beginning of March in order to enable appointments to be made before the summer and so enable a smooth transition in the course of the Autumn.

36. The Executive considers that this work could be conducted using internal resource. However, it would take longer to bring to fruition and there is no guarantee that this option would be as effective at addressing the identified problem (overly strong ties to the history, culture and rules of professional self regulation acting as a drag on the better regulation principles and endangering the regulatory objectives at risk) than a simple rule on lay chairs. Furthermore, detailed rules on the appointments process would be more onerous for the regulators to comply with than a requirement to have a lay chair.

[17] The new chairs are due to be appointed in December 2014. See https://www.barstandardsboard.org.uk/media-centre/latest-news/bsb-reappoints-baroness-ruth-deech-as-chair/ http://www.sra.org.uk/sra/news/press/chair-reappointed-2013.page

I. Issue guidance on the appointments and reappointments processes used by the regulators under section 162 of the Act

37. The Board could choose to offer guidance on best practice in the appointments and reappointments process for all regulatory board members. There is a precedent for guidance in this area being given by an oversight regulator. In the health sector the Professional Standards Authority has published its own guide to *Good practice in making council member and chair appointments to regulatory bodies*[18]. This guide describes good practice in the process of recommending that the Privy Council appoints, reappoints, or extends the appointment of a council member or chair. It also covers areas such as term extensions, emergency appointments, induction and appraisal. This could be used as a template for any guidance by the Board.

38. Guidance should focus on how best to assure independence on the regulatory boards. This may address the extent to which there is lay representation on the appointments panels, or question whether any panel is more likely to appoint a professional person due to undue influence from an approved regulator.

39. Draft guidance would need to be consulted upon. As with option two, the Executive considers that a six week consultation period could be used. Taking into account the time needed for policy development, it is extremely unlikely that any guidance could be issued before recruitment for the next SRA and BSB chairs begins. In comparison with option two, the provision of guidance would offer the regulators some flexibility by operating on a 'comply or explain' basis, although there is, of course, an offsetting loss of certainty for the LSB. Again the Executive considers that this option is unlikely to be as effective at addressing the problem of a lack of cultural independence as mandating lay chairs, while at the same time likely being more onerous to comply with.

IV. Do nothing

40. This option would not immediately further the objective of increasing the cultural independence of the regulators. The Board may decide this objective is not a priority in light of most legal regulators and representative bodies not being in favour of the proposed change to the IGR. The Board should also note the neutrality shown by the general public questioned in the YouGov survey (described under option 1).

41. The Board may wish to restrict action taken in relation to the IGR to investigating potential breaches when it has a concern that actual loss of independence may have occurred, and taking enforcement action where appropriate. This option

[18] http://www.professionalstandards.org.uk/docs/scrutiny-quality/october-2012---appointments-good-practice-guidance-.pdf?sfvrsn=0

would have a high impact where used but, as experience has now demonstrated, also resource intensive for both the LSB and regulators in monitoring and the delivery of any investigation.

42. The Board may decide that any progress that can be made in improving the independence of regulation would be more effective as part of the wider work outlined in its *Blueprint for reforming legal services regulation*[19]. In that document we detailed both shorter term changes and legislative simplification that could be achieved either immediately or following the passing of the Consumer Rights Bill, as well as longer term structural changes culminating in the development of a single regulator for legal services. However, it should be noted that even the shorter term changes outlined in the *Blueprint* require primary or secondary legislation to enable implementation by the Ministry of Justice. The role of the Board here can extend little further than continuing to put forward its views.

16.01.14

19 http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/a_blueprint_for_reforming_legal_services_regulation_lsb_09092013.pdf

ANNEX A

Summary of responses to LSB consultation on chairs of the regulatory bodies

Introduction

1. Respondents were unevenly split over the proposed change to the internal governance rules (IGR). Representative bodies and regulators of the legal profession (14 respondents) were opposed to the proposal; consumer bodies (2 respondents) and the Association of Chartered Certified Accountants (ACCA) were in favour. A key objection raised by respondents was that those in charge of appointing chairs of the regulatory boards should not have their discretion fettered in any way; the person appointed should simply be the best candidate for the job. Respondents representing the Bar also doubted that section 30 of the Act gave the LSB the power to enact its proposals.

2. The Chartered Institute of Legal Executives and ILEX Professional Standards (CILEx and IPS) highlighted both benefits and limitations of the proposed change. They noted that while the field of possible candidates for the position of chair would be narrowed by the proposal, a professional chair could raise actual or perceived conflicts of interest due to the overlap between their regulatory and professional roles. The Council for Licensed Conveyancers (CLC) noted that their board had been chaired by a lay person since May 2010, and were in favour of excluding practising authorised persons from the role of chair. However, they argued that the definition of lay in the Act and used in the IGR was overly restrictive and suggested the notion of independence should be used instead. CLC felt that using independent as a criterion would usually result in a lay person as chair, but that lay status as defined in the Act should not be mandated.

3. The submission from the SRA focused primarily on what it saw as the key issue: the independence and robustness of the process for appointing the chair and members of regulatory boards. This was the area the SRA felt the LSB could most usefully concentrate its efforts on. ACCA encouraged the LSB to consider developing a new definition of lay, which did not centre on authorisation to provide reserved activities and so would be relevant to all the approved regulators.

4. The Consumer Panel noted that chairs act as the public face of the regulators and are a key influence on their strategic direction, culture and operation. Which? argued that consumers must have confidence that regulators will act in their interests in the event of a conflict with professional interests, and highlighted that as early as 2007 they were calling for both lay chairs and lay majorities for the regulatory boards.

Question 1: Do you agree with the proposed change to the IGR in order to deliver lay chairs?

5. The majority of respondents disagreed with the proposed change. The key arguments made against it were:

    - The only criterion for the role of chair should be that it is the best person for the job. Appointments should be non-discriminatory in terms of professional qualification/ background
    - Section 30 does not give LSB the power, either expressly or impliedly, to make rules which determine who chairs the Boards. LSB either does not understand the scope of its powers or intentionally did not disclose the limits on its power to those it is consulting with
    - The proposal is not based on any evidence. As both lay and professional chairs exist now evidence should have been available regarding their relative performance
    - The proposal is not:
    - transparent - no evidence of need for change has been shown
    - proportionate - no need for change has been identified
    - targeted - it is targeted at a case where no action is needed.

6. The City of Westminster and Holborn Law Society objected to the unreasonably short consultation period. Liverpool Law Society argued that the LSB's contention that lawyers cannot have leadership experience in a risk based regulatory context did not take into account recent developments in the market, such as the introduction of the role of Compliance Officers for Legal Practice.

7. The Bar Standards Board (BSB) felt that it should never be the case that their appointments panel could not appoint the candidate it considered best qualified because that candidate happened to be legally qualified. It highlighted that the lack of evidence behind this proposal was at odds with the LSB's usual insistence on evidence to support decisions made by the approved regulators. They further disagreed with the LSB that:

    - reform would have moved further under regulators less tied to the profession
    - a regulator would be able to separate itself from the profession more easily under a lay chair.

8. ACCA supported the proposed change but raised concerns that 'such a specific requirement could weaken the focus on the fundamental principle of regulatory independence of the regulatory function as a whole'. Both consumer groups fully supported the proposal. The Consumer Panel explained that:

    - it could further strengthen independence from the profession
    - chairs have a key influence on direction, culture and operation of their organisations and are often its public face

- the proposal would help to counter conservative attitudes and resistance to the idea that consumers should be put at the heart of regulation
- the chair has a formative influence on key decisions
- the proposal would bolster public confidence that regulation is working in their interests in an environment where low public trust of lawyers is partly due to a perception they are a law unto themselves and complaints would not be considered fairly.

Question 2: Do you think the proposed change should take immediate effect or only be applicable to future appointments?

9. Five respondents declined to answer this question, or stated that as they disagreed with the proposal the question became irrelevant. Except for ACCA, those that responded were unanimous that any change should only apply to future appointments.

10. ACCA considered that to impose the requirement for lay chairs immediately would be unreasonable, but also that simply applying the change to any future appointments could result in unintended consequences. Their preferred option would be to require chairs to be lay from a prescribed date in 2015.

Question 3: Do you agree that the requirement for lay chairs should apply only to the AARs?

11. Most respondents felt that any change should be consistent across the approved regulators. The Law Society stated that it was at a loss why the LSB would not apply the principle of independence to the accountancy bodies. It felt that the proposed change would create a less independent class of regulators.

12. The City of London Law Society, the City of Westminster and Holborn Law Society, and CILEx and IPS argued that the change should apply equally to all the regulators. In contrast, ACCA considered that restricting the change to the AARs was appropriate due to the definition of AAR excluding those bodies whose members' main business was not to practise a reserved legal activity.

Question 4: Do you agree with the proposed exclusion of the Master of Faculties from the proposed change?

13. Most respondents did not answer this question. The City of London Law Society, ACCA, the City of Westminster and Holborn Law Society, and CILEx and IPS all agreed with the exclusion of the Master of Faculties from the proposal.

14. The Consumer Panel conceded that by law the Master had to be a legal professional. However, it argued that there was no risk-based reason why notaries should be subject to a different set of rules and noted that 'the historical and cultural ties that the LSB sees as holding back progress are particularly in evidence among notaries'.

Respondents (in alphabetical order)

Association of Chartered Certified Accountants

- Supports proposed change
- Appropriate input from the profession should still be maintained
- The definition of lay in the Act and the IGR relates to authorisation to perform reserved activities and so has no meaning for ACCA. They would require a lay person to be a non-accountant not a non-lawyer
- All accountancy bodies referred to in the consultation are subject to independent oversight from the FRC. Excluding them from the requirements of the schedule to the IGR would be a proportionate approach to furthering regulatory independence
- Believes it is possible to achieve independence through a lay majority. But also believe that the message to the public by having a lay chair underlines ACCA's regard for the public interest
- LSB should seek a definition of lay that is relevant to all approved regulators to mitigate the risk of a two-track system developing
- Due to lack of evidence ACCA questions need for urgent change in the absence of an improved definition of lay
- The accountancy bodies should be excluded from the proposed change. They already cannot appoint accountants to their lay roles; being unable to appoint anyone that had every been authorised in respect of a reserved activity would severely restrict their recruitment pool

Bar Council

- None of the provisions of s30 empowers the LSB, either expressly or impliedly, to make rules which determine who chairs the Boards
- S30 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 regulators
- Even if LSB had the power to make the proposed change there is no basis for it and good reason not to do so
- The proposals are not:
- transparent - no evidence of need for change has been shown
- proportionate - no need for change has been identified
- targeted - it is targeted at a case where no action is needed
- Their experience suggests that the only issue with independence comes from undue influence by the LSB
- Without any evidence LSB should not have wasted the time and money of the ARs by publishing this consultation
- Arguments in para 23 and 24 are misleading
- Surprising that there is no consideration of the broad definition of lay

- The number of posts the proposals apply to are so small that the LSB must know it would be seen as a comment on performance of individual chairs

Bar Standards Board

- Prescriptive process is inappropriate
- Proposal is based on unevidenced and unwarranted assumptions that:
- lay chairs would behave independently in circumstances where legally qualified chairs would not
- a board would behave differently with a lay chair
- No evidence to support conclusion regarding the degree of progress that the regulators have made. This is at odds with LSB's usual insistence that evidence supports decisions being made by the frontline regulators
- Lack of evidence should indicate to the LSB that intervention is not warranted
- No evidence that:
- reform would have moved further under regulators less tied to the profession
- a regulator would be able to separate itself from the profession more easily under a lay chair
- BSB already goes beyond the norm with regard to its lay majority and the independence of its appointments process (compared to eg GMC, ICAEW, General Pharmaceutical Council, RIBA, General Dental Council)
- Panel responsible for appointing BSB's chair is itself chaired by a lay person
- Should never be the case that BSB's appointments Panel cannot appoint the candidate it considered best qualified because that candidate happens to be legally qualified

Birmingham Law Society

- Should be only one criterion for job of chair: the best person for the job
- LSB's entire argument is based upon assumption not evidence
- Dangers with lay chairs:
- lay chair being over-ambitious/lacking technical knowledge/having insufficient regard to the profession's representations
- risk of disenchantment of the regulated community
- knowledge of practice is not easily assimilated or appreciated
- High profile regulators are often appointed from within their industry without suggestion that they favour the interests of the industry over the public
- No evidence that chairs of SRA and BSB are not independent

CILEx and IPS

- The issue of the chair being lay or not should not occur if independence is successfully maintained through a lay majority
- Talent field would be narrowed by precluding non-practising lawyers

- Professional chair may raise actual or perceived conflicts of interest, as their professional role may overlap with their regulatory one
- Boards require some professional input
- Proposals should apply to future appointments and all approved regulators
- LSB should be left to determine status of Master of Faculties (MoF)

City of London Law Society

- Sees little merit in a rule change that narrows the field of candidates where no evidence shows professional chairs have impeded independence
- Any change should be evidence based
- No evidence that regulators with lay chairs have performed better than those with professional chairs
- LSB exaggerates role of chair and the power it exerts
- No comparable bodies in other professional fields are required to have a lay chair (except the General Optical Council)
- Change should only apply to future appointments
- Change to apply to all approved regulators. But agree with exclusion of MoF

City of Westminster and Holborn Law Society

- LSB's general approach is flawed and unlikely to achieve the regulatory objectives
- The fact that AARs do not always agree with LSB doesn't mean they are wrong or motivated by need to defend the interests of those they regulate
- Regulatory and representative functions have already been strictly separated but much of the consultation is based on the premise that separation has not been achieved
- Contrary to experience to suggest that chairs of AARs have not respected this separation
- Main objection is fettering discretion of those in charge of appointing chairs
- Object to unreasonably short consultation period
- Strongly disagree with proposals; if it came it should:
- apply to future appointments
- apply to all ARs
- not apply to the MoF

Costs Lawyers Standards Board

- See no need for lay chairs as well as lay majorities
- Chair should be the best person for the job. Appointments should be non-discriminatory in terms of professional qualification/ background
- Have seen no evidence that professional chairs act in detriment to the better regulation principles or impeded independence under the IGR
- LSB does not acknowledge that chairs act in accordance with the determination of their lay majority board

- Re Q4 - respondent does not seem to understand that CLC and MoF have never had representative functions, and suggests that if they do not have a separate representative arms that they might be most at danger of professional/ representative body influence
- Concerned that this has arisen due to issues between LSB and certain non-lay chairs. 'It seems an attempt by the LSB to depose current non-lay chairs because they have an excellent understanding, through their qualification and experience, of the profession they regulate.'
- LSB has not made the case for the prescriptive outcome sought and current requirements are fair, proportionate and adequate

Council for Licensed Conveyancers

- CLC was established with an exclusively regulatory function so risk of regulatory capture is reduced
- Have had an independent lay chair since May 2010
- Chairs must be visibly and identifiably independent; this is not the same as lay
- Act's definition of lay is unnecessarily restrictive
- Most important thing is for an individual to have skills, experience and strength of purpose to operate independently and be seen as independent by stakeholders and consumers
- A wider definition would allow suitable individuals with legal qualifications but who have never practised to hold position of chair
- Suggest a more suitable definition of independent should be used, including that the individual:
- is independent
- of the management of the regulator
- of the regulated community
- of interested parties
- and is not currently
- a practising Authorised Person
- a member of an LSA professional/representative body
- May be appropriate to prescribe the minimum period they have not been practising/a member
- Presumption should be in favour of appointing a truly lay chair unless the person who is clearly the best candidate for the role has been a practising lawyer
- Use of 'independent' would be more proportionate and targeted response to risk of professional capture, plus being consistent with the interests of consumers, public and profession
- Under this approach chair will usually be lay but this should not be mandated

Council of the Inns of Court

- Profession is best served by the BSB being chaired by the best person for the job regardless of professional qualification
- Proposals are not supported by evidence
- Change has not been held up by professional chairs; sometimes eg rule changes they have been held up by the LSB
- Consider that where there is a lay chair there should be a professional vice-chair and vice-versa

Honourable Society of Lincoln's Inn

- LSB claims power to make proposed amendment under section 30 of the Act. That provision does not bestow that power on the LSB
- LSB either does not understand the scope of its powers or intentionally did not disclose the limits on its power to those it is consulting with
- Any attempt to make the proposed change would invite a court challenge
- The fact that reforms have not progressed as swiftly as LSB would have liked is a reflection on LSB's unrealistic expectations
- Excluding well qualified candidates from the role of chair is not proportionate or rational
- Board appointments are already closely scrutinised by the Office of the Commissioner for Public Appointments. Baroness Deech was not appointed but the Bar but independently (by the Lord Chancellor)
- Absence of evidence suggests LSB's judgment is not to be relied upon

Law Society

- Appointments should be made solely on merit
- There is little evidence backing up the proposals or showing how the proposals would address what LSB sees as a problem
- Law Society's appointments process is very clear and transparent
- No reason why lay chairs would necessarily be less close to the profession than professional chairs
- LSB should look at the evidence of lawyer chairs implementing policies unpopular with the profession eg OFR, QASA
- Implementing change to create closer adherence to the LSB's preferred approach may be overstepping LSB's role as oversight regulator
- LSB needs to look at the independence of the appointments mechanisms, of regulators, and the composition of their boards. If these are sound it is hard to see what limiting those who can be appointed as chair will achieve
- No evidence that CLC has embraced regulatory change quicker than the other regulators
- Loss of involvement of profession has implications for independence from government
- Any change made should apply to future chairs only

- Any change should apply to all ARs

Legal Services Consumer Panel

- Supports the proposal because:
- it could further strengthen independence from the profession
- chairs have a key influence on direction, culture and operation of their organisations and are often its public face
- would help to counter conservative attitudes and resistance to the idea that consumers should be put at the heart of regulation
- the chair has a formative influence on key decisions
- bolster public confidence that regulation is working in their interests in an environment where low public trust of lawyers is partly due to a perception they are a law unto themselves and complaints would not be considered fairly
- Changes should take effect for future appointments and come into force in time for the forthcoming recruitment rounds for the two largest regulators
- Arguments in support of lay chairs apply to all regulators, not just AARs
- There is no risk-based reason why notaries should be subject to a different set of rules
- There remains a lack of cultural independence and serious allegations have been made about representative arms meddling in regulatory matters
- Existing regulatory model needs to be replaced. Until then, LSB is right to find ways to bolster independence within existing framework
- Mindful of research commissioned by the LSB highlighting how measures that have the effect of protecting a profession from competition can be made subconsciously and reflect a genuine belief that controls are in the public interest
- Research has shown consumers feel lawyers are a law unto themselves and would not deal with complaints properly. Lay chairs may help to address these perceptions

Liverpool Law Society

- Agree independence is central to the aims of the Act
- Does not agree with proposed change. Qs 2-4 are therefore irrelevant
- No evidence that chairs view change from the standpoint of the profession
- Chairs should be the most suitable candidate, regardless of professional background
- Do not accept a properly constituted chair would be unduly influenced by the chair
- Assumption that lawyers cannot have leadership experience in a risk based regulatory context does not take into account recent developments eg COLPs

Midland Circuit

- It is imperative that there is lay and professional representation on each regulatory body
- Each regulatory body must be headed by someone who has independence of mind, power of forward thinking and the respect of their colleagues
- Proposals would limit the pool of available talent and potentially lead to less effective chairs
- No established need for any change to the current position
- Doubt whether the LSB has the power to effect this change

Solicitors Regulation Authority

- More important issue is independence and robustness of the process for appointing and reappointing the chair and members of regulatory boards
- Document relies on an assumption that wherever the regulators have not gone as far/ fast as the LSB wished, a significant cause is that regulators have been over-influenced by close ties with the profession
- Ignores possibility that regulators concluded the changes they made and the pace with which they have made them are in the interest of consumers and the wider public
- Absence of structural separation from Law Society has inhibited progress in some areas but SRA's programme of radical reform has not been inhibited by its Board's professional membership
- Protection against being dominated by professional interests is a robustly independent board with a wide range of experience
- Main argument in favour of lay chairs is to strengthen public confidence in independence and be a clear statement that the SRA is a public interest regulator which does not regulate in the interests of the profession
- Because the SRA is not structurally independent from the professional body arguments in favour of a lay chair are stronger. SRA has two risks to its independence:
- professional capture issue raised by the LSB
- influence directly applied to the SRA by the professional body
- Primary argument against a requirement that the chair must be lay is the principle of securing the best person for the job
- A strong lay chair might strengthen the public perception of independence, but a strong professional chair helps to champion and drive through reform within the regulated constituency
- Risk that intervention by the LSB to prohibit the appointment of a professional chair could be used by competing jurisdictions to damage the credibility of SRA regulated firms and their continued economic success in the international market
- Immediate focus for LSB should be the robustness of the appointments and reappointments process for both chair and board

- Robustness and independence of boards would be better served by the regulatory organisations designing the competencies and appointments process in consultation with the approved regulators, plus confirmation from LSB that the arrangements conformed with the IGR
- This could be supplemented with tighter requirements in the IGR for the composition of appointments panels
- IGR should require that both process and decisions on appointments and reappointments should be delegated to an independent appointments panel

Which?

- Support our proposal, and have been arguing since 2007 that ARs should have both lay chairs and lay majorities
- Consumers must have confidence that regulators will act in their interests in the event of a conflict between professional and consumer interests
- Inconsistent that LSB has to have a lay majority and chair but ARs do not
- Agree that a commitment by all AARs to appoint a lay chair at the end of any current non-lay chair's term would be acceptable