

<b>To:</b>	Legal Services Board	
<b>Date of Meeting:</b>	30 April 2014	<b>Item:</b> Paper (14) 22

<b>Title:</b>	Appointments and reappointments to regulatory boards	
<b>Workstream:</b>		
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<b>Status:</b>	Unclassified	

<b>Summary:</b>
The paper summarises responses to consultation and the main points raised by respondents. It then suggests a proposed LSB decision and way forward.

<b>Recommendation(s):</b>
The Board is invited to: <ol style="list-style-type: none"> <li>(1) Note key points raised in consultation</li> <li>(2) Agree the recommended changes to the IGR schedule (annex 2 to the decision document)</li> <li>(3) Agree the implementation plan (paragraphs 30 and 31)</li> <li>(4) Delegate clearance of a final decision document following Board comments to Chris Kenny, Chief Executive</li> </ol>

<b>Risks and mitigations</b>	
<b>Financial:</b>	None
<b>Legal:</b>	[REDACTED]
<b>Reputational:</b>	The proposal is unpopular with the Law Society as well as the CLSB. It is likely that proposals are also unpopular with other stakeholders that have not responded eg the Bar Council.

Some stakeholders will view this proposal as the LSB exceeding its powers and/ or being overly prescriptive, especially as it follows on from amending the IGRs in February to require each applicable approved regulator's regulatory board to have a lay chair.
<b>Resource:</b> None at this stage

Consultation	Yes	No	Who / why?
<b>Board Members:</b>	x		Bill Moyes, Ed Nally
<b>Consumer Panel:</b>	x		The Panel provided a consultation response outlining their views
<b>Others:</b>			

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
<i>Risks and mitigations:</i> <i>Legal</i>	Section 42 – information protected by legal professional privilege	
Annexes 1 and 2	Section 22 – information intended for future publication	

## LEGAL SERVICES BOARD

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### Chairs of regulatory bodies

#### Background

1. Following a consultation exercise, the Board decided at its February meeting to amend the schedule to the Internal Governance Rules (IGRs) to require the chair of each applicable approved regulator (AAR)<sup>1</sup> to be a lay person. At the same time the Board decided to consult on further amendments to strengthen the independence of the appointments and reappointments process. Those amendments would require:
  - regulatory bodies to be responsible for designing the competency requirements for their chair and board members
  - regulatory bodies to be responsible for designing and managing the appointments and reappointments process for their chair and board members
  - the process and decisions on appointments and reappointments of regulatory chairs to be delegated to an independent appointment panel<sup>2</sup>
  - appointment and reappointment arrangements to be approved by the LSB as conforming with the IGRs
2. The consultation also asked whether we should go further and specify how the membership of the appointment panels should be composed.
3. The Board decided to consult on these new proposals in response to feedback received to the lay chairs consultation. Several respondents suggested that the robustness of the appointments and reappointments process was as, if not more, important than the professional background of the chair and other board members for securing independent boards. The Solicitors Regulation Authority (SRA) in particular raised concerns about the existing IGRs allowing the representative body to set the competency criteria for the chair and members of the regulatory board, as well as design and manage the appointments process. It argued that one significant risk of this is that appointments may be made

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<sup>1</sup> An AAR is defined in paragraph 2 of the IGRs as „an Approved Regulator that is responsible for the discharge of regulatory and representative functions in relation to legal activities in respect of persons whose primary reason to be regulated by that Approved Regulator is those person’s qualifications to practise a reserved legal activity that is regulated by that Approved Regulator’

<sup>2</sup> To clarify, we do not intend to set up our own independent appointment panel (as some respondents appeared to believe). We simply mean that the appointment panels used by the regulators should be demonstrably independent from the AARs, in line with best practice

because of a candidate's perceived willingness to advance the interests of the professional body and the profession, instead of their commitment to advance the regulatory objectives aligned to the better regulation principles. The Board saw merit in this viewpoint.

## **Responses**

4. Seven responses were received. The Legal Services Consumer Panel (Panel), SRA and Bar Standards Board (BSB) broadly agreed with the proposals. A joint Chartered Institute of Legal Executives and ILEX Professional Standards (CILEx/IPS) response supported the proposal that appointments and reappointments should be made independently from the professional bodies in principle. However, they thought that further prescription within the IGRs was not necessary to achieve this.
5. The Law Society, CLSB and an individual solicitor respondent opposed the proposals. This was mainly on the following grounds:
  - there is insufficient evidence that a risk to regulatory independence has or will materialise
  - existing IGRs are sufficient to protect against any such risk
  - the proposals will result in a level of structural separation between professional body and regulatory body that was not intended by the Act

## **Main recommendation**

6. Having considered all of the responses, the Executive remains of the view that strengthening the appointments/ reappointments requirements within the schedule to the IGRs is a necessary and proportionate step to safeguard the independence of regulatory boards. We recommend that the schedule is amended to require:
  - regulatory bodies to be responsible for designing the competency requirements for their chair and board members
  - regulatory bodies to be responsible for designing and managing the appointment and reappointment process for their chair and board members
  - the process and decision on appointments and reappointment of regulatory chairs to be delegated to an appointment panel constituted independently of the AAR in line with best practice
7. We do not recommend proceeding with the proposal to require that:
  - appointment and reappointment arrangements must be approved by the LSB as conforming with the IGRs

## **Rationale**

*Independent regulation*

8. We are of the view that, so long as the professional body as the approved regulator retains the final say in setting competencies and designing/ managing appointment/ reappointment processes and approving candidate selections, there is a risk that these powers could be manipulated either to:
  - appoint a board member or chair because of his or her perceived willingness to advance the interests of the professional body and the profession, or
  - prevent the appointment of a meritorious individual because of the perception that he or she holds a contrary view to the professional body and the profession on key issues.
9. This potentially reduces the perceived legitimacy of properly appointed and perfectly able candidates appointed through such a process.
10. The Panel highlighted that the risk is even greater with reappointment, once the AAR has seen the chair and board members in action during their initial terms in office. They suggested that there is a real risk that those seeking reappointment may feel compelled to adjust their behaviour to avoid upsetting the AAR.
11. We consider that the primary responsibility for appointments and reappointments sitting with the professional body means that this risk remains despite other valuable protections such as the requirement for regulatory boards to have a lay majority and a lay chair. The risk remains irrespective of the extent to which AARs follow best practice with regards to other parts of appointment/ reappointment processes.
12. Light is drawn to these risks by the Law Society Council's recent decision not to accept two key proposals about the appointment/ reappointment process for the new SRA chair that had been put forward by the Chair of the Business and Oversight Board<sup>3</sup>. The Council determined that:
  - the final decision on the appointment of the SRA Board chair should be taken by council and not delegated to an independent appointments panel
  - it would not define the process for reappointment of the new chair, or permit the independent panel to do so, until after the chair's first period in the role. This remains open for consideration and decision by Council after the appointment of the successful candidate.
13. In deciding whether and how to strengthen the IGRs, the Board should also consider the significance and likely impact of the risk to independence. The risk is particularly significant in a structure where the professional body is named as the

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<sup>3</sup> The Law Society Council had delegated the responsibility for designing the appointment process to the joint SRA and Law Society Business and Oversight Board (BOB). The BOB oversees the delivery of shared services to both bodies and advises the Law Society Council on oversight of the SRA. See <http://my-sra.com/sra/news/press/business-oversight-board-membership-announced.page>.

approved regulator within the Act. It is essential to have a robust regulatory board determined to regulate independently of the interests of the professional body and the profession despite any pressure put on it by the AAR to do otherwise. The SRA set out in its consultation response real examples where it believes that such pressure has been applied (and repelled).

14. In making its February decision to require that the regulatory board of each AAR is chaired by a lay person, the Board acknowledged the negative impact on the better regulation principles and therefore the regulatory objectives that could be caused by a board and/ or chair that was too closely aligned to the interests of the professional body and the profession<sup>4</sup>.
15. In this context, we consider that the LSB is justified in taking proportionate action to mitigate the risk to the regulatory objectives identified. Contrary to the view of the Law Society and Peter Adams (solicitor) therefore, we think that action is justified, despite the absence of compelling evidence that any existing Board member or chair has been appointed because his or her perceived willingness to advance the interests of the professional body and the profession. We also consider that the scale of the potential risk to independence is such that amendments to the IGRs are a justified and proportionate response.

### *Perception*

16. In making its decision about how to proceed, the Board is justified in taking into account the perception of undue influence in appointment/ reappointment processes. This point was emphasised by both the Panel and CILEx/IPS. We are not aware of any research into public perception of the processes currently used to appoint regulatory board members. However, we consider that the proposed changes are likely to strengthen public, consumer and potential consumer confidence in the independence of legal services regulation and therefore the legal system and the rule of law. A lack of such confidence was one of the drivers for the introduction of the Act. The Panel argued that public confidence will be hard to sustain so long as representative bodies can continue to “install and reappoint those that head the industry watchdogs”. The issue of perception remains even when individual appointees act with upmost independence in practice.
17. Further, these changes send out a strong message to prospective candidates. The SRA and the Panel both argued that existing perceptions of actual or potential undue influence by the representative body are likely to put some meritorious candidates off.

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## **Proportionality**

18. These proposals address an identified risk to regulatory independence that has potentially significant impacts. It is our view that the proposed amendments are proportionate to the risk identified. They build on existing guidance in the IGRs that AARs should consider the extent to which the regulatory boards should be charged with the practical management of appointment and reappointment processes.
19. For at least some AARs, there will be little or no additional cost incurred adhering to the new requirements. Of the bodies that provided details of how the proposed provisions compare to current practice, we note the BSB reported their appointment/reappointment process is already compliant. CILEx/IPS reported that their processes are near compliant and changes are already in train that would make them so. The Bar Council/BSB have independently determined that our proposals constitute good practice.
20. The SRA highlight that their process would not be compliant for the reasons set out in paragraph 11 above. However, the Law Society reported that their assessment panel already follows best practice in line with the Code of the Office of the Commissioner for Public Appointments (OCPA)<sup>5</sup>.

## **Separate approval process for appointment/ reappointment arrangements**

21. We are not recommending that we should require that appointment/ reappointment arrangements must be separately approved by the LSB as conforming with the IGRs before taking effect. We believe that taking this extra step would be a disproportionate response to the potential risk to independence posed by current arrangements. Only one respondent (the SRA) thought that adding this additional layer of bureaucracy was necessary and proportionate.
22. Although this step would be in line with practice in the health sector where the Professional Standards Authority “signs off” processes for the bodies it oversees, we do not think adding this additional layer would be proportionate given that regulatory boards will have responsibility for designing their arrangements. It is also in line with current LSB practice of not seeking to sit on appointment panels for chairs, so that we are not seen in any way as having candidates in place that we can unduly influence (or, conversely, are unable to act against with credibility). We recommend that compliance should be tested as part of the LSB’s process for assessing compliance with the wider IGRs. Regulatory bodies can, of course, raise concerns with and/ or make representations to the LSB at any time if they think that arrangements or proposed arrangements do not comply with the

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<sup>5</sup> <http://publicappointmentscommissioner.independent.gov.uk/the-code-of-practice/>

IGRs<sup>6</sup>. However, this means that we should be more rigorous in reviewing the operation of appointment/ reappointment processes after the event as part of the annual IGR assessment process.

### **Vires and the role of the professional body**

23. The Law Society and Peter Adams (solicitor) argued that the LSB's proposals would "effectively remove any substantive role for the approved regulator". They saw this as creating greater structural independence than was intended by the Act, which designated the professional bodies as approved regulators.

24. We disagree. While safeguarding the independence of regulatory boards, and in turn the exercise of the regulatory functions of that board, the amended rules also provide for the professional body to input fully into the appointments and reappointments process. Guidance within the amended IGR schedule states that:

*The regulatory board should strongly involve the AAR at all stages – fully consulting it on key aspects of the appointments and reappointments process.*

*A proper audit trail of the discussions, the points considered and the final decisions made should be maintained.*

25. Under section 62 of the Act the LSB will have to consider the extent to which an approved regulator has complied with our guidance when we exercise our functions.

### **Applicability**

26. The Law Society and Peter Adams strongly opposed the requirements only applying to AARs. The Law Society stated that it was „at a loss' why the proposals would not be extended to cover the accountancy bodies. It argued that „to have a consultation on the purported basis of increasing the independence of approved regulators while at the same time creating another, less independent class of approved regulators seems irrational.' Peter Adams argued that it was „illusory' to argue that any professional regulator has no representative functions and so did not agree with the distinction drawn between approved regulators and AARs.

27. Similar arguments were made during our consultation on requiring the chairs of regulatory boards. Our answer is the same now as it was then. The IGRs, as formulated in 2009, made a distinction between applicable approved regulators (that discharge both regulatory and representative functions in respect of providers that are primarily regulated by them to undertake reserved legal activities) and other approved regulators (that do not). The reasons for this

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<sup>6</sup> As per the general duty of the IGRs



distinction were laid out in our decision document<sup>7</sup> at the time and remain valid today.

28. Providers that are regulated by accountancy bodies are primarily regulated in relation to accountancy services and not reserved legal activities. It is likely that in the initial stages of any such body being designated an approved regulator for legal services the numbers of their regulated community delivering legal services will be small. Legal services regulatory activity is likely to be a small proportion of these bodies' overall regulatory effort. Being subject to the change to the IGRs would therefore be disproportionate for these bodies. We maintain our commitment to keep this position under review as it may change over time.
29. The Council for Licensed Conveyancers and the Master of the Faculties have no representative functions. Therefore, they are not defined within the IGRs as applicable approved regulators to whom the schedule applies.

### **Implementation**

30. If the recommendations are accepted, the proposed changes to the IGRs would take immediate effect. Transitional arrangements will provide that where a regulator's formal appointment process has been commenced at the time the amendments to the IGRs come into effect, we expect the regulatory body to take over control of the process and consider whether it is content with the arrangements made up to that point. If the regulatory arm is content, there would be no need to amend the process ongoing at that point, even if it would not be fully compliant if it was commenced from scratch. However, we expect that all future appointment and reappointment processes will comply fully with the amended IGRs.
31. We are aware that the appointment process for the chair and board members of the SRA and BSB has already begun. The process for IPS will begin shortly. Therefore, it is important that the Board's decision is made known very quickly. However, no respondent demonstrated that the proposed implementation plan was unworkable.
32. The Panel's response raised questions about the appropriateness of the existing Bar Council/ BSB selection panel. They raised questions over size - seven individuals. Moreover, they report that individuals are variously nominated by the Lord Chief Justice, Bar Council chair, BSB chair and the President of the Inns of Court. They say that this system does not help signal that the appointments are merit-based. It is not instantly clear why this should necessarily be the case, but it

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could be argued that this process of nomination may raise some issues of perception along the lines of those discussed in the lay chairs decision. We make no judgement of the position at this time, but may wish to consider this more fully as part of this year's IGR assessment process.

## **Annexes**

33. A draft summary of responses and decision document can be found at annex 1. A breakdown of key points made by each provider, listed alphabetically can be found at annex 2. Hard copies of all the consultation responses received will be available at the meeting.

23.04.14