The Law Society

LSB Consultation on the appointments and reappointments process for regulatory bodies Board members and their Chairs

The Law Society response
3 April 2014

The Law Society is surprised that the Legal Services Board (LSB) is seeking to change the Internal Governance Rules (IGRs) again despite strong opposition from most consultees to its previous proposals. The latest proposal is not backed by sufficient evidence, goes beyond what was envisaged by Parliament in the Legal Service Act 2007 and is unnecessary. The Law Society is opposed to these changes

In our view, the existing IGRs, certainly for the Law Society, provide clear means of ensuring that Board members of the Solicitors Regulatory Authority (SRA) are appointed in a clear and transparent manner. This process has previously met with approval from the LSB and the LSB has provided no clear evidence for the need for change.

A considerable amount of time and effort has been put into compliance with the LSB's IGRs by both the Law Society and the SRA. Changes to the IGRs will mean revisiting the settlement between the SRA and the Law Society and this will inevitably be time consuming. Given that there is no evidence of any risk to regulatory independence we are surprised and disappointed that the LSB should be creating additional work and red tape for both organisations.

1. Do you agree that the current IGRs allowing professional bodies to design and mange the appointments and reappointments process for regulatory board members and their chairs present a potential risk to regulatory independence? Please set out your reasons.

The current system for appointing regulatory Board members allows both frontline regulators and approved regulators to input fully into the appointments process. The process is run in accordance with best practice principles for public appointments. We are unclear why this process no longer meets with the LSB's approval.

The LSB has failed to provide any evidence that the current system poses any potential risk to regulatory independence. Both the LSB and its consumer panel rely on the SRA's statement that there is a risk that 'appointments may be made because of a candidate's perceived willingness to advance the interests of the professional body and the profession'. However, the SRA has provided no evidence that this has ever occurred, nor is it clear how, on a board with a lay majority, an approved regulator could create a board with a bias towards professional interests. Furthermore, the IGRs require that the SRA is fully consulted on the process for appointments and that the Chair of the Board sits on any appointments panel fully negating any perceived risk.

While there is no evidence of any risk to the independence of frontline regulators, there is clear evidence that the SRA is independent of the Law Society and that it does not feel bound by the views of the Law Society. Furthermore, it is crucial for both the Law Society and for the SRA that the Board is of a high calibre, able to oversee the SRA properly and to hold its executive to account. Thus, when it comes to selecting Board members our interests are very much aligned.

2. Do you agree that all, or some, of the provisions set out in the bullet points above would help to safeguard the independence of regulation from the interests of professional bodies and the regulated professions? Please set out the reasons for your viewpoint.

As noted above, we do not believe that any changes are necessary. More broadly, we are concerned that the IGRs are becoming increasingly prescriptive and detailed. We question whether the powers granted under the Legal Services Act 2007 (LSA) were intended to be used to control the functioning of approved regulators and their frontline regulators to such a degree.

The LSA assigned regulation to approved regulators which had both professional and regulatory functions, as long as there was structural independence of regulatory decision-making as far as practicable. The LSA requires that there be rules to ensure that:

- the exercise of regulatory functions is not prejudiced by the representative functions and

- that decisions in relation to an approved regulator's functions are so far as reasonably practicable taken independently from decisions relating to the exercise of its representative functions.

The LSA is based on Sir David Clementi's recommendation 'Model B+' which includes the framework of separated professional and regulatory functions within one body. In legislating this framework the Government rejected the option to remove regulatory functions from the approved regulators completely. The Government outlined that Clementi's Model B+ would include the advantages associated with independent regulation while also rightly retaining the profession's expertise.

We are concerned that the proposed change appears to go beyond what was envisaged by the LSA by creating a more institutional separation with more limited accountability for the appointments process by effectively removing any substantive role for the approved regulator in the process. For example, the proposals would require that the IGRs be amended to require that 'appointments and reappointments arrangements must be approved by the LSB as conforming with the IGRs, rather than approved regulator involvement. In any event, we note this requirement has not been included in the draft other than assurances in the Consultation Paper that the approval process would align as closely as possible to the 2014/15 IGR certification process.

The approved regulators role in appointing board members has not been shown to prejudice the exercise of regulatory functions or to interfere in the decisions taken by the approved regulator in exercising its regulatory functions. We are therefore unsure how the LSB justifies making rules on this issue.

Further, the Society is concerned that the proposal includes changes which are not fully articulated in the consultation to allow for informed input. For example, the appointment process of a regulatory chair is to be carried out by an independent appointments panel. The draft IGRs do not provide guidance on what is envisaged by the independent panel.

3. Do you think that we need to go further and specify how the membership of appointment panels should be composed?

As noted above, we do not believe that there is any justification for changing the current rules for appointments.

4. Are there any other safeguards that should be put in place?

As noted above, we do not believe that there is any evidence to suggest that the current system for appointments and re-appointments has been shown to put at risk regulatory independence.

5. How do the above provisions compare to current practice?

Currently, appointments within the Law Society are governed by a panel with an independent chair, a Law Society representative, an SRA representative and an accredited assessor. The LSB has indicated that it was satisfied by these arrangements. They accord with the current requirements of the IGRs that there should be an element on the panel which is completely independent, an element from the regulatory board itself and overall a non-representative majority on the panel (including the independent element). It is unclear to us how the SRA would wish to alter these arrangements.

6. Is there any specific circumstance where one or more of the proposed changes would cause particular issues in terms of proportionality and/or workability?

A considerable amount of time and effort has been put into compliance with the LSB's IGRs by both the Law Society and the SRA. Changes to the IGRs will mean revisiting the settlement between the SRA and the Law Society. This will inevitably be time consuming and will distract both organisations from their core goals. Given that there is no evidence of any risk to regulatory independence we are surprised and disappointed that the LSB should be creating additional work and red tape for both organisations. In future, we would hope the LSB would consider undertaking an impact assessment in relation to changes to the IGRs, to show the cost/benefit.

7. Do you agree with the proposed implementation plan? Please provide reasons.

We note that these rules only apply to applicable approved regulators (AAR). We are at a loss to understand why, given that independence in the exercise of the regulatory function is the corner stone of the LSA, that this principle is ignored because the regulator does not simply regulate lawyers. A client will have the same needs whether they use a solicitor or an accountant to undertake their probate work. If independent regulation is deemed a requirement to ensure client protection for a solicitor's client, it is not clear how an accountant's client differs.

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.

8. Are you aware of any specific practical issues that this implementation plan may cause for particular regulators in the context of currently scheduled appointments/reappointments?