

The Honourable Society of Lincoln's Inn

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Dear Mr Mackay

Chairs of Regulatory Bodies: Consultation

Lincoln's Inn welcomes the opportunity to respond to the above consultation document. I enclose a paper which represents the considered view of this Inn, after much thought and deliberation by a number of our Benchers and members.

I would add that the Inn also endorses the views expressed on behalf of all the Inns by the President of the Council of the Inns of Court, whose response I know is being sent to you separately.

Yours sincerely

A handwritten signature in black ink, appearing to read 'The Lord Grabiner'.

The Lord Grabiner QC

Enc: Lincoln's Inn's response to Consultation

copy to: The Rt Hon Lord Justice Pitchford, President of COIC
Treasurers of the Inner Temple, Middle Temple and Gray's Inn
Under/Sub-Treasurers
Director of COIC

THE RESPONSE OF LINCOLN'S INN

TO THE LSB CONSULTATION

On Lay Chairs

1. This is the response of Lincoln's Inn ("L.I.") to the Consultation paper issued by the Legal Services Board ["LSB"] on the proposal of the LSB to amend its Internal Governance Rules ["IGRs"] to require that the Chairs of the Boards of the regulatory arms of each applicable approved regulator be a lay person.
2. The response of L.I. can be shortly stated for the reasons which hereafter appear.

The Consultation Paper proposals:

3. The Consultation Paper proposes that the LSB's Internal Governance Rules ("IGRs"), which presently require that the majority of members of regulatory bodies are lay people, should be amended to require that the Chairs of the regulatory bodies should be 'lay'. The effect of this change would be to disqualify persons who may at any time in their careers have qualified to carry out any 'reserved legal activity' of whatever type, for however short a time and whether they have practised or not. This disqualification is to apply however well qualified for the role the person might otherwise be.
4. **The grounds for the proposed amendment:** the LSB argues that this change should be made on the basis of its analysis that the approved regulators are "still tied too closely to their individual branches of [their] professions" so that the speed which the LSB desires of progress towards reform is impaired.
5. The LSB recognises that its view "is ultimately a matter of judgment" – that is to say *its* judgment - that there is no empirical evidence to support it.
6. It proposes effecting a change to the IGRs pursuant to the rule making power it was granted by section 30 of the Legal Services Act 2007.

The Response of L.I.

7. The response of L.I. is two-fold: the first ground of objection goes to the entitlement of the LSB to change the IGRs in this way. The second is an objection on the merits.

The First Ground: the legal capacity of the LSB to effect a change:

8. The relevant capacity of the LSB arises as follows.

a. The only power in the LSB to make Internal Governance Rules is set out in section 30 of the Legal Services Act 2007. Although reference is made to the section in footnote 1 to the LSB's paper, the terms of the section are not quoted anywhere in the paper.

b. Section 30 is in the following terms:

- (1) The Board must make rules ("Internal governance rules") setting out requirements to be met by approved regulators for the purpose 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.
- (2) The internal governance rules must require each approved regulator to have in place arrangements which ensure –
 - (a) That the persons involved in the exercise of its regulatory functions are, in that capacity, able to make representation to, be consulted by and enter into communications with the Board, the Consumer Panel, the OLC and other approved regulators, and
 - (b) That the exercise by those persons of those powers is not prejudiced by the approved regulator's representative functions and is, so far as reasonably practicable, independent from the exercise of those functions.
- (3) The internal governance rules must also require each approved regulator –
 - (a) To take such steps as are reasonably practicable to ensure that it provides such resources as are reasonably required for or in connection with the exercise of its regulatory functions;
 - (b) To make such provision as is necessary to enable persons involved in the exercise of its regulatory functions to be able to notify the Board where they consider that their independence or effectiveness is being prejudiced.

9. We have set out the terms of section 30 because it explicitly defines the purpose for which the authority to make rules has been given. The LSB has not claimed any power to make an amendment to the IGRs apart from that set out in this section. It is plain and obvious, from the wording of the section, that the IGRs created pursuant to that power were limited by the objectives explicitly and clearly mentioned in the section; the rules were correctly made and have secured the objective for which the rule-making power was granted.

10. It is also plain that the LSB was granted by section 30 no additional power whatsoever to make IGRs, either generally or in particular to secure that the chair of any approved regulator was a lay person.

11. Since the wording of the section is so plain and obvious, it is a matter of concern to L.I. that either the LSB does not understand the scope of its powers under the Act or does understand it but does not feel it is in its interests to disclose the limitation on its powers to

those whose views are being sought in the present consultation. If the latter were to be the case, it would give L.I. additional grounds for questioning the judgment of the LSB.

12. In either result, L.I. 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.

The Second Ground: A Merits Based Response:

13. Although, having regard to the point set out above, a merits based response is not strictly necessary, a critique of the merits can be shortly stated as follows:
 14. First: L.I. notes that there is no suggestion in the Consultation Paper that any approved regulator has failed to discharge its obligations or functions imposed by section 28 of the Legal Services Act 2007. Nor has the allegation of such a failure been advanced against any chair of any approved regulator.
 15. The complaint of the LSB is that the objectives which it particularly seeks to achieve have taken longer to achieve than it hoped. The response of L.I. is that this criticism is not necessarily a valid criticism of any regulator; but it is rather an indication of unrealistic expectations on the part of the LSB, which, in the view of L.I., appears to be determined to push forward its reforms at such a speed as would be likely to prejudice the quality of legal services, which the LSB is also under an obligation to maintain.
 16. Secondly, an amendment which disqualifies persons who would otherwise be eminently suited for appointment as chair of an approved regulator, merely on the ground that he/she has at some time in his career been authorised to carry out any reserved activity whether he/she practised in the activity or not, is neither rational nor proportionate. Nor is it in the public interest because, inter alia, the proposed measure would narrow the range of competent and appropriate candidates who could be appointed.
 17. Thirdly, L.I. notes that appointment to the Boards of Regulators is closely scrutinised by the Office of the Commissioner for Public Appointments in order to secure that only persons with the appropriate expertise and qualifications for appointment to the Board are considered. The majority of members of the Board are required to be lay persons. It is noted that the appointment of the current chair, Baroness Deech, was made not by the Bar but by an independent party, the Lord Chancellor himself.
 18. Fourthly, the LSB contends that it has reached its conclusion as a matter of judgment - that is to say its judgment, on which others may not agree: it accepts that it has not any empirical evidence. L.I. is surprised that the LSB wishes to make such a change as that proposed without evidence, empirical or otherwise. The absence of evidence suggests that the LSB's judgment is not to be relied upon.

19. L.I. does not accept that the judgment of the LSB is a correct or balanced judgment. It comes to this conclusion for a number of reasons, including
- a. The fact that the LSB has made a judgment before any collection or analysis of evidence, and accordingly, that its judgment is unsupported by any analysis of evidence. L.I. recollects that the chairman of the LSB repeatedly insisted that the Legal Education and Training regime was “broken” and “not fit for purpose” - a judgment which is at variance with the conclusions of the LETR on a strictly evidence based investigation.
 - b. the fact that the LSB issued this consultation without disclosing to consultees that it has no power to amend the IGRs.
 - c. the fact that the chairman of the LSB has authorised the issue of a press release to announce the present consultation in which he is quoted as saying that “this proposal is not intended as a criticism of any current or past Chair” when the detail of its proposal is explicitly to criticise those who are current and past Chairs, by asserting that it is necessary to have rules that would exclude these individuals from appointment.

A Response to the Questions posed in the paper:

- d. Question 1: “Do you agree with the proposed change to the IGRs in order to deliver lay chairs”:
 - i. To this question L.I. responds (a) No; (b) a change would be ultra vires the LSB and (c) would be contrary to the merits.
- e. Question 2: “Do you think the proposed change should take immediate effect or only be applicable to future appointments?”
 - i. To this question L.I. responds that the LSB does not have the power to make any change to the rules so that the question does not present a permissible option.
- f. Question 3: “Do you agree that the requirement for lay chairs to apply only to the AARs?”
 - i. To this question L.I. responds: that the LSB does not have the power to make any change to the rules so that the question does not present a permissible option.