Legal Services Board consultation on lay chairs for front line legal regulators

The Law Society Response

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The Law Society is surprised that the Legal Services Board (LSB) is seeking to change the Internal Governance Rules (IGRs) further at this stage and to restrict the choice of approved regulators in the way proposed. The proposal is not backed by sufficient evidence, goes beyond what was envisaged by Parliament in the Legal Service Act 2007 and is unnecessary. It also calls into question the strength of the remainder of the regulatory boards, both of which have lay majorities.

In our view, the existing IGRs, certainly for the Law Society, provide clear means of ensuring that chairs of the Solicitors Regulatory Authority (SRA) are appointed in a way which looks for all the qualities that a good chair provides. These qualities are not removed from lawyers on qualification and not necessarily lost during their career. There are many examples of lawyers acting as outstanding, impartial chairs and we do not believe that the regulators should be restricted from appointing them, should they prove to be the best candidates.

1. Do you agree with the proposed change to the IGRs in order to deliver lay chairs?

The Law Society does not agree with the proposed changes to the IGRs. Chairs of approved regulators should be selected solely on the basis of merit. We do not believe that a lawyer should be the default choice as chair nor do we believe that rules should require the chair to be a lay person. We want to see a chair with the right set of skills to lead the organisation and tackle the challenges that face it at that moment in time. We do not think a regulator should be prevented from choosing the best candidate by the implementation of a rule of this sort.

We agree that chairs must have leadership experience and an understanding of modern regulatory practice. Possessing these skills and being a qualified lawyer are not mutually exclusive. Moreover, a chair with experience of working in the profession may be better placed to look critically at the profession's arguments from a position of knowledge.

The Law Society is surprised and concerned that the LSB has issued a consultation on changing the IGRs based on very limited evidence. The LSB's evidence is largely based on its 'experience' with limited examples of what this experience might be and how forcing approved regulators to have lay chairs to would change things.

We believe that the LSB needs to consider carefully what problem it is actually trying to solve and whether this is the most appropriate way of doing so. There are the following possible concerns that the LSB may have:

1. The appointments process itself is so close to the professional body that it infringes the requirements of the Legal Services Act. If this is the case, the processes themselves need to considered, not the career history of individual candidates. In fact, the Law Society's processes are very clear and transparent and it is hard to see how the opportunities for the Society to affect the appointment could be more limited, short of taking away the Society's approved regulator role altogether.

2. Individual chairs are too close to the professional body. We doubt that, if this is indeed the case, this will inevitably be as a result of the individual's professional qualification. Professional bodies are just as capable of engaging

closely with lay people as with lawyers and it is very possible that lay people may be less critical of lawyers' arguments than lawyers would be. The SRA's current Chair is a solicitor and could certainly not be accused of being too close to the Law Society. Moreover, the chairs are backed by Boards appointed according to best public sector practice with a majority of lay people. If there are examples of the professional body actually influencing the regulatory board in a way which is contrary to the Legal Services Act, this should be investigated and dealt with. Preventing lawyers being chairs will not inevitably address that problem.

3. A perception that lawyers will inevitably act in what they perceive to be the profession's interest. This is based on a view that there is a single professional interest, shared by the whole profession and that a lawyer who has achieved the sort of pre-eminence and independence of mind to be credible for appointment, will seek to further that. In our experience, there are very few cases where there is such a single unanimous interest – and, if there were, the regulator would not be doing its job if it did not take that seriously. In many cases (e.g. referral fees), the profession is split. The decisions taken over QASA, moreover, were taken by both boards against the wishes of the overwhelming bulk of the profession. Outcomes Focussed Regulation was introduced by lawyer chairs of the SRA Board to the deep scepticism of the profession. There may be a popular conception that lawyers will inevitably act in the interests of their profession. But we believe that the LSB should look at the evidence and the fact that those chairs are appointed independently, have strict procedures to preserve their independence and are backed by boards with lay majorities.

4. Experience of boards departing from the LSB's preferred approach. We believe the LSB needs to be careful, if this is one of their reasons, of over-reaching their role. The legal services environment is complex. We live in a pluralistic society. There will inevitably a number of legitimate approaches to any problem and the current regulatory structure invites tensions between the different regulatory bodies. The fact that an approved regulator does not slavishly follow the LSB's approach does not mean that its chair is necessarily following the profession's line. It may reflect a rational, but different approach based on evidence. We think that it is likely that these tensions and different approaches will remain even if the chairs are all lay. Parliament has given the approved regulators the leading role in regulating their profession and the LSB has, rightly, been slow to second-guess them. The LSB should not seek to address disagreements by seeking to change who can be appointed as chair. Indeed, even if it does, it is unlikely in fact to change behaviours.

In short, the LSB needs to look at the independence of the appointments mechanisms, the independence of action of regulators, and the composition of their boards. If these are sound, then it is hard to see what limiting the people who can be appointed as chair will achieve. If there is real evidence of breach of the provisions of the Legal Services act, then that should be investigated and acted upon. Tensions and disputes are inevitable in this environment and the LSB should be mature enough to recognise this. These will arise whether or not the chairs are lawyers.

The LSB is in 'no doubt that reform would have come further under regulators not tied to their particular professions'. Yet there is no evidence that the Council for

Licensed Conveyancers (CLC), a body unfettered with ties to a professional body, has gone further or faster in reforming its regulatory framework. Regulators are naturally cautious about regulating new types of entities and using new regulatory approaches, as these changes bring with them the risk of regulatory failure and client harm. It is often the role of the representative body to be more open and to push for change, as the Law Society did by lobbying for the introduction of ABSs.

Finally, there is already a perception internationally that the loss of involvement of the profession from the regulatory system adversely affects the independence of the profession from Government. If lawyers are barred from securing leadership positions in regulatory bodies this view will be reinforced and there is a danger that the credibility of the profession internationally will diminish with adverse effects on the professions' competitiveness. The LSB should have stronger evidence of a problem before imposing this change.

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

If the change were to be made, it should apply to the next appointed chair. We are concerned that, if the rule came into immediate effect, the LSB would allow a non-lay chair to remain in place provided they did not act 'unreasonably'. It is not the LSB's role to sit in judgement over the chair of an approved regulator.

3. Do you agree that the requirement for lay chairs to apply only to the AARs?

We do not agree. We are at a loss to understand why, given that independence is the corner stone of the Legal Services Act 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.

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

No comment.