

Appointments and reappointments to regulatory boards

Summary of responses to consultation on amendments to the Internal Governance Rules relating to the processes for appointing and reappointing regulatory board members and their chairs and decision document.

Contents

Introduction and background.....	3
Summary of responses to consultation	5
LSB decision	5
What we are doing.....	5
What we are not doing.....	7
Those not affected by the change.....	7
Summary of responses to questions posed	9
Annex 1: List of respondents.....	18
Annex 2 Internal Governance Rules (as amended)	19
Schedule to Internal Governance Rules	24

Introduction and background

1. The Legal Services Act 2007 (the Act) imposed on the Legal Services Board (LSB) a duty to make rules to ensure that legal services regulation is carried out independently from the exercise of professional representative functions¹. These are our Internal Governance Rules (IGRs) 2009, as amended in February 2014². Independent regulation is central to the aims of the Act. The perception that the regulation of legal services was too closely aligned to the professional interest, rather than the public or consumers, was a significant driver of the reforms brought in by the Act.
2. The IGRs include a range of requirements for regulators to meet. Central to these is a duty to both have in place arrangements that observe and respect the principle of regulatory independence and to act in a manner compatible with that principle at all times. The IGRs explain the principle of regulatory independence as being that 'structures or persons with representative functions must not exert, or be permitted to exert, undue influence or control over the performance of regulatory functions, or any person(s) discharging those functions'³.
3. The schedule to the IGRs contains detailed principles, rules and guidance. The schedule applies only to the applicable approved regulators (AARs)⁴. Since their inception the IGRs have imposed a requirement for the regulatory boards of the AARs to have a majority of lay members. In February 2014 the LSB amended the IGRs for the first time to introduce a requirement that the chairs of the regulatory boards were part of the lay membership. Almost four years' experience of overseeing regulation in the legal services sector led us to conclude that having lay people as chairs would be likely to provide for greater regulatory independence and help to deliver the regulatory objectives aligned to the principles of better regulation and best regulatory practice⁵.
4. Our latest consultation, which closed on 3 April 2014, proposed that the IGRs are amended to strengthen the independence of the process for appointing and

¹ Section 30, Legal Services Act 2007

² http://www.legalservicesboard.org.uk/Projects/independent_regulation/index.htm#igr

³ This contrasts with the more widely understood notion of regulatory independence as being independence from the executive arm of government. See Yarrow, George *Response to the MoJ's legal services review call for evidence* (2013) at p9

⁴ 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'

⁵ Further details of the rationale for and background to the LSB's decision to require lay chairs can be found in our October consultation paper:

http://www.legalservicesboard.org.uk/what_we_do/consultations/pdf/lwb_consultation_on_lay_chairs_08_10_13.pdf and subsequent decision document http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/20140219_LSB_Lay_Chairs_Summary_Of_Responses_And_Decision.pdf

reappointing regulatory board members and their chairs. We 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.

5. At present this process may be controlled by professional representative bodies. It is our view that the proposed change would help secure demonstrably independent and robust boards. Our consultation proposed that the IGRs are amended to require the following:

- 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
- appointment and reappointment arrangements to be approved by the LSB as conforming with the IGRs

6. We proposed that the changes would be to the schedule to the IGRs, and therefore would only apply to the AARs. We also proposed that any changes would take immediate effect. However, for any approved regulator that would have to change its current processes to comply, we would accept a commitment to make the necessary changes so as to apply to the next scheduled appointment/reappointment after the changes are introduced. Where an appointment process was in train at the point the changes came into effect, the regulatory body must take over control. Part of this would be to consider whether they were content with the arrangements made up to that point.

7. In its response to our consultation on lay chairs for the regulatory boards the Solicitors Regulation Authority (SRA) suggested that the schedule to the IGRs could contain greater specificity about the composition of appointment panels. An example given by the SRA was a requirement for an independent chair and a lay majority on the panel, including people with broad regulatory and consumer experience. Our consultation on appointments and reappointments to the regulatory boards therefore asked for views on whether we should go further and specify how the membership of appointment panels should be composed.

Summary of responses to consultation

8. Seven responses were received to this consultation. Of those the SRA, Legal Services Consumer Panel (the Panel) and the BSB were in favour of the proposed changes. The joint response from the Chartered Institute of Legal Executives and ILEX Professional Standards (CILEx/IPS) supported the principle that appointments to the regulatory boards should be made independently from the professional bodies, but argued that further prescription by LSB was not necessary. The Cost Lawyers Standards Board (CLSB) argued against the proposals on the basis that it paid for the services of its chair and would 'not allow any paid person who has not been considered, interviewed, vetted etc. by the CLSB to be forced upon them'. The Law Society and Peter Adams (solicitor) also disagreed with the proposals.
9. The issues raised by respondents and the LSB's response are explored later in this document under the heading of 'summary of responses to questions posed'. We have not been persuaded by the arguments against the proposed change to the IGRs that some respondents put forward.

LSB decision

What we are doing

10. Having considered all of the consultation responses received, the LSB has decided to amend the schedule to the IGRs 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 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 appointment panel independently constituted in line with best practice
11. We remain of the view that this is a necessary and proportionate step to safeguard the independence of regulatory boards, and in turn the exercise of the regulatory functions of those boards, from the representative interests of professional body and the regulated profession. We consider that the changes are more likely to deliver independent regulation in the public and consumer interest. This should strengthen public confidence in the independence of legal services regulation and therefore the legal system.

12. The changes build on existing guidance in the IGRs that approved regulators should consider the extent to which the regulatory boards themselves should be charged with the practical management of the appointments and reappointments processes. We have also incorporated much of the guidance from the LSB chief executive's letter from 2008 into the amended IGRs, so that the letter no longer needs to be referred to separately.
13. We note that the Bar Standards Board (BSB) reports its appointments and reappointments process is already compliant with the new requirements. The Bar Council and BSB have independently determined that this is good practice. CILEx/IPS stated that their processes are near compliant and changes are already in train that would make them so.
14. The amended schedule provides for the AARs 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.*
15. The guidance also says that at least one representative of the AAR should always form part of the appointment panel. Under section 162 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.
16. The complete IGRs version three: 30 April 2014 can be found at annex 2 and have been published on the LSB website⁶. This replaces version two of the IGRs dated 20 February 2014. Version three takes immediate effect. All future appointments/ reappointments must follow a process compliant with the amended IGRs. 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.

6

http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/Submissions_Received_To_The_Consultation_On_Amendments_To_The_Internal_Governance_Rules.htm

17. We have clarified at paragraphs 43 and 44 what we mean by requiring the process and decisions on appointments and reappointments of regulatory chairs to be delegated to an independent appointment panel.

What we are not doing

18. 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 was necessary and proportionate. Compliance will 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 IGRS⁷.

19. We would like to clarify that the LSB will not sit on appointment/reappointment panels and decisions to appoint/reappointment candidates will not have to be approved by the LSB.

20. We do not propose to specify how the membership of appointment panels should be composed. The IGR schedule guidance already states that account should be taken of the Code of the Office of the Commissioner for Public Appointments (OCPA) so far as it is relevant. In future, the regulatory boards of the AARs will be responsible for determining the composition of each appointments panel. These boards will consist of a lay chair and a lay majority once version two of the IGRs is fully implemented. In this context, we do not consider it to be proportionate to add further prescription to the IGR schedule on this point. We have clarified the current IGR guidance, as explained further in paragraphs 43 and 44 below.

Those not affected by the change

21. The changes detailed above are to the schedule to the IGRs, and therefore only apply to the AARs. The Association of Chartered Certified Accountants (ACCA), the Institute of Chartered Accountants of Scotland (ICAS) (should they become active approved regulators/ licensing authorities under the Act) and the Institute of Chartered Accountants in England and Wales (ICAEW) (should they be designated) are excluded. This is because the providers that these bodies regulate 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

⁷ As provided for in the general duty of the IGRs

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.

22. The Council for Licensed Conveyancers (CLC) and the Master of the Faculties are not constitutionally tied to a professional body with representative functions. Therefore, they are not defined within the IGRs as an applicable approved regulator to whom the schedule applies.

Summary of responses to questions posed

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

23. The SRA and the Panel agreed that the current IGRs present a risk to regulatory independence. The Panel shared the view of the SRA that there is a risk that a candidate “may be appointed because of his or her perceived willingness to advance the interests of the professional body and the profession”. The Panel argued 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 was a risk that those seeking reappointment may feel compelled to act in a way so as to secure the AAR’s support for their reappointment.
24. The SRA argued that the current operation of the appointment and reappointment process for its new chair presented a risk to regulatory independence. In their view this risk was demonstrated by the Law Society Council⁸ changing two key aspects to the process developed by the joint SRA and Law Society Business and Oversight Board⁹. First, the Council required that the final decision on the appointment of the new SRA chair be taken by the Council and not delegated to an independent appointments panel. Second, the Council declined to define prior to the initial appointment the process for reappointment of the new chair, or to permit the independent panel to so do. It has left the matter open for consideration and decision by Council after the appointment of the successful candidate.
25. The SRA put forward the view that the potential risk to independence was particularly significant because the determination of the chair and the board to exercise its regulatory functions independently of the interests of the professional body and the profession was a key protection against pressure put on it by the Law Society to do otherwise. The SRA set out examples of when it believes that such pressure has been applied (and repelled).
26. The SRA and the Panel both argued that perceptions of potential undue influence by the representative body are likely to put off some meritorious prospective

⁸ The Law Society council agrees the strategic direction of the Society’s work, including the annual business plan and budget, changes to Law Society policy and rules, and where we focus our efforts on behalf of our diverse membership. See <http://www.lawsociety.org.uk/about-us/council-elections/>

⁹ The joint SRA and Law Society Business and Oversight Board 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>

candidates. The Panel further argued that public confidence would be hard to sustain so long as representative bodies can continue to “install and reappoint those that head the industry watchdogs”.

27. On the other hand, the Law Society argued that no evidence had been presented to show that the current system posed a threat to regulatory independence. They argued that there was no evidence a candidate had ever been appointed because of his or her perceived willingness to advance the interests of the professional body and the profession. Peter Adams (solicitor) similarly said that there was no evidence to support the assertion of a potential risk to regulatory independence.
28. Both the Law Society and Peter Adams argued that sufficient protection against a lack of independence already existed. Both highlighted that the Law Society already followed best practice. The Law Society went on to emphasise that the existing IGRs require the chair of their regulatory board to sit on any appointments panel, and also that the regulatory board is fully consulted. They further suggested that as all regulatory boards must have a lay majority it was difficult to see how a board could be created with a bias to the professional interest. CILEx/IPS supported the proposal that in principle appointments and reappointments should be made independently from the professional bodies. However, they thought that further prescription within the IGRs was not necessary to achieve this.
29. The CLSB stated that the provision in the current IGRs requiring that the process is “demonstrably free of undue influence” clearly sets out the independence requirement and provides a monitoring mechanism. The BSB said that this requirement provided a high test against which an objective assessment of compliance should be possible. However, the BSB went on to say that as other regulators have found this not to be the case, stronger requirements seemed necessary.

LSB response

30. In deciding whether and how to strengthen the IGRs, we have also considered the significance and likely impact of the risk posed. The risk to independence is particularly significant in a structure where the professional body is named as the 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.

31. Our decision in February 2014 to require that the regulatory board of each AAR is chaired by a lay person¹⁰ acknowledged the negative effect on the better regulation principles and therefore the regulatory objectives that could result from a board and/ or chair being too closely aligned to the interests of the professional body and the profession.
32. Irrespective of the other protections in place and the extent to which other parts of appointment and reappointment processes follow best practice, this risk remains so long as the representative body has the final say in setting competencies, and making process and selection decisions. It is of concern that the Law Society Council has insisted that it must actively approve the selection decision made by a properly constituted independent appointment panel, with a Law Society representative on it, in relation to the new SRA chair. It is also of concern that the Law Society Council declined to establish transparent reappointment criteria in advance of appointments being made.
33. We agree that it is important that the appointment/reappointment is perceived as being independent as well as being independent in practice. We think that these changes will send a clear message to both the public and to prospective candidates about the key role independence has in the regulation of legal services. 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. We also consider that the changes will similarly strengthen the confidence of prospective candidates.

Question 2: Do you agree that all, or some, of the provisions set out in the bullet points at paragraph 21 would help to safeguard independent regulation? Please set out the reasons for your viewpoint.

34. The SRA considered that collectively all of the provisions remove the risk of the professional body and the profession exercising undue influence over appointments and reappointments. They stated that all should be implemented. They also emphasised that the requirement to delegate decision making to an independent panel provided a guarantee of transparency as well as helping to safeguard the independence of regulation.
35. The Panel agreed that regulatory bodies should be responsible for designing the competency requirements for their board and for designing and managing appointment and reappointment processes. They said that this would help

10

http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/20140219_LSB_Lay_Chairs_Summary_Of_Responses_And_Decision.pdf

safeguard independence. The Panel also argued that it would likely lead to better quality appointments as regulation and representation are different roles with different skill sets. The regulatory body is best placed to decide what type of individual is needed for regulatory roles. The Panel endorsed delegating process and decisions on appointment and reappointment of regulatory chairs to an independent appointment panel. They highlighted the benefits of an OCPA compliant process and argued that this would promote consistency, equality and fairness. However, the Panel also warned that the full OCPA process could be disproportionate for smaller approved regulators.

36. Both the Law Society and Peter Adams stated that as they did not see any evidence of a problem (see their answers to question 1), none of the provisions proposed were necessary. Further, both claimed that the LSB's proposals went beyond what was envisaged by the Act. They argued that Parliament deliberately assigned regulation to approved regulators with both professional and regulatory functions, as long as (as far as practicable) there was structural independence of regulatory decision-making. Section 30 of the Act requires the LSB to make rules to ensure that the exercise of regulatory functions is not prejudiced by the representative functions. Decisions in relation to an approved regulator's regulatory functions must, so far as reasonably practicable, be taken independently from decisions relating to the exercise of its representative functions. Between them, the Law Society and Peter Adams argued that:

- Our proposals went beyond this remit
- The suggested provisions would create greater institutional separation than was intended, effectively removing any substantive oversight role of the parent professional body
- The provisions were ultra vires
- The appointment/ reappointment process is not of itself the exercise of a regulatory function
- Existing protections were sufficient
- The consultation paper did not articulate what was meant by an independent appointment panel

37. Of those that commented, only the SRA supported the proposal that appointment/ reappointment arrangements must be approved by the LSB as conforming with the IGRs. The Panel stated that this additional layer of bureaucracy would not be necessary if the other measures were put in place to safeguard independence. The BSB highlighted that there was already a process for assessing compliance with the IGRs. They argued that the new provisions were not sufficiently different or risky to require a separate, before the event, process. Two respondents mistakenly thought that the LSB was proposing that it must approve the appointment, as opposed to the process.

LSB response

38. We have decided to proceed with our proposal to amend the guidance to the IGR schedule.

39. Section 30 of the Act imposes a duty on the LSB to make rules to ensure:

(a) that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions

(b) that decisions relating to the exercise of an approved regulator's regulatory functions are as far as reasonably practicable taken independently from decisions relating to the exercise of its representative functions.

40. Plainly, the independence of regulatory functions from representative functions could be jeopardised if regulatory board members responsible for exercising regulatory functions are themselves not independent. Measures to ensure this does not happen therefore fall within the scope of section 30. The risk to independence will be present as long as the primary responsibility for appointments/ reappointments sits with the AARs, despite other valuable protections such as the requirements for boards to have lay chairs and lay majorities. We consider that this risk remains irrespective of the extent to which AARs follow best practice with regards to other parts of the appointment and reappointment process.

41. We note the concerns raised by some respondents about the proportionality of our proposals. However, many of the regulatory bodies already have the key tenets of our proposals in place and will be required to change very little in their processes. Guidance for regulators in this area has also been made more user friendly: we have incorporated the guidance from the LSB chief executive's letter from 2008 into the amended IGRs, so that the letter no longer needs to be referred to separately.

42. The proposed changes will ensure that responsibility for designing competencies, and designing and managing the appointment and reappointment process, formally sits with the regulatory boards and not the representative bodies. In particular, the right to approve or reject decisions reached by appointment panels will be taken away from representative bodies.

43. The amended guidance will state that process and decisions relating to appointments and reappointments to regulatory boards should be delegated to an independent appointment panel or equivalent. As requested by some respondents, we set out further details of what we mean by independent appointment panel below:

- We clarify that we do not intend to set up a wholly new appointment panel. We simply expect that the panels already used by regulators for appointments and reappointments to their boards will be constituted in line with best practice and will be compliant with existing guidance within the IGR schedule
- Account should be taken of the OCPA Code so far as it is relevant
- It is essential that any appointment process for members of a regulatory board must be – and must be seen to be by outside observers including the general public– capable of producing a demonstrably qualified and genuinely independent regulatory organisation
- In line with the OCPA Code the external perspective provided by having at least one appointment panel member that is independent of both the AAR and the regulatory board will help regulators to demonstrate the independence of their panel and that best practice for public appointments has been taken into account
- Lay representation and an external perspective on each panel will also help regulators to demonstrate the independence of their panel and that best practice for public appointments has been taken into account
- Independence and the perception of independence will be greatly aided by regulatory boards publishing clear criteria for the roles they have available, as well as details of the selection process. This information should be available regarding both board members and chairs and also for members of appointment panels. Concerns about some existing practice in this area were raised by the Panel in response to questions 4 and 5
- We have expanded the existing illustrative guidance within the IGRs slightly to:
 - clarify the above points
 - incorporate much of the guidance from the LSB chief executive’s letter from 2008, which no longer needs to be referred to separately

44. Delegating responsibility to an independent panel is a matter of best practice.

The two new rules within the IGRs that give responsibility for appointments and reappointments to the regulatory board rather than the AAR address the risk of undue influence within the appointment and reappointment process. AARs will maintain a key role as members of appointment panels. They will continue to be consulted at each stage. Future systems for appointing regulatory board members will continue to allow both approved regulators and their regulatory arms to input fully into the appointments process.

45. We would like to clarify that the LSB will not sit on appointment/reappointment panels and decisions to appoint/reappointment candidates will not have to be approved by the LSB.

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

46. Of the responses that answered this question, only the Panel said that the LSB should specify how the membership of appointment panels should be composed. They considered that we should dictate that panels should have an independent chair and a lay majority including people with broad regulatory and consumer experience. The Panel said that this would send a strong message about the independence of the appointment process. They also stated that this would help deliver a quality selection process.
47. The BSB suggested guidance requiring a lay chair or lay people experienced in the recruitment of public appointments would be advantageous in demonstrating independence of the appointment panel and would serve to ensure current best practice is adopted.
48. The Panel suggested that the LSB should review the Bar Council/ BSB's appointment panel selection process. They highlight that this panel is made up of seven individuals variously nominated by the Lord Chief Justice, Bar Council chair, BSB chair and the President of the Inn's Council. They argued this number seems too large and that the nominations system does not signal that the appointments are merit based. This is despite the system having safeguards such as requiring a lay chair and an OCPA accredited member.

LSB response

49. We do not intend to specify how the membership of appointment panels should be composed. We have outlined our expectations for appointment panels above in our response to question two.
50. We note the Panel's concerns about the nominations aspect of the Bar Council and BSB's appointment panel selection process. We will consider this as part of the next round of the IGR self certification process.

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

51. The Panel was the only respondent to suggest further safeguards. They suggested that marketing for the recruitment process should be led by the regulatory arm with adverts jointly branded by the regulatory and representative arms. They asserted that the job advertisement is the most visible part of the process and will shape the perception of the public candidates about the independence of the regulator from the profession. Therefore, it should be clear that the regulatory board is responsible for recruitment. As the professional body remains the approved regulator under the Act it would be transparent to adopt joint branding.

LSB response

52. The LSB does not disagree with the sentiments of the Panel. However, in a process owned and managed by the regulatory board, we do not think that it would be proportionate for the IGRs to include this level of specificity.

Question 5: How do the above provisions compare to current practice?

53. The Law Society reported that appointments are governed by a panel with an independent chair, a Law Society representative, a SRA representative and an accredited assessor. The SRA stated that the arrangements currently approved by the Law Society Council do not meet the LSB's proposed requirements for the reasons set out in its answer to question 1.

54. Both CILEx/IPS and the BSB stated that their arrangements were already compliant or in the process of becoming compliant with the LSB's proposals. The Panel noted that although they would not expect details of current practice to be displayed prominently on the regulators' websites, there were mixed levels of transparency about how each AAR deals with appointments and reappointments.

LSB response

55. We are pleased that based on the responses received some AARs and regulatory bodies have already independently adopted our proposals as standard good practice.

Question 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?

56. CILEx/IPS thought that the outcomes wanted could be achieved without further prescription within the IGRs so argued that the proposed changes may impose disproportionate cost. The Law Society argued that changes to the IGR would require their settlement with the SRA to be revisited, which would 'distract both organisations from their core goals'. In contrast, the SRA did not anticipate any particular issues.

LSB response

57. We consider that the proposed changes to the IGRs are a justified response to an identified risk. As outlined in our response to question two, most of what the amended IGRs require is already in place with many of the approved regulators. The amendments will formally shift responsibility for appointments and reappointments from the approved regulators to the regulatory boards.

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

58. The SRA agreed with the proposed implementation plan and highlighted the importance of upcoming appointments adhering to the LSB's proposals. Conversely, 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.

59. CILEx/IPS had no issues with the proposed implementation plan.

LSB Response

60. The amended IGRs will take immediate effect. We agree with respondents who argued that the upcoming appointments should be subject to the amended IGRs within the context of the transitional arrangements set out at paragraph 16 above.

Question 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?

61. CILEx/IPS stressed the need to be informed of any changes as soon as possible to facilitate their upcoming appointments process. Peter Adams felt that the implementation plan would 'be used to evidence bias and prejudice by the LSB in the discharge of its duties.'

62. As noted above, the CLSB argued against the proposals on the basis that it paid for the services of its chair and would 'not allow any paid person who has not been considered, interviewed, vetted etc. by the CLSB to be forced upon them'.

63. Other respondents did not answer this question.

LSB Response

64. As stated above, the amendments to the IGRs take immediate effect. Regulators can therefore proceed with any appointments processes they have in underway on the basis of version three of the IGRs.

65. We would like to clarify that we were not suggesting that the appointment of board members and the chair must be approved by the LSB.

Annex 1: List of respondents

Adams, Peter (solicitor)

Bar Standards Board

Chartered Institute of Legal Executives and ILEX Professional Standards Ltd
(joint response)

Cost Lawyers Standards Board

Law Society

Legal Services Consumer Panel

Solicitors Regulation Authority

Annex 2 Internal Governance Rules (as amended)

Internal Governance Rules 2009 (as amended)

Version 2 **3: 30 April 2014**

The Legal Services Board has, on 9 December 2009, made the following rules under Legal Services Act 2007 (c.29), section 30(1) – (as amended 20 February and **30 April 2014**):

A. DEFINITIONS

1. In these Rules, a reference to “the principle of regulatory independence” is a reference to the principle that:

structures or persons with representative functions must not exert, or be permitted to exert, undue influence or control over the performance of regulatory functions, or any person(s) discharging those functions.

2. The words defined in these Rules have the following meanings:

Act	the Legal Services Act 2007 (c.29)
Applicable Approved Regulator	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
Approved Regulator	has the meaning given in Section 20(2) of the Act
Board	the Legal Services Board

Consumer Panel	the panel of persons established and maintained by the Board in accordance with Section 8 of the Act
lay person	has the meaning given in Schedule 1, paragraphs 2(4) and (5) of the Act
legal activities	has the meaning given by section 12(3) of the Act
OLC	the Office for Legal Complaints established under Section 114(1) of the Act
person	includes a body of persons (corporate or unincorporated)
prejudice	the result of undue influence, whether wilful or inadvertent, causing or likely to cause the compromise or constraint of independence or effectiveness
regulatory board	has the meaning given by Rule B in Part 1 of the Table in the Schedule to these Rules
regulatory functions	has the meaning given by Section 27(1) of the Act
regulatory objectives	has the meaning given by section 1(1) of the Act
representative functions	has the meaning given by Section 27(2) of the Act
representative interests	the interests of persons regulated by the Approved Regulator
reserved legal activities	has the meaning given by section 12(1) of the Act
undue influence	pressure exercised otherwise than in due proportion to the surrounding circumstances, including the relative strength and position of the parties involved, which has or is likely to have a material effect on the discharge of a regulatory function or functions.

B. WHO DO THESE RULES APPLY TO?

3. These Rules are the rules that the Board has made in compliance with 30(1) of the Act relating to the exercise of Approved Regulators' regulatory functions.
4. Accordingly, these Rules apply to each Approved Regulator.
5. In the event of any inconsistency between these Rules and the provisions of the Act, the provisions of the Act prevail.

C. GENERAL DUTY TO HAVE IN PLACE ARRANGEMENTS

6. Each Approved Regulator must:
 - (a) have in place arrangements that observe and respect the principle of regulatory independence; and
 - (b) at all times act in a way which is compatible with the principle of regulatory independence and which it considers most appropriate for the purpose of meeting that principle.
7. Without limiting the generality or scope of Rule 6, the arrangements in place under that Rule must in particular ensure that:
 - (a) persons involved in the exercise of an Approved Regulator's regulatory functions are, in that capacity, able to make representations to, be consulted by and enter into communications with any person(s) including but not limited to the Board, the Consumer Panel, the OLC and other Approved Regulators;
 - (b) the exercise of regulatory functions is not prejudiced by any representative functions or interests;
 - (c) the exercise of regulatory functions is, so far as reasonably practicable, independent of any representative functions;
 - (d) the Approved Regulator takes 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; and

- (e) the Approved Regulator makes 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.

D. REQUIREMENTS FOR APPLICABLE APPROVED REGULATORS

- 8. In the case of each Applicable Approved Regulator, the arrangements in place under Rule 6 must also meet the requirements set out in the Schedule to these Rules.

E. ENSURING ONGOING COMPLIANCE

- 9. Each Applicable Approved Regulator, jointly with its regulatory board, must:
 - (a) if it considers itself to be compliant with these Rules, certify such compliance in the form and manner prescribed by the Board from time to time; or
 - (b) if it considers itself not to be compliant with these Rules, in some or all respects, notify such non-compliance and set out:
 - (i) why it has been unable to comply in such respects as it has identified;
 - (ii) when it considers that it will be compliant; and
 - (iii) how it plans to achieve compliance, and by when, and how much it is expected to cost.
- 10. Subject to the agreement of the Board, an Applicable Approved Regulator may invite any other appropriate body, including a consumer panel associated with the Applicable Approved Regulator, to provide a certification in a similar form and manner.

F. GUIDANCE

- 11. Approved Regulators must, in seeking to comply with these Rules, have regard to any guidance issued by the Board under this Rule.

12. For the avoidance of doubt, any guidance issued under Rule 11 does not, of itself, constitute a part of these Rules.

Schedule to Internal Governance Rules

The requirements set out in this Schedule are that Applicable Approved Regulators, in making arrangements under these Rules, must:

- (a) adhere to the principles set out in the table below in respect of specified areas which arrangements must cover;
- (b) comply with the rules set out in the table below in respect of demonstrating compliance with the principles; and
- (c) take account of the illustrative guidance set out in the table below when seeking to comply with the principles and rules.

Principle	Rule	Illustrative guidance
<p>Part 1: Governance</p> <p>Nothing in an Applicable Approved Regulator's (AAR's) arrangements should impair the independence or effectiveness of the performance of its regulatory functions.</p>	<p>A. Each AAR must delegate responsibility for performing all regulatory functions to a body or bodies (whether or not a separate legal entity/separate legal entities) without any representative functions (herein after 'the regulatory body' or 'the regulatory bodies').</p>	<p>An AAR should take all reasonable steps to agree arrangements made under these Rules with the regulatory body or, as the case may be, the regulatory bodies.</p>
		<p>If an AAR wishes otherwise than through its regulatory body/bodies to offer guidance to its members or more widely on regulatory matters, it should:</p> <ul style="list-style-type: none"> • ensure that it does not contradict or add material new requirements to any rules or guidance made by the regulatory body/bodies; and • consult with the regulatory body/bodies when developing that guidance.
	<p>B. The regulatory body or, if more than one, each of the regulatory bodies, must be governed by a board or equivalent structure (herein after</p>	

	the 'regulatory board').	
	<p>C. In appointing persons to regulatory boards, AARs must ensure that:</p> <ul style="list-style-type: none"> • a majority of members of the regulatory board are lay persons; and • the chair of the regulatory board is a lay person 	
<p>Part 2: Appointments etc</p> <p>(1) Processes in place for regulatory board members' appointments, reappointments, appraisals and discipline must be demonstrably free of undue influence from persons with representative functions.</p>	<p>A. All appointments to a regulatory board must be made on the basis of selection on merit following open and fair competition, with no element of election or nomination by any particular sector or interest groups.</p>	<p>If regulatory boards do not lead on managing the appointments process, it should have a very strong involvement at all stages.</p> <p>Best practice for public appointments should be taken into account. In particular, account should be taken of the Code of the Commissioner of Public Appointments insofar as relevant. <i>This includes publishing clear criteria for available roles and publishing details of the selection process¹¹.</i></p>
		<p><i>The appointments panel should be – and should be seen to be – capable of producing a qualified and independent regulatory board. This is likely to mean having:</i></p> <ul style="list-style-type: none"> • <i>having at least one lay representative on the appointments panel or equivalent; and</i> • <i>having at least one representative external to the AAR and regulatory board on the appointments panel or equivalent</i>
	<p>B: <i>The regulatory body must be responsible for:</i></p> <ul style="list-style-type: none"> • <i>designing competency</i> 	<p><i>The regulatory board should strongly involve the AAR at all stages - fully consulting it on the key aspects of the</i></p>

¹¹ This should apply to roles on the appointment panel as well as roles on the regulatory board

<p>(2) All persons appointed to regulatory boards must respect the duty to comply with the requirements of the Legal Services Act 2007.</p>	<p><i>requirements</i></p> <ul style="list-style-type: none"> • <i>designing and managing the appointments and reappointments process</i> 	<p><i>appointments and reappointments process.</i></p> <p><i>A proper audit trail of the discussions, the points considered and final decisions made should be maintained.</i></p>
	<p>B C. The selection of persons so appointed must itself respect the principle of regulatory independence and the principles relating to “appointments etc” set out in this Part of this Schedule.</p>	<p>Appointment panels or equivalent should be established following the guidance set out in the Board’s letter of 2 December 2008¹². A representative of the AAR should always form part of the appointment panel or equivalent</p>
		<p><i>The process and decisions on appointments and reappointments of regulatory chairs should be delegated to an independent appointment panel or equivalent</i></p>
		<p>The appointments process should be conducted with regard to the desirability of securing a diverse board with a broad range of skills. The framework applied at Schedule 1 paragraph 3 of the Act serves as a useful template.</p>
	<p>C D. Decisions in respect of the remuneration, appraisal, reappointment and discipline of persons appointed to regulatory boards must respect the principle of regulatory independence and the principles relating to “appointments etc” set out in this Part of this Schedule.</p>	<ul style="list-style-type: none"> • Remuneration – decisions in respect of regulatory board pay and conditions should be made having regard to best practice and in any event should not be controlled wholly or mainly by persons responsible for representative functions; • Appraisals – while persons with representative functions may be consulted about regulatory board members’ appraisal, they should not be involved formally in agreeing the outcome, or future objectives;

¹² See: <http://www.justice.gov.uk/news/docs/legal-services-board-open-letter-021208.pdf>

		<ul style="list-style-type: none"> • Reappointments – decisions should be guided by objective appraisals and the desirability of ensuring a balance between regular turnover <u>and</u> continuity.
	<p>D E. Except insofar as an AAR would be, or would reasonably be considered likely to be, exposed to any material legal liability (other than to pay wages, salaries etc) as a consequence of the delay required to obtain the concurrence of the Board, no person appointed to a regulatory board must be dismissed except with the concurrence of the Board.</p>	<p>While the LSB accepts that there may be <u>exceptional</u> reasons which justify immediate dismissal without concurrence having first been obtained, it would expect a full explanation if such circumstances were ever to arise. An AAR should accordingly be prepared to justify why it could not comply with the relevant Rule.</p> <p>Where an AAR proposes to discipline one or more member(s) of a regulatory board, where such discipline is short of dismissal, the Board should be consulted privately in advance of the action being taken, and the AAR should consider any representations the Board may chose to make.</p>
	<p>E F. No person appointed to and serving on a regulatory board must also be responsible for any representative function(s).</p>	<p>Where possible, a person appointed should not have been responsible for any representative functions immediately prior to appointment. The longer the gap between holding responsibility for representative functions and taking up regulatory functions, the more likely it is that the principle of regulatory independence will be observed.</p> <p>Codes of conduct or equivalent for board members should highlight the importance of observing and respecting the regulatory objectives and the principles of better regulation, rather than operating to represent any one or more sectoral interests. Codes should also highlight the</p>

		<p>importance of respecting the principle of regulatory independence, as underlined by the provisions of sections 29 and 30 of the Act.</p>
<p>Part 3: Strategy and Resources etc</p> <p>Subject only to the oversight permitted under Part 4 of this Schedule, persons performing regulatory functions must have the freedom to define a strategy for the performance of those functions and work to implement that strategy independently of representative control or undue influence.</p>	<p>A. Defining and implementing a strategy should include:</p> <ul style="list-style-type: none"> • access to the financial and other resources reasonably required to meet the strategy it has adopted; • effective control over the management of those resources; and • the freedom to govern all internal processes and procedures. 	<p>The Act requires separation of regulatory and representative functions. Absent of corporate management structures that are robustly and demonstrably separated from the control of persons with representative functions, these Rules are likely to require a high degree of delegation to regulatory bodies in respect of the control of strategy and resourcing.</p> <p>What is or is not a regulatory function is determined in accordance with the Act. Subject to the Act, whether something is 'regulatory' should be for each regulatory body to determine, in close consultation with respective AARs.</p> <p>Where members of staff are employed by an AAR to discharge regulatory functions under the delegated remit of a regulatory body, the position of the AAR as legal employer should be recognised in the arrangements made under these rules. However, in complying with these Rules, those arrangements should make clear how decisions with respect to the management and control of such members of staff are to be exercised. The presumption under such arrangements should be – subject only to being exposed to unreasonable liability (such as in creating a pension scheme) – that an AAR should always</p>

		<p>agree a reasonable request from its regulatory body. While an AAR has a right of veto, therefore, it also carries a responsibility to justify that decision in light of the principle of regulatory independence.</p> <p>The Board may from time to time issue further illustrative guidance on these issues under Rule 11 of these Rules.</p>
		<p>Each regulatory body should act reasonably when defining and implementing its strategy, and should in particular have regard to the provisions of Section 28 of the Act. It should also have due regard to the position of the AAR and in particular to any responsibilities or liabilities it may have as AAR.</p>
	<p>B. The regulatory body (or each of the regulatory bodies) must have the power to do anything within its allocated budget calculated to facilitate, or incidental or conducive to, the carrying out of its functions.</p>	<p>Each regulatory body should act reasonably when exercising its functions in accordance with this Rule, and should in particular have regard to the provisions of Section 28 of the Act. It should also have due regard to the position of the AAR and in particular to any responsibilities or liabilities it may have as AAR.</p>
	<p>C. Insofar as provision of resources is concerned, arrangements must provide for transparent and fair budget approval mechanisms.</p>	<p>The process established by the AAR should provide appropriate checks and balances between it and the regulatory body (or bodies) so as to ensure value for money and observe the wider</p>

		requirements of the Act, without impairing the independence or effectiveness of the regulatory body (or bodies).
	<p>D. Insofar as provision of any non-financial resources is concerned (for example, services from a common corporate service provider, or staff), arrangements must provide for transparent and fair dispute resolution mechanisms.</p>	<p>Subject only to the formal budgetary approval process and the operation of its dispute resolution mechanism(s) , an AAR’s arrangements should not prevent those performing regulatory functions, where they believe their independence and/or effectiveness is compromised or prejudiced, from obtaining required services otherwise than through the AAR.</p> <p>AARs and regulatory bodies should be particularly careful to ensure that, in respect of public and/or consumer-facing services (including media relations and marketing-type activities), the principle of regulatory independence should be seen to be met, as well as being met.</p> <p>When considering whether arrangements meet the required standards, the Board will consider factors such as:</p> <ul style="list-style-type: none"> • evidence that the provision of services to the regulatory body (or bodies) is not subordinate to the provision of services to any other part of the AAR; • provision being made for service level agreements agreed between respective parties; and • transparent, fair and effective dispute resolution mechanisms being in place.

<p>Part 4: Oversight etc</p> <p>Oversight and monitoring by the AAR (which is ultimately responsible and accountable for the discharge of its regulatory functions) of persons performing its regulatory functions must not impair the independence or effectiveness of the performance of those functions.</p>	<p>A. Arrangements in place must be transparent and proportionate.</p>	<p>In making its arrangements, an AAR should balance its ultimate responsibility for the discharge of regulatory functions with its responsibilities to ensure separation of regulatory and representative functions.</p>
		<p>In considering proportionality, AARs should consider the risk of Board intervention. Note the Board's policy statement on compliance and enforcement powers, and in particular the Board's intention to use its most interventionist powers only when other measures (including informal measures) have failed.</p>
	<p>B. Arrangements in place must prohibit intervention, or the making of directions, in respect of the management or performance of regulatory functions unless with the concurrence of the Board.</p>	<p>In determining whether to give concurrence, the Board will consider the extent to which the process leading to the proposed intervention or directions complies with the principle of regulatory independence.</p>