

Regulatory Independence Certificate initial assessment summary – Institute of Legal Executives (ILEX) / ILEX Professional Standards (IPS) submission

Introduction

1. The Legal Services Board's (LSB's) Internal Governance Rules came into effect on 1 January 2010 and applicable approved regulators (AARs) were required to self-assess their compliance with the rules by the end of April 2010. In areas where it had not proved possible to achieve compliance by that date AARs were asked to provide an action plan that would deliver compliance by no later than 31 October 2010.
2. We have now completed an initial analysis of your arrangements against the substance of the IGRs and the implementation timetable. This is the summary report of our initial analysis. The assessment highlights areas of concern and areas where we do not feel that we have sufficient information to assess compliance. It also sets out the actions that are now required. Where we have asked for further submissions these should be returned by Friday 27 August. This will allow the LSB Board to make final decisions at its end of September meeting and respond to you in October.
3. We may ask for any combination of the following:
 - an action plan for reaching compliance
 - confirmation of whether risks that we have highlighted are recognised and the extent of the risks (and details of how the risks will be mitigated)
 - provision of further information.
4. In areas where we have not highlighted concerns our review of the information provided has concluded that your structures are likely to be compliant with the IGRs but of course on-going compliance with the principles, rules and the spirit of independent regulation will be required in practice

Documents provided

5. The ILEX / IPS submission consists of
 - ILEX/IPS Joint Certificate of Compliance
 - Service Level Agreements
 - ILEX/IPS Protocol
 - IPS Memorandum of association
 - IPS Articles of Association
 - IPS Code of Conduct for Board Members
 - ILEX 3 year Business Plan and Budgets
 - ILEX Articles of Association.

Overall conclusion

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6. ILEX has made significant progress in establishing an independent regulatory function and installing a suite of protocols and service level agreements to govern the relationship between the regulatory board and its parent company. The information provided indicates that the internal governance arrangements that have been put in place appear largely fit for purpose and able to deliver compliance with the IGRs.
7. However, we have concerns about the arrangements around accessing resources and dispute resolution given the potential inequality of bargaining power between the regulatory board and parent body. In particular whether a model of discussion and negotiation followed by potentially lengthy and costly mediation provides sufficient safeguards in practice.
8. We also have some concerns around the arrangements for approaching the Legal Services Board in instances of dispute.
9. It has been certified that there remains representative members on two regulatory working committees and it is proposed that compliance will be achieved at the end of the year. This has been accepted.
10. We have a general concern across the approved regulators about the use and composition regulatory committees advising the regulatory board and are requesting further information about such committees.

Issues / areas of concern

General Duties C6 (A) Each AAR must have in place arrangements that respect the principle of regulatory independence.

11. We have come to understand that it is common for the approved regulators to have regulatory groups with strong professional membership sitting beneath their regulatory board. The IGR requiring lay majorities for regulatory boards may not explicitly extend to these groups but there is an appreciable risk that the spirit and perception of independence is compromised if a significant proportion of the advice provided to a regulatory board comes from groups which could be seen as being dominated by the provider interest (to the relative exclusion of the consumer voice). We would like to understand the regulatory committee structure for ILEX / IPS to help us better understand what our level of concern should be about this issue.

LSB ASSESSMENT

Compliance: *Further information required to assess compliance*

Response: *ILEX/ IPS to provide details of the role of any regulatory committees or working groups - their delegations and decision making authorities, their reporting lines, composition and the appointment process for members.*

General Duties C7(a): ensure that persons involved in the exercise regulatory functions are... able to make representationsand enter into communications with anyone including but not limited to the Legal Services Board...C7(c): the

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Approved regulator makes provision...to enable persons involved in the exercise of representative functions to be able to notify the Board where they consider that their independence or effectiveness is being prejudiced.

12. The dispute resolution process detailed within the protocols provided includes the requirement for either company, in the event of a dispute, to provide five days notice if they intend to refer the matter to the Legal Services Board. The service level agreement provides that any dispute currently subject to independent mediation may not be referred until independent mediation has terminated.
13. This appears to fetter the ability of those responsible for regulatory functions to approach and to make representations to the LSB. It is difficult to reconcile codified restrictions on when the LSB may be approached with the provisions of Section 30 (2)(a) and 30 (3)(b) of the Legal Services Act and the IGRs.

LSB ASSESSMENT

Compliance: **Non-compliant.**

Response: *ILEX/ IPS to confirm that they recognise this issue and the steps that might be proposed to address it by 31 October 2010. Alternatively ILEX / IPS to provide a rationale for why they believe that maintaining these restrictions is compatible with the independence requirements. ILEX / IPS to confirm that, other than the restrictions set out above relating to the referral of disputes, there are no other restrictions on when the LSB may be approached.*

General duty C7 (c): ensure that the exercise of regulatory functions is not prejudiced by our representative function

14. Paragraph 11 of the protocols state that “IPS will give ‘due weight to the aspirations of ILEX and its members as expressed through the ILEX council.’ It is unclear what this means and whether this provision has the potential undermine the independence of the IPS. The LSB is concerned that a codified commitment for the independent regulatory function to give due weight to the aspirations of the professional body and those of its members appears difficult to reconcile with the principles and perception of independent regulation.
15. Paragraph 11 also provides for ILEX and IPS to contribute and support the attainment of objectives set out from time to time in the other’s strategy and business plans consistent with the requirements of the LSA. It is assumed that this means commitments to comply with the regulatory objectives and other such requirements.

LSB ASSESSMENT

Compliance: **Further information required to assess compliance**

Response *ILEX/IPS to provide an explanation of what is meant by giving ‘due weight to the aspirations of ILEX and its members as expressed through the ILEX council’ and criteria around how this is applied in practice.*

Principle 2, Appointments, IGR, C: Decisions in respect of the remuneration, appraisal, reappointment and discipline respects the principle of regulatory independence...

16. The protocol for deciding the level of remuneration for members of the regulatory board involves a discussion between the President and CEO of ILEX and the Chair and CEO of IPS. The IPS Chair will not take part in any discussion relating to their own remuneration which means that the discussion will be between the CEO of IPS and the CEO and Chair of ILEX. Any dispute will be dealt with under the dispute resolution protocol.

17. It is unclear how appraisals will be carried out. The text provided simply states 'appraisals will be carried out in accordance with arrangements that the Board will determine'. The reappointment process appears appropriate providing that the appraisal process agreed by the regulatory board is appropriate.

LSB ASSESSMENT

Compliance: Appreciable risk

Risk: The process for settling the remuneration of the IPS chair appears to if not be controlled mainly by persons responsible for representative functions certainly weighted so that there is an imbalance in favour of the parent body in the discussions with the regulatory board. Given concerns raised in relation to Principle 3 there may also be potential imbalance in power in settling the remuneration level of other Board members.

Response: ILEX / IPS to confirm whether they recognise the risk around remuneration provisions and if so how the risk will be mitigated. ILEX / IPS to provide further information on the performance measurement framework for IPS board members and any role played by ILEX, including as a consultee.

Principle 2, Appointments, IGR, D.: Except in no person appointed to a regulatory board must be dismissed except with the concurrence of the Board (or in exceptional circumstances)

18. The protocols and code of conduct for board members make no reference to the requirement for ILEX/IPS not to dismiss any member of the regulatory board without the concurrence of the LSB. ILEX noted this requirement in their certificate that notice would be given to the LSB.

LSB ASSESSMENT

Compliance: Appreciable risk

Risk: There is no codified requirement for LSB concurrence to dismiss a member of the IPS Board. The certificate reports that the notice will be given to the LSB but this may fall short of concurrence is not future proofed.

Response: ILEX / IPS to confirm whether they recognise this risk and if so how it will be addressed.

Principle 2, Appointments, IGR, E.: No person appointed to and serving on a regulatory board may also be responsible for any representative function plus general regulations

19. No members of the regulatory board are currently responsible for any representative activities. There are two committees that fall under the remit of the regulatory board that have members who are also ILEX council members and are therefore seen to have responsibility for representative duties. It is reported that the composition of both committees will change so as to have no Council members serving on them by the end of the year. This is as a result of near concluded work relating to applications to extend the reserved activity that ILEX regulates that will shortly be made to the LSB. It is argued that in these circumstances it may be reasonable to allow the composition of the committees to remain unchanged until the end of the year

LSB ASSESSMENT

Compliance: **Non-compliant**

Response: *The timetable for reaching compliance is accepted but non-compliance beyond 31 December will not be considered acceptable unless the LSB has agreed this in advance.*

Principle 3, Strategy and Resources, Subject only to the oversight permitted.. 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.

20. The arrangements provide that IPS is to have control over the management of its resources. However, the vast majority of these resources are provided to IPS by ILEX under a shared services agreement. However, it will be important to ensure that the reliance on the parent body does not fetter the independence of the IPS in practice.

21. The protocols include detail on how the budget will be set out by IPS and approved by ILEX. It includes the proviso that if ILEX cannot agree the budget proposed by IPS, ILEX will set out its reasons in writing for any variation that it proposes. If this cannot be agreed by the IPS then the dispute resolution process will begin. The LSB considers that setting out variations to the budget as opposed to setting out reasons why the budget presented is beyond that which is 'reasonably required to meet the strategy that it [IPS] has adopted' and / or causes concerns around value for money or other relevant issues and allowing IPS to respond with revisions may allow an undue level of representative control.

22. As mentioned in paragraphs 12 & 13, there is a specific issue in relation to the dispute resolution process detailed in the protocols. This issue is the requirement for the IPS to provide five days notice to ILEX when referring matters to the LSB.

23. In addition we have concerns that the process set out may require protracted and expensive dispute resolution. The process requires the relevant chairs and

CEOs to discuss any dispute. If these discussions do not resolve the dispute then the dispute can be referred to the LSB or an independent mediator. An independent mediator may be time consuming and costly and formally approaching the LSB is unlikely to be attractive in many instances. This may provide a disincentive to escalating disputes or an incentive for IPS to settle short of securing the resources it believes are required to set and implement its preferred regulatory strategy.

LSB ASSESSMENT

Compliance: **Appreciable risk**

Risk: *Freedom to access and control resources and services is key to enabling the development and delivery of regulatory strategy and policies by the regulatory board. The protocols and service level agreements that have been put in place appear to be comprehensive, largely fit for purpose and able to deliver compliance with the IGRs. However the relationship and arrangements between ILEX and IPS are built on principles of discussion and negotiation between CEOs and Chairs followed by formal dispute resolution. There is an appreciable risk that this may not provide sufficient safeguards in practice given the potential inequality of bargaining power between IPS and its parent body and the potential length and cost of independent mediation.*

Response: *ILEX /IPS to confirm whether this risk is recognised and if so the extent of the risk and the actions that you may take in mitigation. ILEX/ IPS to provide details of the metrics currently or prospectively utilised to monitor whether arrangements do operate successfully in practice and deliver the necessary degree of independence.*

As well as this general governance risk, particular risks for which further explanation is requested around:

**Setting out 'any variation' to the IPS's proposed budget*

** Potential costs and delays involved with using third party mediators at an early stage of dispute resolution*

Principle 4 oversight etc.

24. ILEX requires IPS to provide regular information to ILEX council; including regular reports on financial matters and proper accounts. This information will be used to assess value for money. From a governance perspective it is appropriate that the parent organisation must ensure that activities are compliant with the regulatory objectives and provisions of the Legal Service Act and that spending is reasonable. However, safeguards should protect that this does not lead to unnecessary interference, influence or disruption. With regards resource, once an AAR has agreed the budget for the regulatory board it is anticipated that the AAR would normally focus spending reviews on whether the regulatory board's activities will take expenditure beyond the agreed budget or presents unexpected resource requirements. The oversight arrangements provide minimal detail information and reporting requirements or the framework of operation including for ILEX action upon receipt.

25. As the sole shareholder of the IPS, ILEX is entitled to call a General Meeting of IPS. Such a meeting could be considered as an intervention in the activity of the IPS and there is currently no requirement that a general meeting of IPS can only be called with the concurrence of the LSB. This requirement is not set out the protocols.

LSB ASSESSMENT

Compliance: **Further information required to assess compliance**

Response: *ILEX / IPS to clarify the criteria for settling information requirements and how the information provided by the IPS to ILEX is scrutinised, risk assessed and how it is determined what action is taken and safeguards to protect against fettering of activity.*

ILEX/IPS to confirm whether they recognise that a general meeting of IPS should only be called with LSB concurrence. If not ILEX/IPS to provide a risk assessment of why this safeguard is unnecessary.

12 July 2010