

## **Regulatory Independence Certificate initial assessment summary - Law Society (TLS) /Solicitors Regulation Authority (SRA) 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 SRA/TLS submission consisted of:
  - A completed certificate.
  - TLS's General Regulations [15 June 2010]
  - Current Oversight Arrangements – May 2010
  - Agreed Key Principles for budgeting and shared services
  - Agreed Appointments Arrangements

### **Overall conclusion**

6. TLS has made considerable progress towards establishing an independent regulatory function and in agreeing arrangements to protect against undue representative influence. This includes:
  - (i) principles of shared services and budgets protocol

- (ii) appointments protocol
- (iii) establishing a Support Services Resolution Board (SSRB) with equal TLS and SRA membership and lay membership
- (iv) establishing a Joint Resources Board (JB) with equal numbers of TLS and SRA voting members.

7. However, there remains a number of concerns including a lack of commitment to move to a lay majority on the SRA Board until the end of current Board terms, the chairmanship being restricted to solicitors and the potential for a complex set of decision making and scrutiny arrangements (in place of an independent corporate hub or similar) which could frustrate the ability to deliver regulatory strategy and policies in practice.

## **Summary of issues**

### *Governance*

- There is non-compliance with the requirement that a majority of the SRA Board be lay persons and no proposal to reach compliance prior to 2013. Concern about this non-compliance is heightened by four of the five regulatory committees having professional majorities.
- The structures that the TLS/SRA are putting in place are complex (see framework diagram at end of summary) and that this complexity may provide / hide levers or control that could prejudice the ability of the SRA to deliver its strategy without (undue) hold up or disruption.
- TLS President will Chair the Joint Board and while not possessing voting rights, this may provide Council bias on “equal” board.

### *Appointments*

- Overall the appointments protocol appears capable of delivering compliance but some concerns remain.
- There is no commitment to address existing non-compliance with the appointment of the Chair not being restricted by virtue of a legal qualification (at least until the expiry of the current appointment).
- The SRA lead the disciplinary process but there remains authority for TLS to substitute with their own procedures. Recognition of the need for LSB concurrence for dismissal of board members is not codified within arrangements.

### *Strategy and Resources*

- Structurally compliant as the SRA has delegated authority to set its own budget and has an agreed shared services and budget protocol. But the approval and scrutiny arrangements appear complex.

### *Oversight*

- Overall the oversight arrangements appear compliant. Concerns as throughout are with the complexity of arrangements and how the layers operate in practice. Are there adequate safeguards to prevent undue interference.

## **Initial Assessment**

### ***Principle 1, Governance, IGR C, a majority of the regulatory board are lay persons***

8. The responsibilities and functions (terms of reference) of the SRA Board are covered in General Regulation (GR) 26. The Board membership is covered in GR 14.6.
9. Board membership:
  - (i) 16 members, including a chair.
  - (ii) At present the Chair is a solicitor (and is required to be so by GR 6(a)).
  - (iii) Five Committees established by the Board to assist in its work, covering:
    - Compliance
    - Education and Training
    - Finance and Resource
    - Financial Protection
    - Standards
  - (iv) All appointments made by an appointment panel in accordance with agreed TLS and SRA protocol.
  - (v) According to the General Regulations 16(4) the terms of office of the Chair and Members of the SRA Board shall be up to four years and they shall be eligible for reappointment (without any guarantee) for one or more further terms up to a total of six years.
10. The current members of the SRA Board are:
  - A Chairman who is a solicitor (and is required to be so by GR 6(a)).
  - 9 Solicitors
  - 7 lay members
11. The certificate reports that the SRA Board could not become compliant before the end of its current term without enlarging its current membership beyond 16 through the recruitment of lay members (whether all at once or on a phased basis) or by asking existing solicitor members to step down.
12. TLS and SRA have expressed the view that such solutions would be disproportionate and would be likely to disrupt the SRA's ongoing work and its programme of regulatory reform. They therefore propose to proceed to compliance on a phased basis over the coming three years, and reach compliance with what they perceive as minimal disruption to the work of the SRA Board as a whole. There is no assessment as to the level of risk that non-compliance poses or substantive justification for not complying sooner. There is no action plan to become compliant beyond a stated intention to become compliant on a phased basis over the coming three years and an offer to discuss the approach and timeline further with the LSB.
13. The SRA has five formal regulatory committees of which four have a solicitor majority. 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 will be compromised if a significant proportion of the advice provided to the SRA comes from groups seen to be dominated by providers to the relative exclusion of the consumer voice.
14. GR 14 still requires a solicitor chair and solicitor majority, with no codified arrangement for these requirements to cease even at the end of the existing Board terms.

#### **LSB ASSESSMENT**

**Compliance:** **Non-compliant**

**Response:** TLS/SRA to provide for LSB consideration an action plan for delivering compliance by no later than 31 October 2010 or provide for LSB consideration a full justification for why it may be reasonable to move to a lay majority more slowly alongside a detailed plan for becoming compliant. TLS / SRA to confirm whether they recognise the risk of professional dominated regulatory committees, the extent of the risk that they perceive and provide information about how the risk will be mitigated. TLS/SRA to provide details of the activities undertaken by such committees and groups, the role that they play in regulation, their delegations and decision making authorities, reporting lines and the composition and appointment process followed.

**Principle 1, Governance, IGR C: the selection and appointment of a chair is not restricted by virtue of any legal qualification that person may or may not hold.**

15. Although a joint TLS/SRA letter to LSB dated 7 May commits to making lay persons eligible for Chairmanship in future recruitments, GR 14(6)(a) still requires that the SRA Board shall consist of “a Chair, who shall be a solicitor” and the certificate does not explicitly propose to amend this. The existing chairman was selected through a process that restricted selection to solicitors. The certificate reports that the TLS/SRA could only become compliant in relation to the role of chair without a new selection process open to lay members. No further detail is provided about when and how the TLS/SRA proposes to come into compliance (although it is understood that they do not intend to do so before the end of the existing chair’s appointment).

#### **LSB ASSESSMENT**

**Compliance:** **Non-compliant**

**Response:** TLS/SRA to provide an action plan to deliver compliance by no later than 31 October 2010 full justification for LSB consideration of why it is reasonable to move to compliance more alongside a plan for becoming compliant. Arguments of proportionality are likely to be more persuasive following satisfactory conclusion of the lay majority non-compliance issue to reduce the overall risk of a regulatory board being seen to be dominated by the provider interest (at the relative expense of the consumer voice).

**Principle 2, Appointments, discipline must be demonstrably free of undue influence from persons with representative functions, IGR D: no person is dismissed except with the concurrence of the Board (or in exceptional circumstances).**

16. GR 19 sets out arrangements relating to conduct of members of regulatory boards. Any complaint against an SRA Board member will be referred by the SRA Chair to a body established by the SRA Board to investigate the complaint. The investigating body will report to the Chair whether it considers the complaint to be substantiated and if so what sanction should be recommended. The report and Board's decision will be sent to TLS

Chief Executive. Only TLS Council may impose removal of Board membership under 19(6) of the amended GRs. The Council may substitute its own procedure for investigating and determining complaints if it believes that that the procedure established by the regulatory board is inadequate under 19 (7) of the amended GRs. There is no reference to requiring concurrence from the LSB before any SRA Board member is dismissed within the amended GRs, although the certificate reports that TLS and SRA recognise this requirement.

#### **LSB ASSESSMENT**

**Compliance:** **Appreciable risk.**

**Risk:** *TLS Council retains powers that may allow it to unduly influence the discipline and dismissal of SRA Board members and there does not appear to be any explicit requirement to seek concurrence from the LSB set out in GRs*

**Response:** *TLS/SRA to confirm whether they recognise the risk, the extent of the risk that they perceive and provide information about how the risk will be mitigated (inc. details of the circumstances in which the Council may refuse SRA recommendations and / or substitute its own disciplinary procedures. LSB will likely want to review the working of the disciplinary process in practice if ever initiated. TLS/SRA to confirm whether the requirement to seek concurrence from the LSB before any person may be dismissed from the SRA Board (except in exceptional circumstances) is codified in any TLS/SRA regulations or authorities.*

**Principle 2, Appointments, C Guidance, decisions relating to regulatory board pay and conditions should.... not be controlled wholly or mainly by persons responsible for representative functions.**

17. GR 33 provides that the Remuneration Committee responsibility for determining compensation levels of SRA Chair and Board Members. GR28(17) provides that membership shall be:

- a chair appointed by Council on recommendation of Management Board and who is neither a Council Member nor SRA Board Member
- the chair of the Management Board and Treasurer
- two other non-council solicitor members who shall not be members of a regulatory board, appointed by Council on recommendation of Management Board
- one other council member elected by ballot
- one member of the SRA Board appointed by Council on recommendation of SRA Board

18. However, the certificate and other information indicates that the Remuneration Committee is independent and consists of 6 members, one of whom is an SRA Board member, two whom are Council members and the rest presumably independent.

#### **LSB ASSESSMENT**

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

**Response:** *TLS/ SRA to clarify the composition of the Remuneration Committee*

***Principle 3, Strategy and Resources etc 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 free of  
representative control or undue influence<sup>1</sup>***

19. A new 'Joint Resources Board' (JB) is being established to deal with issues around the provision of support services to the SRA and the budget including resolving disagreements between TLS and the SRA. The JB will report directly to the Council and comprise equal numbers drawn from TLS Council and the SRA Board plus the President of TLS in a non-voting capacity as Chair. Where the JB cannot agree on support service or budgetary issues, the matter will be referred to the Support Services Resolution Board (SSRB), which comprises four members drawn from each of TLS and SRA plus two external members. However, in terms of overall governance arrangements relationships, reporting lines, authorities and protections remain unclear (**see governance framework map at end of summary**). The SRA has the delegated authority to set their own strategic objectives, monitor performance against them and to prepare plans and budgets. The Council maintains overall control of approving those objectives, plans and budgets. The role of the Management Board going forward is unclear. The SRA terms of reference (ToR) require that they prepare the above mentioned for "presentation to the Management Board". The Management Board ToR provide responsibility of "scrutiny of regulatory boards", informed by the representative Regulatory Affairs Board, inc. advising Council on business plans; budgets; approach to risk management; terms of reference; composition and appointments to Regulatory Board. However, they must now do so "subject to the powers and responsibilities" of the JB and the SSRB. The new GRs explicitly permit the Management Board to express views to Council on any issues which formal recommendations to Council has been delegated to SRA, JB or SSRB. The ToR for JB are to: consider and advise the Council on the SRA budget and level of support services; determine issues of support services for the SRA if TLS & SRA CEOs disagree and to consider and advise on oversight issues. The complexity of this overall governance seemingly has the potential to generate uncertainty for the SRA in terms of having the control to set and freely implement its strategy and have access to all it needs to do so.
20. The balance of equal numbers of voting members drawn from both TLS and the SRA on the JB provides voting equality when there is full membership or minimum quorum. However, can JB sit and make decisions (all) where unequal numbers of TLS and SRA members are in attendance at a given meeting meaning that one or other side is over represented?
21. The President of TLS will Chair the JB, and while he has no voting rights this position is likely to provide opportunity for influence for example through agenda setting and controlling discussions - the potential is particularly great when decisions are finely cut. This appears to provide an imbalance in favour the professional body.
22. GRs do not appear to place any requirements for the SRA contingent of JB to include lay members to off-set the professional membership of the TLS contingent, although the

---

<sup>1</sup> Assessment of overall governance arrangements in relation to Principle 3 (all parts) could equally apply to Principle 1 and across the IGRs more generally  
Initial assessment summary – 12.07.2010

SRA Board paper of 4 June suggests that the SRA will self impose this requirement. Similarly GRs do not appear to place any requirements for the SRA contingent of the SSRB to include lay members to off-set the professional membership of the TLS contingent.

23. The agreed key principles in relation to budgets and resources appear fit for purpose but next level down protocol and Service Level Agreements are to be agreed as part of the budget approval process and we will be key to their success in practice for example in safeguarding the SRA's ability to access its allocated resources in a timely fashion as needed.

#### **LSB ASSESSMENT**

**Compliance:** **Appreciable risk.**

**Risk:** *Arrangements appear complex with numerous lines of accountability between structures and committees. We are concerned that this may provide and / or hide levers of control that may restrict the SRA's ability to implement strategy without (undue) hold up or disruption. There may also be a risk that the composition requirements of JB and SSRB may allow for professional body bias.*

**Response:** *TLS/SRA to confirm whether they recognise the risk, the extent of the risk that they perceive and provide information about how the risk will be mitigated and managed in light of the LSB assessment.*

*TLS/SRA to provide details of the processes currently or prospectively in place to monitor whether the arrangements operate successfully in practice and deliver the necessary degree of independence.*

*TLS / SRA to provide details as they become available of the service level agreements in relation to shared services that are to be developed during the budget-setting process.*

*TLS/SRA to provide further information about the operation of the JB and in particular its operation if absence were to result in unbalanced TLS to SRA member attendance and safeguards against professional body influence by virtue of the chairmanship. Further information also required about any requirements for the SRA representatives on JB and SSRB to be lay.*

**Principle 4: Oversight: monitoring by the AAR: A. Arrangements in place must be transparent and proportionate. 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.**

24. The certificate reports that the establishment of the JB will improve the current arrangements for oversight. Oversight of issues of major concern had previously been dealt with informally between the respective CEOs and President. They will in future come before the JB as set out in GR 18.3.
25. The "Current Oversight Arrangements" submitted alongside the certificate do not permit TLS to make directions concerning the management or performance of the regulatory function. The arrangements set out TLS requirements relation to information provision, routine monitoring, and "higher level scrutiny" through the Joint Board.

26. The information requirements and routine monitoring set out appear to be comprehensive but not necessarily unreasonable. The scrutiny arrangements provide that the professional body may refer any matter of concern to the Joint Board and TLS can "suggest changes to SRA's policies & procedures". The arrangements also provide that "where such suggestions concern the SRA's delegated regulatory decision making, it will be for the SRA Board alone to decide – and to what extent- to adopt that suggestion".
27. Given the overall concerns highlighted previously about the complexity of governance arrangements and lines of reporting there may be potential for SRA uncertainty over whether it will be free from interference (including from delay through reporting, monitoring and provisions for representative input) to carry out its functions freely unless there is a circumstance of manifest concern that threatens corporate stability or the delivery of regulatory objectives.

#### **LSB ASSESSMENT**

**Compliance:** **Appreciable risk.**

**Risk:** *In light of concerns raised previously about the complexity of governance structures the broad reach of the oversight arrangements may have the potential for influence to be exerted on SRA regulated policy and procedures in practice.*

**Response:** *TLS/SRA to confirm whether they recognise the risk, the extent of the risk that they perceive and provide further information about the safeguards in place - in particular the reporting and feedback lines in relation to the routine information and monitoring requirements and the process for TLS recommending changes to SRA policy and procedures. TLS/SRA to provide details of the current or prospective metrics collected to routinely monitor whether the arrangements operate successfully in practice and deliver the necessary degree of independence.*

**12 July 2010**

# Law Society & SRA Governance Arrangements

7/7/2010

