

19.iii.2014

RESPONSE OF PETER ADAMS, Solicitor
to

Appointments and reappointments to regulatory boards

Consultation on amendments to the Internal Governance Rules
relating to the processes for appointing and reappointing
regulatory board members and their chairs

This consultation will close at 5pm on 3 April 2014

Questions for consultation

1. We welcome views on the specific questions below and any more general comments or observations on the issues discussed in this paper.

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 present a potential risk to regulatory independence? Please set out your reasons.

ANSWER:

No: the concept underlying the Act is very clearly (by Schedule 4) that it is the Law Society (amongst others) that Parliament intended to be an Approved Regulator and (by Ss27-30) that the exercise of regulatory functions should not be prejudiced by the representative function. In naming the Approved Regulators in Schedule 4, Parliament understood very well the scope of the Law Society's responsibilities for the governance of the solicitors' profession.

There is no evidence to support the assertion of a "potential risk" to regulatory independence: it is based on a remote possibility, and under the spotlight of the intent clearly set out by Ss27-30, it is so remote as to be imperceptible.

The Law Society uses best practice (including the regulatory function's representatives) to select and appoint the best person for the job; fettering the appointment process to benefit some an obscure "potential" risk carries no merit.

The power of the LSB to make IGRs is limited to ensuring

- (a) that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions, and
- (b) that decisions relating to the exercise of an approved regulator's regulatory functions are so far as reasonably practicable taken independently from decisions relating to the exercise of its representative functions.

And

The internal governance rules must require each approved regulator to have in place arrangements which ensure—

- (a) that the persons involved in the exercise of its regulatory functions are, in that capacity, able to make representations to, be consulted by and enter into communications with the Board, the Consumer Panel, the OLC and other approved regulators, and
- (b) that the exercise by those persons of those powers is not prejudiced by the approved regulator's representative functions and is, so far as reasonably practicable, independent from the exercise of those functions.

The IGRs are thus restricted to dealing with "the exercise" of regulatory functions. The appointment/reappointment of the Chair of the devolved regulatory is not – of itself – the exercise of a regulatory function.

2. **Do you agree that all, or some, of the provisions set out in the bullet points above would help to safeguard the independence of regulation from the interests of professional bodies and the regulated professions? Please set out the reasons for your viewpoint.**

ANSWER:

No: the consultation suffers from a key flaw from the first paragraph in abbreviating in the LSB's own terms, the concept of "independence" set out Ss27-30. The relevant provisions of S30 are put in full in the answer to Question 1: Parliament did not intend (as expressed in this question) "independence of regulation from the interests of the professional body". If that had been Parliament's intention it would not have appointed the professional bodies as Approved Regulators. Parliament intended, as the Act sets out in S30 a) and b), that the exercise of regulatory functions should not be prejudiced by the representative functions. The four bullet points have no material bearing on the exercise of regulatory functions.

By S3.3b) of the Act the LSB has the duty to promote the Regulatory Objectives in accordance with

"any other principle appearing to it to represent the best regulatory practice."

By seeking to supplant best practice current at the time the appointment is made the Board is in breach of this provision.

Specifically, appointments do not need to be referred to the LSB for approval of conformity with the IGRs – both the Act and the IGRs make provision for complaint in the event of prejudice in the exercise of a regulatory function so prior approval is completely unnecessary. The LSB has criticised what it refers to as the complexity of the current system: it is demonstrable that the complexity is the work of the LSB. If adopted, bullet point 3 is an example of this.

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

ANSWER: No – see answer to Question 2.

4. **Are there any other safeguards that should be put in place?**

ANSWER: No – see answer to Question 2.

5. **How do the above provisions compare to current practice?**

ANSWER:

The "current" practice is – in summary - to engage in a transparent process that follows best practice as that is understood at the time the appointment is planned. The above provisions do not follow best practice in that they remove the professional body from the process. A well designed regulatory body will comprise of persons having access to all stakeholders; a poorly designed regulatory body will suffer from mono-culture and consequently to a greater or lesser extent make decisions which reflect that mono-culture.

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?

ANSWER:

Yes; I repeat this statement from Answer 2: “The LSB has criticised what it refers to as the complexity of the current system: it is demonstrable that the complexity is the work of the LSB. If adopted, bullet point 3 is an example of this.”

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

ANSWER:

The Applicability section is, presumably, subsumed within this question: applicability seems to rest on whether the CLC, ACCA and the ICAEW have functions “with the representation, or promotion, of the interests of persons regulated by it.” (S27.2 LSA)

The core of professional regulation is the protection of the public through education, standards, compensation, etc. “Professional regulation” creates a selling point for those who have subjected themselves to it, whether they are solicitors, barristers, licenced conveyancers, accountants, etc. The very existence of a professional regulator is, therefore, a promotional function, and it is therefore illusory to argue that any professional regulator has no representative functions.

While it may be possible to distinguish advertising (as a promotional activity) from representation, it is also illusory to pretend that the professional regulators do not engage in representation. These are a few examples of the very clear exercise of representational functions drawn from the respective websites:

- The CLC says in its Business Plan
“We also want to engage with and inform the government’s review of legal services ...” (Forward)
“Our Approach Promote ease of access and service” (Introduction)
“We aim to play a key role in the debate [on the review of regulation] that will be engendered by the review.” (Supporting Innovation)
- The ACCA Fellowship “status demonstrates to employers that members have extensive experience and have made a long-term commitment to professionalism and ethics.”
- The ICAEW says to its members
“When you become a member, you will be awarded the highly-respected ACA designation, which is recognised globally.”
“Benefits from links to the Central Association of Agricultural Valuers”
“Reap the benefits of our strong links with the Charity Commission and other sector big hitters”

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?

ANSWER:

It will be used to evidence bias and prejudice by the LSB in the discharge of its duties. The LSB is on record as regarding Clementi as “the great Yoda of the current regulatory regime” (the Times, 27th Feb).

This betrays a misunderstanding of Parliament’s intent: if there is a “great Yoda” it is the Legal Services Act. The Consultation supports the contention that the LSB is more inclined to pursue a “Clementi” model than the enacted model. That is particularly concerning in the case of a body one of the objectives of which is to promote the rule of law.

How to respond

2. Views on our proposals from any interested party are welcome by 5pm on xxxx– this provides six weeks for interested parties to respond. We consider a six week period to be appropriate as this these proposals directly stems from feedback and suggestions received in a previous consultation exercise.
3. We would prefer to receive responses and representations electronically (in Microsoft Word or pdf format), but hard copy responses by post, courier or fax are also welcome.

Responses should be sent to:

Email: consultations@legalservicesboard.org.uk

Post: Michael Mackay
Legal Services Board
7th Floor, Victoria House
Southampton Row
London WC1B 4AD
Fax: 020 7271 0051

4. We propose to publish all responses to this consultation on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We may record and publish the identity of the respondent and the fact that they have submitted a confidential response.
5. We are also happy to engage in other ways and would welcome contact with stakeholders during the consultation period. Please contact Chris Handford by e-mail: chris.handford@legalservicesboard.org.uk or telephone: 020 7271 0074.

Complaints

6. Complaints or queries about the LSB's consultation process should be directed to Michelle Jacobs, Consultation Co-ordinator, at the following address:

Michelle Jacobs
Legal Services Board
7th Floor
Victoria House
Southampton Row
London WC1B 4AD

Or by e-mail to: michelle.jacobs@legalservicesboard.org.uk

Glossary of Terms

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 persons' qualifications to practise a reserved legal activity that is regulated by that Approved Regulator
Approved regulator	A body which is designated as an approved regulator by Parts 1 or 2 of schedule 4, and whose regulatory arrangements are approved for the purposes of the LSA and which may authorise persons to carry on any activity which is a reserved legal activity in respect of which it is a relevant approved regulator
CLC	Council for Licensed Conveyancers – the regulator of Licensed Conveyancers
Consultation	The process of collecting feedback and opinion on a policy proposal
Legal Services Consumer Panel or the Panel	The panel of persons established and maintained by the Board in accordance with Section 8 of the Legal Services Act 2007 to provide independent advice to the Legal Services Board about the interests of users of legal services
Lay Person	<p>Has the meaning given in Schedule 1, paragraphs 2(4) and (5) of the Act:</p> <p>(4)... a reference to a —lay personll is a reference to a person who has never been—</p> <p>(a)an authorised person in relation to an activity which is a reserved legal activity;</p> <p>(b)a person authorised, by a person designated under section 5(1) of the Compensation Act 2006, to provide services which are regulated claims management services (within the meaning of that Act);</p> <p>(c)an advocate in Scotland;</p> <p>(d)a solicitor in Scotland;</p> <p>(e)a member of the Bar of Northern Ireland;</p> <p>(f)a solicitor of the Court of Judicature of Northern Ireland.</p> <p>(5)For the purposes of sub-paragraph (4), a person is deemed to have been an authorised person in relation to an activity which is a reserved legal activity if that person has before the appointed day been—</p> <p>(a)a barrister;</p> <p>(b)a solicitor;</p> <p>(c)a public notary;</p> <p>(d)a licensed conveyancer;</p> <p>(e)granted a certificate issued by the Institute of Legal Executives authorising the person to practise as a legal executive;</p> <p>(f)a registered patent attorney, within the meaning given by section 275(1) of the Copyright, Designs and Patents Act 1988 (c. 48);</p> <p>(g)a registered trade mark attorney, within the meaning of the Trade Marks Act 1994 (c. 26); or</p> <p>(h)granted a right of audience or a right to conduct litigation in relation to any proceedings by virtue of section 27(2)(a) or section 28(2)(a) of the Courts and Legal Services Act 1990 (c. 41) (rights of audience and rights to conduct litigation).</p>
LSB or the Board	Legal Services Board – the independent body responsible for overseeing the regulation of lawyers in England and Wales
the Act	Legal Services Act 2007
Principles of Better	The five principles of better regulation, being proportional,

Regulation	accountable, consistent, transparent and targeted
Regulatory Objectives	<p>There are eight regulatory objectives for the LSB that are set out in the Legal Services Act (2007):</p> <ul style="list-style-type: none"> • protecting and promoting the public interest supporting • the constitutional principle of the rule of law improving access to justice • protecting and promoting the interests of consumers promoting competition in the provision of services in the legal sector • encouraging an independent, strong, diverse and effective legal profession • increasing public understanding of citizens legal rights and duties • promoting and maintaining adherence to the professional principles of independence and integrity; proper standards of work; observing the best interests of the client and the duty to the court; and maintaining client confidentiality.
SRA	Solicitors Regulation Authority - independent regulatory arm of the Law Society

Annex 1 Internal Governance Rules (as amended)

Internal Governance Rules 2009 (as amended)

Version 2-3: XX 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 *XX 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 IMPLEMENTATION 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 <u>regulatory board</u> ’).	
	<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.</p>
	<p>B: <i>The regulatory body must lead on:</i></p> <ul style="list-style-type: none"> • <i>designing competency requirements</i> • <i>designing and managing the appointments and</i> 	<p><i>The regulatory board should strongly involve the AAR at the all stages - fully consulting it on the key aspects of the 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 2008¹⁸. The chair of the regulatory board (or an alternate) should always form part of the appointment panel or equivalent, unless the panel is established to select the chair (in which case another member of the regulatory</p>

¹⁸ See: <http://www.justice.gov.uk/news/docs/legal-services-board-open-letter-021208.pdf>

<p>(2) All persons appointed to regulatory boards must respect the duty to comply with the requirements of the Legal Services Act 2007.</p>		board should participate).
		<i>The process and decisions on appointments and reappointments of regulatory chairs should be delegated to an independent appointment panel or equivalent</i>
		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>CD. 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; • Reappointments – decisions should be guided by objective appraisals and the desirability of ensuring a balance between regular turnover <u>and continuity</u>.
<p>DE. 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</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</p>	

	<p>concurrence of the Board, no person appointed to a regulatory board must be dismissed except with the concurrence of the Board.</p>	<p>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>EF. 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 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 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</p>

		<p>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>

Annex 2: 2008 letter from the LSB to all approved regulators

LSB

Legal Services Board

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Open letter to the Chief Executives/Directors of all
Approved Regulators and their respective regulatory
arms.

2 December 2008

Dear colleague,

Regulatory independence: appointments to regulatory boards

I wrote to the regulatory and representative arms of all Approved Regulators on 16 July seeking information on the extent to which the exercise of their regulatory functions was independent of any representative functions also undertaken. We are grateful for the replies received and for the constructive way in which Approved Regulators have engaged with the Board on this issue in the intervening period.

Ensuring the separation of regulatory and representative functions in line with the spirit and the letter of the Legal Services Act is an issue to which the Board attaches great importance. Indeed, the issue of regulatory independence is crucial to the credibility of the Act with consumers and the general public. As Chairman of the Board, David Edmonds has spoken publicly about these issues on a number of occasions. The Board is now developing policy proposals with a view to issuing a public consultation paper early in the New Year as a precursor to making rules under Section 30 of the Act later in 2009.

Ahead of those publications, however, and in the light of recent public discussion on the specific issue of independence in relation to appointments and re-appointments to Regulatory Boards, this letter sets out the Board's emerging thinking in this area. We would of course welcome views ahead of our more formal consultation.

In relation to any appointments or re-appointments process, Approved Regulators should always consider regulatory and public appointments best practice. For example, there is helpful guidance available on the Office of the Commissioner for Public Appointments' website (<http://www.publicappointmentscommissioner.org/>). However, the Commissioner's remit does

not extend to cover appointments to regulatory boards in our sector and so neither the Commissioner nor her office would be able to undertake any formal role, whether in an advisory capacity or otherwise.

It is essential that any appointments process for members of a Regulatory Board must be – and must be seen to be by outside observers, including the public at large – capable of producing a demonstrably qualified and genuinely independent regulatory organisation. What this means in practice will differ between the creation of a new body and appointments to an already existing organisation.

In the former case, in order to command public credibility, it is important that there is significant involvement of both lay representatives and those who are demonstrably independent of the Approved Regulator itself in the appointments process. However, particularly for smaller organisations, practical considerations may lead to a greater degree of involvement from Approved Regulators themselves than would be appropriate for a more mature organisation.

In the latter case, the considerations are different. In developing proposals for appointments to existing Boards, Approved Regulators should consult fully and transparently with the regulatory arm itself and with its Chair on such issues as composition of the Appointments Panel; the competencies sought in Chair and members; the duration of the term of office; the remuneration offered to attract candidates of the right calibre; and the mechanics to be used, for example, in relation to appointing search consultants. When the appointment is of a Chair, the regulatory arm should be fully consulted, usually through discussion with its entire Board.

Approved Regulators should also consider to what extent the Regulatory Organisation itself should be charged with practical management of the mechanics of the exercise. Although this may not always be appropriate in relation to the appointment of a Chair, it may well be the sensible route for managing member appointments. There should, in any event, be clear governance and an audit trail to show how this process of discussion has been undertaken, the points raised considered and final decisions made.

I should add that the focus of this letter on appointments and re-appointments should not be interpreted as a signal that we regard this as the only important issue in relation to regulatory independence, but recent comments on the issue suggested that some early clarification would be helpful. Queries about this letter should be addressed to Craig Robb at the LSB.



CHRIS KENNY
Chief Executive (Designate), Legal Services Board

Schedule

Copies of this letter are being sent to each of the following:

Keven Bader, Chief Executive, Institute of Trade Mark Attorneys, Canterbury House, 2-6 Sydenham Road, Croydon, Surrey CR0 9XE (and by email)

Peter F B Beesley, Registrar of the Faculty Office, 1 The Sanctuary, Westminster, London SW1P 3JT (and by email)

Diane Burleigh, Chief Executive, Institute of Legal Executives, Kempston manor, Kempston, Bedford, MK42 7AB (and by email)

Sheila Chapman, Administrative Secretary, Association of Law Costs Draftsmen, Equity Law Costing, The Barn, Cowels Lane, Lindsell, Essex, CM3 3QG (and by email)

Anton Colella, Chief Executive, Institute of Chartered Accountants of Scotland, CA House, 21 Haymarket Yards, Edinburgh, EH12 5BH (and by email)

David Hobart, Chief Executive, General Council of the Bar and England and Wales, 289-293 High Holborn, London, WC1V 7HZ (and by email)

Desmond Hudson, Chief Executive, Law Society of England and Wales, 113 Chancery Lane, London WC1A 2PL (and by email)

Mike Knight, Acting Chief Executive, Intellectual Property Regulation Board, 95 Chancery Lane, London WC2A 1DT (and by email)

Mandie Lavin, Director of the Bar Standards Board, 289-293 High Holborn, London, WC1V 7HZ

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Michael Ralph, Secretary and Registrar, Chartered Institute of Patent Attorneys, 95 Chancery Lane, London WC2A 1DT (and by email)

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