

Craig Wakeford,  
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Legal Services Board,  
One Kemble Street,  
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18 June 2018

Dear Craig,

**Opportunity to provide further input to the IGR review in light of the LSB investigation report into the Law Society's oversight and monitoring arrangements for the SRA**

Thank you for the opportunity to provide further input to the IGR review, following the publication of the LSB investigation report.

CILEx has reviewed the content of the report and, although it does not particularly change the views we expressed in our consultation response, there are a number of its findings which resonate with those views and to an extent substantiate them which we reference below.

**Generally**

Firstly, CILEx is not surprised that the Investigation did not find anything substantive and did not, for example, find *'evidence that TLS's representative functions...impaired the SRA's independence in its performance of regulatory functions'* (paragraph 223). Our view is that most AARs do not intend to overstep their prescribed mark; rather they interpret the subjective terminology of the IGRs, which at times lacks clarity and is open to interpretation, in good faith and try to discharge the residual AR role (as defined by the Legal Services Act 2007 and informed by the Internal Governance Rules), in a manner that provides genuine and realistic oversight and accountability for the liabilities they retain in that role.

In the Law Society's case (and the report refers to this) this intention was possibly complicated by a complex governance structure (which has now, of course, been revised) and a number of the complicating factors this gives rise to, referred to in the report, were also highlighted in our consultation report and therefore worthy of a degree of reiteration here:

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## Specifically

### 1. Lack of Clarity

In our response, we spoke about the need for the IGRs to be clearer in (a) recognising the need for proper oversight and accountability of the activities of ARs and (b) defining the limits of oversight by both the LSB and AARs better<sup>1</sup>. Given (and the Report also brings this out) that the relationships between AARs and ARs vary, they will also have to be general enough to manage those differing relationships, and practical arrangements that derive from them, and specific enough to add value by clarifying any problematic scenarios that those differing relationships give rise to.<sup>2</sup>

It seems that *'the discretion the ARs (had/have) in arranging the structure of their regulatory arms in a way that fits their circumstances, and in a manner which they determine to be reasonably practicable'* which the report refers to<sup>3</sup>, is not properly understood or clear enough to create consistency.

Given this lack of clarity, it is not surprising that the Report found that TLS's oversight and monitoring arrangements could be disproportionate<sup>4</sup> and create multiple reporting lines<sup>5</sup> which could have a direct impact on SRA efficiency. This provides a ready example of the concern we expressed in our consultation response that, in this case, the lack of clarity created *'a lack of awareness of the limits of their oversight and monitoring roles'*<sup>6</sup>.

### 2. Subjective Terminology open to interpretation

Part of the lack of clarity is borne out of the language currently used in the IGRs which is often subjective and open to interpretation. CILEx aired this concern strongly in our response<sup>7</sup> and the Investigation Report acknowledges that this was a material issue in relation to the TLS/SRA relationship.

The practical effect in this scenario was *'that the language of the IGR (was felt to be) qualified, open to interpretation and difficult to apply in practice'*<sup>8</sup>. The Report provides evidence for this concern which led to: *'a difference in view between the SRA and TLS about how TLS fulfilled its residual statutory role'*<sup>9</sup> and *'a lack of shared understanding about what oversight the AAR should exercise over the regulatory body'*<sup>10</sup>.

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<sup>1</sup> CILEx response, paragraph 2.1

<sup>2</sup> Ibid, 2.3

<sup>3</sup> Investigation Report, para 232

<sup>4</sup> Ibid, 185

<sup>5</sup> Ibid, 186

<sup>6</sup> Ibid 211

<sup>7</sup> CILEx response, paragraphs 2.5, 3.2, 3.17

<sup>8</sup> Investigation Report, para 236

<sup>9</sup> Ibid, 160

<sup>10</sup> Ibid, 235

### 3. Accountability and Oversight

CILEx's consultation response discussed, mindful of the priority to properly maintain independence of regulatory decision-making and within the parameters of the IGRs, the need for there to be real oversight creating genuine accountability of the AR because, without it there is a risk that lack of accountability and control could lead to an existential threat to some AARs if neither they nor the LSB hold ARs practically account for their performance, have visibility of their management of risk or have the ability to challenge plans on the basis of business plans<sup>11</sup>.

The 'constructive challenge and rigorous testing'<sup>12</sup> that this should result in has been applied in varying degrees by the AARs. The Investigation Report has found that TLS did not always get the balance right but it does not detract from CILEx's view that that oversight and accountability is necessary and should be discharged by someone. If TLS did not always get that right then, again, perhaps greater clarity is required to make the delineation of roles as clear as possible.

It seems to us that AARs, in trying to apply oversight and gain accountability, are in the main trying to manage any liabilities they may have in the event of 'bad regulation' in an environment where they have minimal controls (due to the need to safeguard regulatory independence) and a lack of clarity of what action they can take.

In this context, it is interesting that the Report identifies a breach of Rule 2B and Principle 2(1) of the Schedule to the IGR<sup>13</sup>. This of course relates to the process of appointments to the regulatory board and is set out in full within the Report<sup>14</sup>:

*'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 [LSB's] Board, no person appointed to a regulatory board must be dismissed except with the concurrence of the Board'*

CILEx's consultation response discusses liabilities which AARs may have in relation to regulatory functions over which they have no control and which, in the worst case scenario, could manifest themselves as risks which pose an existential threat should they come to fruition. Arguably therefore, the qualification at 2E ('*Except insofar as an AAR would be, or would reasonably be considered likely to be, exposed to any material legal liability*'), could and should be applied to other activities. CILEx is, for example, the employer of all CILEx Regulation

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<sup>11</sup> CILEx response, paragraph 2.4

<sup>12</sup> Ibid, 2.6

<sup>13</sup> Investigation Report, para 244

<sup>14</sup> Ibid, para 43

employees and therefore there is a Group interest in ensuring that good employment practices are discharged across the Group. CILEx has recently changed (and is continuing to change) its governance structure and such matters would fall to the independent purview of its Group Audit & Risk Committee. However, we suggest that any amendment to the IGRs should contemplate all liabilities that the AAR retains (such as those governed by employment law, statutory corporate compliance etc and all those which could affect the financial well-being and reputation of the whole group of companies) and clarify how in practice it should best manage them whilst balancing the need for independence of regulatory decision-making.

#### 4. Mediation and Arbitration

CILEx's consultation response discusses the possibility of the LSB's future role as a mediator or arbiter in matters of IGR interpretation<sup>15</sup> and/or in situations where an impasse may develop between an AAR and AR. The Investigation Report bears out this need in our view. It acknowledges '*the practical consequences of disagreements on independence including the time and resources of the AAR and the regulatory body being spent dealing with tensions around independence*'<sup>16</sup>. To this might be added the time and resources spent by the LSB in resolution.

This is exacerbated by the lack of any mechanisms for resolving differences in interpretation. The Report refers to the obligation under IGR Rule 9(b) for the AAR and AR to jointly self-refer if they are not compliant with the IGRs<sup>17</sup> but such self-reporting immediately takes the situation onto a formal path (with all the potential time and expense that might entail) when a shorter form of informal clarification/remedy might be possible.

In a sense, this is exactly what has happened with the Investigation. With no informal routes to explore the issues at play, it has escalated to a full formal investigation. Arguably, it would have been better for all parties had there been some other informal resolution mechanism facilitated by the LSB which could have dealt with this before it reached the formal stage.

CILEx does not see that this would need an injection of extra resource; clearer, amended IGRs, accompanied by a suite of complementary guidance materials, should mean that this role would be kept at a minimum<sup>18</sup> and might be kept to an incremental approach to be taken i.e. in the first instance, those concerns would be 'sense checked' with the LSB and, if valid, the LSB would have the discretion to make further enquiries.

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<sup>15</sup> CILEx response, paragraphs 2.9, 3.11 4.1

<sup>16</sup> Investigation Report, para 235

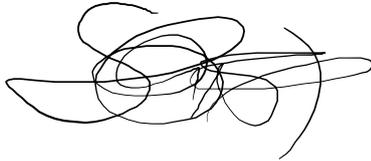
<sup>17</sup> Ibid, para 7

<sup>18</sup> CILEx response, paragraphs 3.11, 3.13

In CILEx's view, this approach is preferable to simply amending the IGRs to reduce the need for interaction between the AARs and ARs to a limited set of circumstances/gateways<sup>19</sup>. Whilst that approach might reduce the number of opportunities for disagreements or tensions arising, it would make any developing concerns even harder to identify and would not prevent ineffective regulation. It would also lose the positive benefits of maintaining an ongoing working relationship based on mutual shared understanding developed by exposure to ideas, motivations and aspirations<sup>20</sup>.

Please do not hesitate to contact me if you have any questions or wish to discuss any elements of this supplementary response.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Simon Garrod', written in a cursive style.

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<sup>19</sup> CILEx response, paragraph 3.8

<sup>20</sup> Ibis, 3.26.