

LSB CONSULTATION – APPOINTMENTS AND REAPPOINTMENTS TO REGULATORY BOARDS

SRA RESPONSE – 28 MARCH 2014

Summary

- 1 The SRA welcomes this consultation. In its response to the LSB's recent consultation on the appointment of lay chairs for regulatory boards, the SRA highlighted risks to independent regulation flowing from weaknesses in the current Internal Governance Rules (IGRs) concerning the appointment and reappointment of chairs and members of regulatory boards. The SRA said,

“The root of the risk lies in the process of the appointments to boards. The current guidance in the Internal Governance Rules... and the LSB's letter of 2 December 2008¹²... is permissive and general. In particular, the process can be run by the professional body (albeit with the involvement of the regulator), and there is no requirement that the selection panel should have people with consumer or wider regulatory experience. In principle, the appointments panels for AARs could be dominated by people from the representative body or the regulated profession. And, while the guidance in the letter of 2 December 2008 requires consultation with the regulator about the arrangements, the final say on the competencies for the board and the appointments process can rest with the professional body, not the regulatory organisation.”

- 2 In the SRA's view, the current provisions give rise to the risk that appointments may be made because of a candidate's perceived willingness to advance the interests of the professional body and the profession.
- 3 The SRA supports the proposed amendments to the LSB's IGRs to strengthen the independence of the process for appointing regulatory board members and their chairs. The SRA believes that they are proportionate steps to address current weaknesses in the IGRs that present a risk to the actual, and perceived, independence of the process and hence to the independence of the regulatory boards themselves.
- 4 Should the LSB decide to make the proposed amendments, the SRA would also support their application to all future appointments; including the process currently under way to appoint a new chair for the SRA Board.
- 5 The planning for the appointment of the next SRA Board Chair current is already well advanced and it is important that the successful

candidate is identified in time for them to be well prepared to take up the role. Given this, it is important that the LSB is able to announce its decision as soon as possible following the close of consultation consistent with the need to ensure a full consideration of all the issues raised by respondents. The SRA will engage closely with the Law Society and the Society's Business and Oversight Board in the interim period with the aim of ensuring that the appointment process is able to proceed as satisfactorily as possible pending the LSB's final decision.

Question One – 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.

- 6 The SRA agrees that the current IGRs present a risk to regulatory independence.
- 7 Within the current regulatory framework the chair and members of the regulatory boards are critical to ensuring independent regulation in the public interest. The criticality of the regulatory board's role is magnified because of the framework for legal services regulation provided by the Legal Services Act 2007. The Act has provided arrangements to enable independent regulation which, in the Board's view, carry inherent risks, are not transparent and which require significant layers of governance and continued vigilance.
- 8 In the case of the SRA, it is not an independent organisation but a part of the Law Society and, therefore, within the overview and ultimately control of the Law Society Council. There have been numerous examples where the views of the Law Society, its executive and its Council have differed from the SRA's view on what is necessary to fulfil its regulatory responsibilities under the Legal Services Act.
- 9 For example, the application for the SRA to become a licensing authority for ABS (a step which in the SRA's view was critical to the liberalisation of the legal services market) had to be made by the Law Society as approved regulator even though all of the work in developing the application and the arrangements that underpinned it had been undertaken by the SRA. The process of ensuring that the application was made, in the form regarded by the SRA Board as being consistent with its regulatory remit under the Act, was lengthy, hard fought, and at times acrimonious. Right to the point at which the form of the application was approved by the Council, pressure was applied to the SRA to make changes; including, for example, to place structural barriers within the regulatory arrangements which would have prevented the licensing of MDPs.
- 10 Another example is provided by the process for setting the SRA's regulatory budget. The process which has been agreed and which is

documented in the Society's general regulations is that the SRA's budget is set by the SRA Board and then recommended to the Council for approval by the Business and Oversight Board following scrutiny by that Board. That process was followed in 2013 for the setting of the 2014 budget. Having followed that process, the Council discussion and decision on the budget was disrupted by the tabling, at the last moment prior to the Council's vote, of an amendment from the Law Society Management Board (which consists of Council members and executives) proposing that a portion of the SRA budget be held back and only released subject to a further vote by the Council.

- 11 On both of these occasions, the SRA was ultimately able to ensure that its regulatory judgments were not overturned by the Society and its Council. However, within such an environment and legal structure the actual delivery of independent regulation is heavily dependent on the determination of the SRA Chair and Board to regulate independently in the public interest. That is, independently of both the profession and of the professional body which represents it (and within which the SRA must operate).
- 12 Given this, any risks to the independence of the SRA Chair and SRA Board members are significant, and proportionate measures to mitigate such risks should be taken.
- 13 In the SRA's view there is evidence of current real risk in the operation of the appointment and reappointment processes under the current IGRs.
- 14 During 2013, the issue of the reappointment of the current SRA chair had to be addressed. The current regulations and delegations within the Society's internal governance arrangements are not clear as to the process to be followed or on the responsibilities for making such a decision. The matter was raised and debated in Council and decisions made by the Council, initially, without proper consideration of the issues.
- 15 The matter was then remitted to the Business and Oversight Board for the development of a reappointment process. However, responsibility for making the final decision was retained by the Council. The process consumed significant time and gave rise to unnecessary levels of uncertainty. The prospect of such a process might well impact on the willingness of any SRA Board chair to uphold the principles of independent public interest regulation in the face of pressure from the Society and its Council.
- 16 The process for the appointment of a new SRA Board chair has already commenced. The design of the appointment process has been delegated by the Council to the Business and Oversight Board (BoB) and is being progressed by the chair of BoB aided by an ad hoc sub-committee.

- 17 The BoB chair proposed a process for the approval of Council. However, Council did not accept these proposals in total but made two significant changes:
- it required that the final decision on the appointment of the new SRA Board chair be taken by Council and not delegated to an independent appointments panel; and
 - it declined to define the process for re-appointment of the new chair after their first period in the role or permit the independent panel to do so and left the matter open for consideration and decision by Council following the appointment of the successful candidate.
- 18 In the SRA's view, both decisions are likely to make it more difficult to attract a candidate of the highest calibre and create real risk to regulatory independence.
- 19 For example, the sub-committee designing the process was convinced that any candidate would need to be clear, at the time of their initial appointment, about the process for re-appointment and the basis on which any decision would be made. Following the Council's decision this will not be possible. Instead a candidate would have to accept appointment knowing that their re-appointment would be decided by a governing body with which they would probably have disagreements in order to maintain the independent public interest role of the SRA.
- 20 The unwillingness to delegate the appointment and reappointment of the SRA Board chair to an experienced and properly constituted, independent, appointments panel demonstrates an actual risk to regulatory independence.

Question Two – 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?

- 21 The SRA believes that all of the provisions should be implemented and that, collectively, they will significantly help safeguard the independence of regulation.
- 22 Collectively the changes remove the risk of the profession and professional body exercising undue influence over these processes. The process will be controlled by regulatory boards with lay majorities free from the control of the professional bodies.
- 23 The arrangements must be approved by the LSB, thus providing a further assurance of independence.

- 24 The requirement to delegate decision-making to an independent appointments panel is a further guarantee of independence and a guarantee of transparency of decision-making outside of the regulatory body itself.

Question Three – Do you think we should go further and specify how the membership of appointment panels should be composed?

- 25 In the SRA's view the only area in which the LSB might be justified in specifying the make up of the independent appointments panel would be on the balance between lay and professional members, i.e. that the independent panel should have a lay majority. However, on balance the SRA does not feel that it is necessary to make such a specific requirement as regulatory boards, especially now with lay majorities themselves, will tend to make such a decision in any event.

Question Four – Are there other safeguards that should be put in place?

- 26 The SRA would not propose any further requirements over and above those proposed by the LSB. However, we believe the drafting of the amendments to the IGRs proposed to give effect to the new policy should be strengthened.

- 27 In Part 2 of the Schedule to the IGRs Rule B states:

“B: The regulatory body must lead on:

- designing competency requirements
- designing and managing the appointments and reappointments process.”

Our concern is that the term, “lead on”, is imprecise and open to a range of interpretations. We would recommend that the drafting be amended to, “The regulatory body is responsible for:”.

Question Five – How do the provisions compare to current practice?

- 28 The arrangements currently approved by the Council for the current appointment process for a new SRA Board chair do not meet the LSB's proposed new requirements. Further details are provided in the response to question one.

Question Six – Is there any specific circumstance where one or more of the proposed changes would cause particular issues in terms of proportionality and/or workability?

- 29 No.

**Question Seven – Do you agree with the proposed implementation plan?
Please provide reasons.**

- 30 The SRA agrees with the proposed implementation plan. The SRA believes that it is critical that the process leading to the appointment of the next SRA Board Chair is undertaken in accordance with the proposed IGR changes. The implementation proposals seem to be a proportionate approach to achieve that should the LSB make the proposed changes following consultation.

Question Eight – Are you aware of any specific practical issues that the implementation plan may cause for particular regulators in the context of currently scheduled appointments/reappointments.

- 31 As explained above, the current process for the appointment of the next SRA Board Chair will require amendment. In particular:

- responsibility for the process will need to move from the BoB to the Board. In order to manage this transition smoothly the SRA Board would plan to ask the current BoB sub-committee to continue with its work of putting the arrangements for the independent appointments panel in place on behalf of the SRA Board;
- the responsibility for selecting and appointing the new Chair will need to be formally delegated to the independent appointments panel (this is the position recommended previously by the sub-committee but rejected by the Council);
- the appointment process will also need to be amended to provide clarity for candidates about the process for reappointment at the end of the first appointment and, to the extent that this process needs to be confirmed, the SRA Board would delegate responsibility for doing so to the current BoB sub-committee on behalf of the SRA Board (again, this is the position recommended previously but rejected by the Council); and
- the criteria for the new Chair will need to be amended to reflect that they must be a lay person in accordance with the now current IGRs.

- 32 All of these changes are capable of being made. However, they will be greatly assisted by an early decision following consultation by the LSB and by the goodwill and positive engagement by the Law Society. The SRA will engage closely with the members of the BoB and with Law Society officials and office holders with the objective of ensuring a smooth transition to any new arrangements required by the IGRs.