

Response of the City of Westminster and Holborn Law Society to the Legal Services Board (“LSB”) Consultation “Chairs of Regulatory Bodies”

1 The City of Westminster and Holborn Law Society

The City of Westminster and Holborn Law Society (“CWHLS”) enjoys perhaps the most diverse membership amongst local Law Societies, encompassing as it does, a membership ranging from larger firms, including those which have been called in recent years “the silver circle” down to small high street practices and individual in-house solicitors, including those working for public bodies and government. Our membership includes those who practice at all levels of the profession, including those who regularly represent solicitors in SRA investigations and members of the Solicitors Disciplinary Tribunal, and those who have practised extensively in the field of solicitors’ negligence and professional indemnity insurance.

Membership is voluntary and CWHLS is run by a committee comprising about 30 solicitors representing a very wide range of specialisms. Its work is carried out by 11 specialist sub-committees, one of which, the Professional Matters Sub-Committee, concentrates on matters such as regulation of solicitors, and matters affecting their practice, including matters relating to professional indemnity etc.

2 General Comments

- a) In our responses to previous consultations from the LSB we have commented on the fact that the LSB appears to have its own pre-conceived idea of how the legal profession should be organised. It appears to wish to do away with the idea of a legal profession and regulate providers of legal services by what they do. We have pointed out that this approach will inevitably leave gaps in regulation to the detriment of consumers. We need not repeat our arguments here. Suffice it to say that we think the LSB’s approach is flawed and unlikely to achieve the Regulatory Objectives. For present purposes the important point to bear in mind is that the LSB’s approach is not the only way of achieving the Regulatory Objectives. It is important that the LSB should not “work backwards” and assume that anyone who is sceptical of the appropriateness of the LSB’s approach is an obstacle to achieving the Regulatory Objectives.
- b) We have not been alone in our doubts about the LSB’s approach. The LSB has received much criticism from other representative bodies and also from the Applicable Approved Regulators (“AARs”). We hope that the LSB regards such criticism as intended to be constructive. However in our view the LSB should reflect on whether it is itself being entirely objective in what it says in this Consultation. It says that “*almost four years’ experience of overseeing regulation...has shown that the approved regulators are tied still too closely to the individual branches of the profession that they oversee*”. No evidence is provided for this assertion although it is crucial to the case for change advanced by the LSB. The fact that AARs do not always agree with the LSB does not mean that they are

wrong or motivated by the need to defend the interests of those they regulate. It is not a reason for implementing this proposal.

- c) In paragraph 9 of the Introduction to the Consultation the LSB refers to the requirement that “*structures or persons with representative functions must not exert, or be permitted to exert, undue influence over the performance of regulatory functions, or any person(s) discharging those functions.*” We fully accept that. However we question why the LSB raises it in support of this proposal. The regulatory and representative arms of the branches of the legal profession have already been strictly separated, although much of the Consultation seems to be argued on the premise that such separation has not been achieved. It would be contrary to experience to suggest that the chairs and members of the boards of AARs have not respected this separation or cannot act on it. The chair of the SRA for instance is a solicitor but no longer in practice and does not represent solicitors either in theory or practice. We would expect him and any future chair of the SRA to understand the separation and act on it in the same way that a judge would be expected to judge a case impartially regardless of the fact that he or she was previously a solicitor or barrister or may know the lawyers acting for one of the parties. Is the LSB suggesting that that has not happened with AARs? That would be unfair and insulting to the individuals concerned.
- d) The obvious (and in our view unanswerable) criticism of this proposal is that it will fetter the discretion of those charged with appointing chairs of AARs in a way that may prove regrettable. It is not as if they are currently prevented from appointing lay chairs if they felt that that would be desirable. What this proposal would do is to prevent the appointment of lawyers even if otherwise a lawyer might be the person most suitable for the job. In our view that cannot be justified. Future circumstances cannot be foreseen. The balance of a particular board of an AAR or the particular issues facing it may make it desirable to appoint a lawyer as chair. Alternatively a person of outstanding merit might emerge who happens to be a lawyer. (The lawyer need not necessarily be from the particular branch of the profession to be regulated. It may for instance be thought desirable at some point to appoint a solicitor as chair of the Bar Standards Board, and similar possibilities may arise.) It does not seem to us to be sensible to prevent the appointment of any such persons as chair of an AAR as this proposal would do.
- e) We add one final point. We strongly object to the way in which this proposal is being rushed through without allowing a proper time for consultation. The Consultation was launched on 8 October 2013 and closes on 19 November 2013. That is an unreasonably short time. If the LSB genuinely wishes to consult on important issues it should do it properly, which means allowing a reasonable time for responses. Otherwise there is a danger that proposals will not be fully considered and important issues overlooked. As busy solicitors we have to consider this Consultation and consult with our members as well as carrying out our day jobs. Similar circumstances will apply to other consultees and interested parties. In our view three months should be the normal minimum consultation period, and we would urge the LSB to adopt it.

3 Responses to Questions for Consultation

We set out our responses to the individual questions posed. However our General Comments a) to d) above apply to them all.

1) Do you agree with the proposed change to the IGRs in order to deliver lay chairs?

We strongly disagree. This change is unnecessary to enable a lay person to be appointed as chair of an AAR. That is already permitted. The effect of the proposal would be to restrict unnecessarily the choice of chair for an AAR. That is most unwise.

2.) Do you think the proposed change should take immediate effect or only be applicable to future appointments?

If the change is to be put into effect (which we think would be regrettable) then in our view it should only apply to future appointments. It would be regrettable if the LSB gave the impression that it was seeking to implement the change in order to get rid of particular individuals who currently chair AARs. If the LSB feels that such individuals are unsuitable or should be removed it should say so. Otherwise the disruption of having to replace them may be counter-productive as well as unfair to the individuals concerned.

3) Do you agree that the requirement for lay chairs to apply only to the AARs?

As will be apparent, we disagree with the whole proposal. However there is no logical reason why the proposal should only apply to current AARs and not to the various accountancy regulators (ICAEW, ACCA, and ICAS) should their members become active providers of legal services. We appreciate that this would be embarrassing and “political” for the LSB as it would find itself accused of poaching on the regulation of accountants. However if it is felt that lawyer chairs of AARs are likely to be over-influenced by the interests of the legal profession it must follow that accountant chairs of regulators of active providers of legal services are just as likely to be over-influenced by the interests of the accountancy profession. There are certainly relevant issues on which the views of the accountancy profession could be brought to bear. We quote two examples. Accountants are subject to different (and in our view laxer) rules regarding conflicts of interest than those applicable to solicitors. Accountants are also for allowed to require the withdrawal of a complaint of professional misconduct against them as a term of settlement of a negligence claim against them. Solicitors are not allowed to do this.

4) Do you agree with the proposed exclusion of the Master of Faculties from the proposed change?

Yes, but subject to an extent to the same reservation expressed in answer to question 3).

4 Conclusion

The Consultation states that “*this proposal is ultimately a matter of judgment based on what we have seen ...rather than on empirical evidence.*” The case for change has not been based on compelling evidence. For the reasons given, we think the proposal is unnecessary and could have unfortunate and unforeseen consequences. We urge that it be dropped.