

Consultation response

LSB: Lay chairs

Overview

1. **The Panel supports the proposal that the Chairs of the Boards of the regulatory arms of each applicable approved regulator be a lay person, because:**
 - This could further strengthen the independence of regulation from the profession – a key theme of the Simplification Review responses.
 - Chairs have a key influence on the strategic direction, culture and operation of their organisations and are often its public face.
 - Boards operate in an environment where conservative attitudes towards legal services as a market persist and there has been resistance to the idea that consumers should be put at the heart of regulation – lay chairs would help to counter this culture.
 - The Chair has a formative influence on key decisions. Decisions by Boards may be made with good intentions, but inevitably they are shaped by attitudes and beliefs stemming from the professional backgrounds of their members. Measures that protect a profession from competition can be made subconsciously and reflect a genuine belief that the controls are necessary to safeguard standards.
- Lay chairs could bolster public confidence that regulation is working in their interests, in an environment where low public trust of lawyers is partly due to a perception they are a law unto themselves and complaints would not be considered fairly.
2. **The changes should take effect for future appointments and come into force in time for the forthcoming recruitment rounds for the two largest regulators.**
3. **The arguments in support of lay chairs apply to all regulators, not just AARs. All the regulators are subject to influence by the profession and must be able to demonstrate they are independent. It is important for the LSB to be consistent.**
4. **The Master of Faculties by law must be an ecclesiastical judge, so the LSB is unable to insist on a lay chair. However, there is no risk-based reason why notaries should be subject to a different set of rules. The historical and cultural ties that the LSB sees as holding back progress are particularly in evidence among notaries, while the LSB's regulatory standards assessment of the Faculty Office gave the lowest possible score in every assessment area.**

The proposals

5. The LSB is consulting on an amendment to the Internal Governance Rules (IGRs) to require that the Chairs of the Boards of the regulatory arms of each applicable approved regulator (AAR) be a lay person. Some of the approved regulators – the Council for Licensed Conveyancers (CLC), the Master of Faculties and the accountancy bodies – are not classified as AARs and it is proposed to exempt them from this rule change.

The Panel's response

6. The Panel responded to the LSB's previous consultation on requiring the Boards of the AARs to have a majority of lay persons. We strongly supported the lay majority proposal but said the arguments for requiring Chairs to be lay were more finely balanced; our views on this would be shaped by future events. This response updates the Panel's position in light of experience.

Q1. Do you agree with the proposed change to the IGRs in order to deliver lay chairs?

7. The Panel agrees with this proposal for a number of reasons:
 - Strengthening of independence
 - Cultural change and de-biasing decision-making
 - Putting consumers first
 - Building trust and public confidence
8. The Panel's response to the Ministry of Justice Simplification Review explained why

we think there is a need to strengthen the independence of regulation from the legal profession. We said that while regulation is more independent on paper than it used to be, there remains a lack of cultural independence and serious allegations have been made about representative arms meddling in regulatory matters. We are clear that the existing regulatory model needs to be replaced, but until such time, the LSB is right to find ways to bolster independence within the existing regulatory framework. Other responses to the review also emphasised the need to strengthen regulatory independence.

9. This consultation is important because of the key influence of Chairs of Boards on the strategic direction, culture and operation of their organisations. Chairs adopt different working styles in seeking to achieve a consensus decision, but the philosophical approach and preferences of the individual concerned can hold significant sway. The Chair is also a key public face of their organisation and thus will shape external perceptions of it. These factors assume great importance in a regulatory setting where policy matters are often contested and public confidence that regulators are independent of the industry is vital.
10. The LSB's consultation document argues that overly strong ties to the history, culture and rules of professional self-regulation has meant that regulatory reform has failed to progress at the extent or pace it wants. The Panel recognises that some significant changes have been introduced since 2007, but some of these – for example, changes to codes of conduct – have not been as radical as we had wished. We are mindful

of research commissioned by the LSB on the economic rationale for regulation, which highlighted how measures that have the effect of protecting a profession from competition can be made subconsciously and reflect a genuine belief that the controls are necessary to safeguard standards in the public interest.¹ Therefore, while we have no doubt that the Boards of the AARs are making decisions with the best of intentions, their view of the public interest is inevitably shaped by attitudes and beliefs shaped by the professional backgrounds of their members, with the Chair having a formative influence on particular decisions.

11. The innate conservatism of parts of the legal profession is a relevant consideration since it forms part of the environment that Boards respond to in their decision-making. Parliament wanted the legal services reforms to put consumers at the heart of regulation, reflecting the principle that end users are ultimately meant to benefit from regulation. However, there has been a backlash against the central role that consumer interests have played, including references by senior commentators to an '*unreflective consumer fundamentalism*'² and a '*cult of consumerism*'.³ What underpins these types of views is resistance to the influence of market forces on the law and a false perception of a clash of values between the consumer interest and professionalism. Against this background, it is essential that the Boards of regulators and their Chairs, which are responsible for delivering reforms with the strap line '*putting consumers first*'⁴, can clearly demonstrate both structural and cultural independence from the profession.
12. Another relevant background factor is low public trust in the legal profession. The Panel's Tracker Survey has recorded a fall from 47% to 42% between 2011 and 2013, reflecting declining trust in the professions as a whole.⁵ LSB commissioned research on the reasons why large parts of the public do not trust lawyers identified a perception that 'legal professionals are a law unto themselves' and cynicism about making a complaint partly due to a view that lawyers would stick together.⁶ Research undertaken by the Legal Ombudsman and the Panel⁷ also found that many consumers fear their complaint would not be considered fairly by the law firm. The Panel considers that a requirement for Boards to have lay Chairs would help to address these perceptions and instil more confidence in regulators.
13. We agree with the LSB that the Boards of the AARs should include legally trained individuals in order to contribute expertise, but this should not be given unique priority in determining board composition and leadership. Of more relevance is having a good understanding of the art of regulation and bringing experience from different backgrounds, including consumer affairs. Certainly those regulators that have lay chairs now have not suffered due to their Chair not being a lawyer by background.
14. We are aware that opponents of the change argue that the best person should be appointed as chair, regardless of their professional background. However, as has been demonstrated by recently appointed lay members of regulatory boards, the pool of lay persons is sufficiently strong to give the LSB confidence in the quality of the potential field of candidates for Chairs.

Moreover, the LSB must also factor in the wider public interest arguments in favour of lay chairs, as described above.

15. Action is needed to address the SRA's concerns that the appointments process is insufficiently independent. This risk would also exist if the requirement for lay chairs was introduced, so remedial steps are needed regardless of the consultation outcome. Moreover, this lack of independence, which has been an ongoing frustration since the Act was implemented, only strengthens the case for requiring lay chairs to counter the influence of a strong professional voice.

Q2. Do you think the proposed change should take immediate effect or only be applicable to future appointments?

16. We agree with the LSB that the proposed change should only be applicable to future appointments. Otherwise this would be too disruptive to the running of boards overall and add unnecessary recruitment costs. We are mindful that new Chairs for the two largest AARs – the Solicitors Regulation Authority and Bar Standards Board – are due to be appointed in the near future, so change would come about reasonably quickly in any event.
17. It is essential that the LSB makes this decision quickly so that the requirement applies to these two appointments. It must also be careful that these recruitment processes are not started before the rule would take effect, as happened following the lay majority rule change for some regulators, otherwise this would introduce lengthy and unacceptable delay before consumers benefited from the change.

Q3. Do you agree that the requirement for lay chairs to apply only to the AARs?

18. Our starting point is that the arguments in support of lay chairs apply to all regulators; the distinction between AARs and approved regulators is in many ways an artificial one. The LSB's thinking when making the IGRs was that the CLC and Master of Faculties could be exempted since they do not have representative arms and as such did not require rules to ensure an appropriate separation of functions. We do not consider this is a sound argument as both bodies are lobbied by their respective parts of the profession and influenced by it, even if the legal relationship with the professional body is a different one. In other sectors, regulators are fully structurally independent of their industries but must have a majority of lay persons on their boards.
19. The CLC's experience shows the benefits of having a lay chair, with strong consumer credentials, leading the organisation. Our experience is that the CLC has engaged well with the Panel and been responsive to policy recommendations we have made. For example, it is currently collaborating with us on a toolkit⁸ that we are developing to help the regulators identify where the consumer interest lies on a given issue. Of course, the CLC is free to choose to continue to appoint lay chairs in future. However, in public perception, it will be subject to different requirements. The LSB should be consistent in its treatment of all the front line legal services regulators. We gather this could be done by changing the IGRs to give the CLC the status of an AAR.
20. In relation to the accountancy bodies, we take the point that legal services amount to

a minority of the business activities which they oversee. The Panel refers the LSB to our advice on ICAEW's approved regulator and licensing authority applications,⁹ which it is currently considering. We have secured more independent governance than was originally proposed and note that ICAEW has publically committed to a full review of its regulatory governance arrangements, with changes taking effect in 2014. We are pleased that the LSB plans to review its position on whether the accountancy bodies should be classified as AARs should their impact on the legal services market grow.

Q4. Do you agree with the proposed exclusion of the Master of the Faculties from the proposed change?

21. We understand that the law requires the Master of Faculties to be an ecclesiastical judge; therefore changing this requirement is not within the LSB's gift.
22. As above, from a consumer perspective, the arguments in favour of lay chairs apply to all branches of the legal profession – we do not see a risk-based regulation reason why solicitor conveyancers regulated by the Solicitors Regulation Authority should have one set of rules, but notaries and licensed conveyancers doing identical work should be subject to another set. The LSB's rationale for this consultation is that the reforms have been too slow to take root due to cultural and historical ties. Arguably, these ties are particularly strongly evidenced in the notarial profession. Further, the LSB's regulatory standards assessment of the Faculty Office gave the lowest possible score ('5 – recognise this needs to be done but work has not yet started') in every assessment area, which

suggests that it has not yet been able to fully embrace modern regulatory good practice.

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¹ Dr Christopher Decker and Professor George Yarrow, Regulatory Policy Institute, *Understanding the economic rationale for legal services regulation*, Legal Services Board, October 2010.

² Lord Neuberger of Abbotsbury, MR, 25th Annual Bar Conference, *The Tyranny of the Consumer and the Rule of Law*, 6 November 2010.

³ Baroness Deech, Second Reading of Public Bodies Bill, 9 November 2010.

⁴ 'Putting Consumers First' was the subtitle of the White Paper setting out the then Government's proposed reforms.

⁵ Legal Services Consumer Panel, *Tracker Briefing 4 – Public confidence in the market*, June 2013.

⁶ Optimisa Research, *Consumer use of legal services: Understanding consumers who don't use, don't choose or don't trust legal services providers*, Legal Services Board, April 2013.

⁷ YouGov, *Consumer experiences of complaint handling in the legal services market*, Legal Ombudsman and Legal Services Consumer Panel, August 2012.

⁸ Legal Services Consumer Panel, *The consumer interest: Using consumer principles*, forthcoming.

⁹ Legal Services Consumer Panel, *Applications by ICAEW to become an approved regulator and licensing authority for probate activities under the Legal Services Act 2007*, March 2013.