Internal Governance Rules

Enhancing regulatory independence

Responses to the November 2018 and May 2019 consultations

23 July 2019

Responses to the November 2018 consultation

Respondent

1. The Association of Chartered Certified Accountants (ACCA)
2. The Association of Costs Lawyers (ACL)
3. The Bar Council (BC)
4. The Bar Standards Board (BSB)
5. The Chartered Institute of Legal Executives (CILEx)
6. The Chartered Institute of Patent Attorneys (CIPA)
7. The Chartered Institute of Trade Mark Attorneys (CITMA)
8. CILEx Regulation (CILEx Reg)
9. The Costs Lawyer Standards Board (CLSB)
10. The Council for Licensed Conveyancers (CLC)
11. EY Riverview Law
12. The Faculty Office
13. The Honourable Society of Lincoln's Inn
14. The Institute of Chartered Accountants in England and Wales (ICAEW)
15. The Intellectual Property Regulation Board (IPReg)
16. The Law Society (TLS)
17. Liverpool Law Society
18. The Solicitors Regulation Authority (SRA)

Click here for May 2019 consultation responses.

Proposed Internal Governance Rules

Consultation paper published by the Legal Services Board (LSB)

Comments from ACCA
January 2019
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Further information about ACCA's views of the matters discussed here may be requested from Ian Waters, Head of Standards (email: ian.waters@accaglobal.com; telephone: +44 (0) 207 059 5992).

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GENERAL COMMENTS

1. ACCA is grateful for the opportunity to respond to the consultation paper published by the LSB, and for the continuing discussions between our two organisations. This response has been prepared in consultation with the Chairman of ACCA's Regulatory Board.

2. In accordance with its obligations under section 30 of the Legal Services Act 2007 (the Act), the LSB issued the Internal Governance Rules (IGR) in 2009 (amended in 2014). In discharging its functions, section 3 of the Act requires the LSB to act in a way that is compatible with the regulatory objectives (set out in section 1) and have regard to the better regulation principles. These principles include proportionality in regulation, and the need to target regulatory action at cases in which action is needed (consistent with the Regulators' Code). We recognise the challenge faced by the LSB in meeting the requirements of the Act in a proportionate way. However, the overriding importance of section 3 must be observed. Similarly, the LSB faces the challenge of furthering all eight regulatory objectives in a balanced way. These include improving access to justice, promoting competition, and encouraging a strong and diverse legal profession (as well as an independent one).

3. Although we support the LSB's objective of producing a simplified, principles based set of IGR, we do not believe that the current drafting of the IGR and guidance meets the overriding requirements of section 3 of the Act.

4. The IGR currently define an applicable approved regulator (AAR) as '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**' [emphasis added]. These IGR were issued soon after ACCA and ICAEW became approved regulators for probate services and, while there is a need to avoid the perception that some regulators are treated more favourably than others, the definition of an AAR is a means of recognising the diversity of approved regulators and the reserved legal activities in respect of which they are approved.

5. The distinction excludes some approved regulators from the additional requirements of the IGR that are more relevant to AARs only, and thereby helps to ensure that the regulatory burden is proportionate to the risks. It recognises, for example, that approved regulators such as ACCA and ICAEW are subject to oversight by other lead regulators. This allows the LSB's regulatory governance requirements to focus on the necessary outcomes, and recognises the diversity of approved regulators. The distinction that currently exists was considered particularly important for a body that regulates accountants as providers of legal services, as

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opposed to a body that regulates lawyers. If the definition of an AAR is to be removed, the LSB must be clear about how the required outcome of independent regulation will be achieved while, at the same time, supporting the regulatory objectives and paying due regard to the better regulation principles and the Regulators' Code.

6. In its response to the comments received in respect of its November 2017 consultation, the LSB committed itself to 'new rules that take a more principled and outcome-focused approach and that are supported by statutory guidance'. ACCA is supportive of a principles-based approach, as such an approach requires regulators to focus on achieving the right regulatory outcomes (and being seen to do so). This makes approved regulators accountable for having effective (and sometimes innovative) regulatory arrangements.

7. However, while we welcome the drafting of Rule 1 (the overarching duty), we do not perceive the proposed IGR as a whole to be principles-based; nor do we believe that the proposed IGR and accompanying guidance are sufficiently focused on achieving the necessary outcomes. Instead, they appear to be based on an assumption that enhancing the IGR necessarily entails additional prescriptive rules, and detailed guidance, in order to close loopholes and enhance clarity. We believe that such an approach is likely to have unintended consequences. Not only would it give rise to challenges in respect of IGR compliance, but it would fail to acknowledge that an extensive set of prescriptive rules will never succeed in being relevant to all possible circumstances.

8. The proposed IGR comprise a preamble followed by 17 Rules. The IGR are to be accompanied by statutory guidance, issued under section 162 of the Act. The status of the guidance is set out in section 162(5) of the Act:

   'When exercising its functions, the Board may have regard to the extent to which an approved regulator has complied with any guidance issued under this section which is applicable to the approved regulator.'

   This is reiterated in proposed Rule 15, which states that an approved regulator must 'have regard to' the guidance. The proposed guidance extends to 40 pages, and includes detailed guidance in respect of each of the 17 Rules. ACCA would like the final guidance to be more streamlined, and drafted with a focus on clarity, in order to help achieve effective compliance by the approved regulators. As currently drafted, the guidance includes surplus information, including processes to be adopted by the LSB. Although we accept that the proposed guidance is not intended to be prescriptive, we believe that, in practice, it would have such significance as to place a disproportionate burden on both the approved regulators and the LSB.

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Detailed Rules and guidance

9. Before addressing the specific questions asked within the consultation paper, we comment below on some of the specific Rules in the context of the draft statutory guidance.

10. We have an overriding concern that the distinction between an approved regulator and an AAR may be removed without the amended IGR being sufficiently principles-based to deliver flexibility and proportionality. Such a situation could threaten the public interest in having a diversity of approved regulators, and would fail to recognise the variety of ways in which approved regulators may achieve the principle of independent and robust regulation. At a meeting on 13 December 2018, the LSB explained to ACCA that this decision was a result of the AAR definition not being well understood, although this is not the rationale given in the July 2018 decision document.[1] According to the consultation document, a significant driver for the removal of the distinction appears to be a 'level playing field'.[2] While a level playing field is appropriate in the sense that all regulators should be required to achieve the same outcomes, it is not appropriate if it means that the same regulatory tools and processes are imposed irrespective of the regulatory risks.

11. Nevertheless, the proposed IGR acknowledge the diversity of approved regulators, as they distinguish between approved regulators that only have regulatory functions and those that also have representative functions. (The former would be completely exempt from 8 of the proposed Rules.) The challenge of perceived inconsistency in the requirements would not exist with a principles-based drafting of the IGR and guidance.

Rule 1

12. Proposed Rule 1 (described in the guidance as 'pre-eminent') sets out the overarching duty of an approved regulator 'to ensure that decisions relating to its regulatory functions are not influenced by any representative functions or interests it may have'. This Rule is expressed at a suitably high level, and clearly articulates a desired outcome in the context of section 28 of the Act (reproduced in Appendix 1).[3] However, we are very concerned by the use of the word 'influenced' while the Act uses the word 'prejudiced' in sections 29 and 30. The proposed drafting of the IGR

[1] July 2018 response and decision document, pages 15 to 17
[2] Page 4 of the November 2018 consultation document states 'all approved regulators with both representative and regulatory functions will be subject to the same obligations under the new IGR'.
[3] Section 28 mirrors the LSB's duty, under section 3, to promote the regulatory objectives and to have regard to the better regulation principles (that regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed).

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goes beyond the requirements of the Act, and fails to recognise the intent in drafting the Act, which is evident from the Hansard record of the debate in the House of Lords.[4] As a result, opportunities and innovations where the interests of both the regulatory and representative functions would be aligned, and where the insights of the regulated population may be valuable, would not be recognised.

13. Inappropriate use of the word 'influence' also introduces inconsistency in the IGR, and amounts to the LSB proposing to use the wrong standard (and a standard that has not been defined) in the Rule that is described as 'pre-eminent'.

14. Page 3 of the proposed guidance states that the IGR and the approved regulator's duty under section 28 to promote the regulatory objectives 'must be complied with simultaneously'. Inappropriate drafting of the IGR would make this impossible. For example, prescriptive and unreasonable IGR would provide a significant disincentive for regulators to enter the area of legal services regulation, and could even persuade the smaller approved regulators (in terms of the numbers of individuals and firms they authorise) to withdraw. In short, the regulatory objectives of:

    - promoting competition, and
    - encouraging an independent, strong, diverse and effective legal profession

    would not be promoted. It may be argued that the Act prevails if a conflict between the IGR, as proposed, and the simultaneous compliance with the promotion of the regulatory objectives would make the IGR unworkable. Above all, the IGR and guidance must achieve clarity among approved regulators and regulatory bodies.

Rule 2

15. The required legal status (if any) of the 'regulatory body' is unclear, and could usefully be explained in the guidance. It is defined in Rule 2(1) as a 'separate body' to which an approved regulator delegates the discharge of its regulatory functions. But the separation of regulatory and representative functions would appear to be limited by the need for the approved regulator (ie the body with the representative functions) to retain responsibility for receiving assurance that the regulatory functions are being discharged in accordance with section 28 of the Act. The consultation states:

[4] HL Deb (22 January 2007) vol. 688, col. 974

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'Misunderstandings about the residual role have underpinned a significant number of disagreements between approved regulators and their regulatory bodies under the current IGR.'[5]

This is unsurprising as, for the residual role to be performed effectively, there must be a degree of influence by the approved regulator over the regulatory body, in order to require the appropriate level of assurance. In practice, this has not been an issue with ACCA's regulatory arrangements, and it is not clear that the proposed IGR and guidance would reduce the risk of misunderstandings in the future.

16. In addition, the regulatory body's 'governing board' or 'regulatory board' (as it is termed) is not defined, and so there is a further lack of clarity in the proposed IGR and guidance. This appears to be because the LSB has assumed that all approved regulators will have structures that are similar (and regulatory bodies will be subject to only one source of oversight regulation), and so this has given rise to prescriptive rules, rather than focusing on the outcome of having independent regulatory decision-making and oversight (in the public interest). This is discussed further under Rule 5 below.

Rule 5

17. This Rule states that 'no person who is materially involved in representative functions may be a member of the board, council or committee which makes decisions about how to exercise regulatory functions'. From the proposed IGR and guidance, all that is clear is that the board is a decision-making body concerning 'how to exercise regulatory functions'. The model with which the LSB is familiar is one in which a board controls and directs the regulatory functions. An alternative model is one that provides separation of the regulatory and representative functions at the operational level, but also has in place an independent board to oversee the regulatory functions to ensure their integrity. In the case of ACCA, such a board exists and has been effective in exercising public interest oversight since 2008. ACCA's Regulatory Board has direct access to members of ACCA's council, and information concerning the Board's membership and activities is publicly available on the ACCA website.[6]

Rule 6

18. Proposed Rule 6 is a new Rule, and we would welcome it. It requires the approved regulator to ensure that individuals involved in the exercise of regulatory functions are aware of and comply with the IGR and the arrangements in place to meet the overarching duty expressed in Rule 1. If the IGR and guidance are clearly drafted, this would provide a useful safeguard, as all those involved in the exercise of

[5] November 2018 consultation, page 9
[6] https://www.accaglobal.com/uk/en/about-us/regulation/regulatory-board.html

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regulatory functions would be assured of having a clear understanding of the principle of regulatory independence.

19. Although Rule 6 is clear and succinct, the proposed guidance extends over three pages. This adds little value, but appears somewhat prescriptive in setting out what the LSB would expect in respect of training. As a result, the importance of an organisation's culture has been overlooked.

Rule 7

20. As the proposed IGR are drafted, the removal of the definition of an AAR would mean that the definition of 'lay person' in the Act (essentially, a person who is not and has never been authorised to conduct any reserved legal activities) would also apply to an accountancy body such as ACCA. ACCA has always maintained that the Act's definition of 'lay' is of little relevance for a regulator of accountants, even though some of its members may be undertaking the reserved legal activity of non-contentious probate.

21. The removal of the definition of an AAR is likely to present difficult questions concerning the constitution of an approved regulator's regulatory board. Where the approved regulator is a body of accountants, for example, it could become necessary to involve lawyers, accountants and others (who are neither lawyers nor accountants), in such numbers as would be possible to satisfy any interpretation of a 'lay' majority. However, we believe such a structure would tend to unwieldiness. Our conclusion is that requiring an accountancy body (itself subject to lead regulator oversight) to classify lawyers as non-lay when the only reserved legal activity its members undertake is non-contentious probate work would be disproportionate to the regulatory risks concerned.

22. Similarly, we would not consider it a proportionate response to require a professional body of accountants to constitute a separate regulatory board in respect of non-contentious probate activities alone. ACCA's Regulatory Board oversees the performance of ACCA's regulatory functions as a whole. It identifies areas of highest risk, providing challenge in those areas and conducting 'deep dives' into other areas. To adopt a different approach could be detrimental to effective, efficient, outcomes-focused regulation.

23. The preamble to the proposed IGR states that 'independent regulation' is essential for consumer confidence, and serves the public interest.[7] ACCA is in agreement to the extent that 'independent regulation' refers to independent regulatory decision-making and oversight.[8] For this reason, ACCA introduced independent oversight of its regulatory functions in 2008, in the form of its Regulatory Board. The preamble

[7] November 2018 consultation, page 23
[8] This also reflects the spirit of the Act, as set out in section 30.

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goes on to state:

> *'The Legal Services Board recognises the inherent tension for approved regulators … who have both representative and regulatory functions and are required to separate their regulatory functions whilst remaining responsible for assuring compliance by their regulatory body with Section 28 of the Act. In this situation, the Act does not allow for complete separation or complete independence.*[9]*'*

In situations where tension exists, the cause of the tension would appear to be the need for the approved regulator to assure compliance with section 28. In the case of ACCA, its responsibility for assuring compliance relies to a great extent on the oversight of the independent Regulatory Board.

Rule 11

24. The principle on which this Rule is founded is that the sharing of resources, including shared services, must not allow representative functions to prejudice regulatory functions. In discussing the Legal Services Bill, the matter of proportionality was considered, and Lord Kingsland said:

> *'We have already indicated at earlier stages in the Bill that we totally accept the Government's reasons for proposing a complete separation of functions, but in some cases that may not be possible, or at least, not possible at anything other than an exorbitant and disproportionate cost. In the absence of any manifest risk of conflict, we believe that Chinese walls should be permitted in agreed instances, so in this respect, we would like the Government to be flexible.'*[10]

Baroness Ashton replied:

> *'I agree completely that proportionality is very important and that the board must have regard to it when exercising its functions under Clauses 28 and 29 [now sections 29 and 30]. We believe that that is covered under the duty in Clause 3, which states:*
>
> *"The Board must have regard to … the principles under which regulatory activities"*
>
> *including its functions under Clauses 28 and 29 should be proportionate. I do not, therefore, want to set out an additional requirement for the board to pay particular regard to what is proportionate under Clauses 28 and 29, as it rather gives the appearance that it does not have to do so when discharging all its functions or*

[9] November 2018 consultation, page 23
[10] HL Deb (22 January 2007) vol. 688, col. 977

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that the tests for other functions should be of less significance. That would not be desirable.

I agree with the noble Lord, Lord Kingsland, that there might be instances when it may be more efficient and cost-effective for approved regulators to operate from the same premises, where the overheads can be shared between the regulatory and representative arms, or for some individuals to carry out functions that could have both regulatory and representative aspects - for example, if those individuals are carrying out support rather than policy or decision-making roles. …

I hope to allay concerns, in a sense, in both directions, that the detail is better set out in the internal governance rules under Clause 29, which allow the board to take a proportionate approach.'[11]

We believe that the conclusions reached in this debate allow the LSB to take a proportionate approach, and such an approach is possible through the proposed drafting of Rule 11. However, the proposed guidance suggests that 'distinct working areas and facilities' would be expected in order to comply with Rule 11. This risks the guidance being perceived as prescriptive, which would deny the flexibility (of approved regulators and the LSB) to meet the necessary outcomes in the most effective way.

Rule 13

25. As with *any* body whose regulatory activities are overseen by a lead regulator, it should be expected that an approved regulator will see its reasonable responsibilities to include candour about compliance with the IGR and any emerging shortcomings in the regulatory body's processes. This is easier to achieve with the right culture within the organisation and an appropriate relationship with the LSB. Therefore, there is an important role for the guidance in explaining how the right outcomes may be achieved.

26. However, in our opinion, the guidance is drafted in such a way that it may impede the generation of the right culture and relationships. This starts with a statement that an approved regulator must respond to the requests of the LSB within 10 days, and goes on to state that systems should exist for logging compliance matters, and prescribes eight elements of those systems.

[11] HL Deb (22 January 2007) vol. 688, col. 978

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27. The draft guidance does not clearly reconcile the requirements that:

    - '[e]ach **approved regulator** must respond' and
    - '[e]ach **approved regulator** must ensure that any issue in relation to compliance with these Rules … is reported in writing to the Legal Services Board' [emphasis added][12]

    with the expectation that 'the monitoring and responses to requests from the LSB for information will come directly from the **regulatory body** where they have primary responsibility' [emphasis added].[13] In fact, the guidance (pages 34 and 35) carries a whole section on notifying the board of non-compliance, which suggests that internal reporting systems are required so that the regulatory body does *not* need to communicate directly with the LSB.

28. Furthermore, the draft guidance states: 'The AR will therefore need to put in place a system for the internal reporting of issues arising under the rules.'[14] However, the approved regulator will not be able to inspect the records generated under such a system, and so there is no link between the expectations set out in the draft guidance and the desired outcomes.

Rule 16

29. Rule 16 (the 'saving provision') is particularly important, because it may help to overcome any challenges arising from the IGR not being sufficiently principles-based. The saving provision may enable the LSB to monitor compliance with the IGR with an appropriate focus on outcomes and assessed risk. It states that '[n]o approved regulator shall be in breach of these Rules if the action or omission, which would otherwise constitute the breach, is … carried out with the prior written authorisation of the Legal Services Board'[15].

30. The guidance will be particularly relevant to this Rule, and care must be taken to avoid the unintended consequence of restricting the situations in which the written authorisation of the LSB may be provided. For example, the draft guidance states: 'Each AR should note that authorisation is only likely to be given if compliance is **clearly impracticable**'[16] [emphasis added], and goes on to state: 'It should be noted that this discretion will be used sparingly. The starting point is that each AR must comply with each and every rule in the IGR which applies to it.'[17] We recommend that unnecessary limitations such as this are removed from the

[12] November 2018 consultation, page 28
[13] Proposed LSB Guidance on the IGR, page 32
[14] Proposed LSB Guidance on the IGR, page 34
[15] November 2018 consultation, pages 28 and 29
[16] Proposed LSB Guidance on the IGR, page 25
[17] Proposed LSB Guidance on the IGR, pages 38 and 39

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guidance, as they serve no purpose, but they impede flexibility and a risk-based approach. Overall, the guidance gives the impression that the LSB has not adopted a truly principles-based approach in its drafting of the IGR and guidance.

AREAS FOR SPECIFIC COMMENT

In this section, we respond to the specific questions asked by the LSB in its consultation paper.

Question 1: Do you agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement? If not why not?

31. We do not believe that the drafting of these IGR and guidance will lead to fewer disputes. An effective, outcomes-focused set of Rules, founded on clear principles, would avoid the need to include Rule 14 (disputes and referrals for clarification).

32. While we acknowledge that the IGR must be drafted within the constraints of the Act, the ambition of the regulatory framework must surely be independent and objective decision-making in the public interest, rather than simply enhanced 'independence of regulatory functions'. The latter may fail to deliver the necessary outcome.

33. In our opinion, excessive detail in the guidance and lack of focus on clear objectives (largely as a result of being seen to deliver the requirements of the Act), mean that the proposed IGR and guidance, as drafted, would not improve clarity. We suggest that the LSB should articulate clear objectives, and the guidance might illustrate examples of good practice. But it should be made clear that there are often alternative means of meeting the objectives.

Question 2: Does the proposed guidance provide sufficient detail to help you to interpret and comply with the proposed IGR? Please provide specific comments on any areas of the guidance where further information would improve clarity.

34. We believe we have answered this question in our detailed comments above. In summary, we believe the proposed guidance is excessive, and would serve to constrain approved regulators and the LSB in delivering the required outcome of independent regulatory decision-making. In our opinion, the proposed guidance does not sufficiently take into account the circumstances of approved regulators

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whose members are not primarily involved in legal services, and which also have other oversight regulators.

35. Some approved regulators will be unsure of their ability to comply with the IGR, given the process of gaining authorisation under the saving provision, the possible frequency of such applications, and uncertainty about whether such an application would be successful.

Question 3: Is there any reason that your organisation would not be able to comply with the proposed IGR within six months? Please explain your reasons.

36. There will be a transition period of six months from the date of publication of the new IGR. After this period, the LSB will require a certificate of compliance from each approved regulator (and each separate regulatory body). Please refer to our comments above concerning the process of gaining authorisation under the saving provision, and the uncertainty around the LSB's willingness to approve ACCA's regulatory arrangements.

37. We have provided the LSB with a document that maps the proposed IGR and guidance to ACCA's existing arrangements, and we have met with the LSB to refine our understanding of the LSB's position and to further explain ACCA's arrangements to the LSB. The process of identifying areas where the saving provision may be relevant cannot take place until the IGR and guidance have been finalised.[18]

38. We believe that ACCA's current arrangements meet the principle of regulatory independence, in a way that focuses on the necessary outcomes, including the perception of third parties. However, we would expect to work closely with the LSB to discuss areas in which ACCA's arrangements might not comply with the prescriptive requirements of the final IGR and the Act, and any areas in which our arrangements might be enhanced. These areas may not be clear to all parties immediately, and so certification of compliance (within six months) is likely to be accompanied by the disclosure of areas where further discussion may be required.

[18] Page 16 of the consultation explains: 'The LSB has carried out an initial qualitative impact analysis to ascertain the work that **each approved regulator** and regulatory body would need to undertake during the six-month transition period and on compliance thereafter. **Each proposed rule** was examined and an initial assessment was formed of what, if anything, would be required to comply based on the LSB's understanding of the current arrangements in place within the approved regulators. The anticipated operational impact given how the bodies currently work was taken into account.' [emphasis added]

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Question 4(a): Beyond the usual resources allocated to compliance with the IGR what, if any, additional resource do you anticipate you will need: (i) to assess compliance with the proposed IGR and then to make changes to come into compliance, if any are required; and (ii) to comply with the IGR on an ongoing basis?

39. We have no further comments to make concerning the possible costs of compliance with the IGR, due to the current high levels of uncertainty.

Question 4(b): Do you agree with our assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the proposed IGR?

40. We have no evidence to suggest that the costs of compliance will reduce under the IGR and guidance as drafted in the consultation. In fact, we have concerns that some areas of the proposed IGR might give rise to increased costs. Therefore, opportunities should be sought to remove requirements that are (or may appear to be) unnecessarily or unreasonably prescriptive. This would require legal regulators to focus on the necessary outcomes, including independent decision-making and oversight (in the public interest).

Question 5: Please provide comments regarding equality issues which, in your view/experience, may arise from implementation of the proposed IGR.

41. We believe that an unintended consequence of the IGR and guidance, as drafted, may be increased costs, which must be passed on to the regulated individuals and firms and ultimately to consumers. This would have a disproportionate negative impact on small practices and their clients. In addition to this issue, which may be seen as an equality issue, there may be a reduction in competition and diversity in the provision of legal services. Care must be taken to support *all* the regulatory objectives. In particular, stifling diversity and innovation in the legal services market would have a negative impact in terms of unmet legal need.

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CONCLUSION

42. According to the LSB, it would like 'rules and guidance to … provide clarity for every approved regulator and its regulatory body to decrease the number of independence-related disputes between them and referrals of such matters to the LSB for clarification or resolution'.[19] This is one of several assumptions within the consultation. The statement also illustrates the focus throughout the consultation on compliance with the IGR, rather than enhancing regulatory decision-making and outcomes.

43. The consultation refers to the 'challenging framework' of the Act concerning the IGR', and that the term 'approved regulator' refers to 'a disparate group of entities with a broad spectrum of structures'.[20] Care must be taken to ensure that the IGR deliver the spirit of the Act and the findings of the Clementi Review that preceded it.

44. The relationship between the approved regulator and the 'regulatory body' to which the regulatory functions are delegated is such that the approved regulator does not have an oversight role.[21] Instead the role is described as one of assurance – 'that regulatory functions are being discharged in accordance with section 28 of the Act'.[22] This may appear a rather contrived explanation of the relationship, which would be unnecessary if the LSB was suitably empowered (by its regulatory performance framework) to oversee the functioning of a body's regulatory arrangements. Alternatively, a single regulator of reserved legal activities may best provide the clarity required.

45. We emphasise again the impact of inconsistent drafting within the proposed IGR, where the use of the word 'influence' goes beyond the intention of the Act, which is to avoid 'prejudice'. This is particularly important in the context of Rule 1 (the 'pre-eminent Rule') as it might give rise to a challenge that the LSB is acting beyond its *vires*.

46. The LSB acknowledges that '[t]he Act does not create a framework in which a regulatory body is structurally separate from its representative body'[23]. The consultation goes on to state that the Act 'creates approved regulators which may have both representative and regulatory functions'.[24] There appears to be an acceptance that the new IGR should not undermine the past recognition of

[19] November 2018 consultation, page 5
[20] November 2018 consultation, page 6
[21] Page 6 of the consultation states that 'after delegation of regulatory functions, the approved regulator's role is one of assurance (not oversight)'.
[22] Ibid
[23] November 2018 consultation, page 3
[24] Ibid

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professional bodies as approved regulators. We anticipate that the fact that established approved regulators have arrangements and processes that have already been judged to be satisfactory will provide a sound basis for an approved regulator seeking one or more written authorisations from the LSB under the saving provision.

47. We are concerned that discussions with the LSB demonstrate how the IGR have been drafted with the existing structures of the AARs in mind. We believe this to be the reason that the LSB perceives the regulatory governance arrangements of ACCA, for example, to be difficult to understand. This is a clear indication that the IGR and guidance have not been drafted with a clear focus on fundamental principles and necessary outcomes.

48. Our response to this consultation is as an approved regulator of legal services only in respect of non-contentious probate. Given the low risk associated with the reserved element of this service, ACCA has often opined that probate should cease to be a reserved legal activity. (This has also been the LSB's own assessment in the past.) We believe that only those legal services that pose systemic risk should be reserved, and that a proportionate and risked-based legal regulatory framework is best achieved through a single regulator in respect of those activities. In the absence of this rationalisation, it is particularly important that regulatory arrangements are consistent with the level of risk associated with the reserves legal activities being provided.

49. We have met with the LSB on a number of occasions to explain ACCA's regulatory arrangements, including its governance and independent public interest oversight arrangements. Some of these meetings have been as a result of the current IGR consultation process, and others have been as part of the LSB's oversight of ACCA since the LSB approved ACCA's regulatory arrangements for probate activities in January 2018. In light of this learning, we would be very pleased to work with the LSB in developing an effective set of IGR that are principles-based and focused on achieving the right outcomes.

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APPENDIX 1: EXCERPTS FROM THE LEGAL SERVICES ACT 2007

Section 1 The regulatory objectives

(1) In this Act a reference to "the regulatory objectives" is a reference to the objectives of—

(a) protecting and promoting the public interest;

(b) supporting the constitutional principle of the rule of law;

(c) improving access to justice;

(d) protecting and promoting the interests of consumers;

(e) promoting competition in the provision of services within subsection (2);

(f) encouraging an independent, strong, diverse and effective legal profession;

(g) increasing public understanding of the citizen's legal rights and duties;

(h) promoting and maintaining adherence to the professional principles.

(2) The services within this subsection are services such as are provided by authorised persons (including services which do not involve the carrying on of activities which are reserved legal activities).

(3) …

Section 21 Regulatory arrangements

(1) In this Act references to the "regulatory arrangements" of a body are to—

(a) its arrangements for authorising persons to carry on reserved legal activities,

(b) its arrangements (if any) for authorising persons to provide immigration advice or immigration services,

(c) its practice rules,

(d) its conduct rules,

(e) its disciplinary arrangements in relation to regulated persons (including its discipline rules),

(f) its qualification regulations,

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(g) its indemnification arrangements,

(h) its compensation arrangements,

(i) any of its other rules or regulations (however they may be described), and any other arrangements, which apply to or in relation to regulated persons, other than those made for the purposes of any function the body has to represent or promote the interests of persons regulated by it, and

(j) its licensing rules (if any), so far as not within paragraphs (a) to (i),

(whether or not those arrangements, rules or regulations are contained in, or made under, an enactment).

(2) …

Section 28 Approved regulator's duty to promote the regulatory objectives etc

(1) In discharging its regulatory functions (whether in connection with a reserved legal activity or otherwise) an approved regulator must comply with the requirements of this section.

(2) The approved regulator must, so far as is reasonably practicable, act in a way—

(a) which is compatible with the regulatory objectives, and

(b) which the approved regulator considers most appropriate for the purpose of meeting those objectives.

(3) The approved regulator must have regard to—

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and

(b) any other principle appearing to it to represent the best regulatory practice.

Section 29 Prohibition on the Board interfering with representative functions

(1) Nothing in this Act authorises the Board to exercise its functions in relation to any representative function of an approved regulator.

(2) But subsection (1) does not prevent the Board exercising its functions for the purpose of ensuring—

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(a) that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions, or

(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.

Section 30 Rules relating to the exercise of regulatory functions

(1) The Board must make rules ("internal governance rules") setting out requirements to be met by approved regulators for the purpose of 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.

(2) 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.

(3) The internal governance rules must also require each approved regulator—

(a) to take 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;

(b) to make such 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.

(4) …

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Schedule 1, paragraph 2 Definition of 'lay person'

(4) In this Schedule a reference to a "lay person" is a reference to a person who has never been—

(a) an authorised person in relation to an activity which is a reserved legal activity;

(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);

(c) an advocate in Scotland;

(d) a solicitor in Scotland;

(e) a member of the Bar of Northern Ireland;

(f) a solicitor of the Court of Judicature of Northern Ireland.

(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—

(a) a barrister;

(b) a solicitor;

(c) a public notary;

(d) a licensed conveyancer;

(e) granted a certificate issued by the Institute of Legal Executives authorising the person to practise as a legal executive;

(f) a registered patent attorney, within the meaning given by section 275(1) of the Copyright, Designs and Patents Act 1988 (c. 48);

(g) a registered trade mark attorney, within the meaning of the Trade Marks Act 1994 (c. 26); or

(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).

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Response of the Association of Costs Lawyers to the Legal Services Board's Consultation into the Proposed Internal Governance Rules

Background:

The Association of Costs Lawyers (ACL) is the approved regulator under the Legal Services Act 2007, which has delegated its regulatory functions to the Costs Lawyers Standards Board (CLSB) since 2011.

This is the response to the consultation paper published by the Legal Services Board on 2nd November 2018 on their proposed revisions to the current Internal Governance Rules which govern the ACL's regulatory activities under s.28 Legal Services Act 2007.

Question 1:

Do you agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement? If not, why not?

The ACL welcomes the proposed IGR's emphasis on 'assurance' by the Approved Regulator of the Regulatory Body's discharging of their obligations under section 28 of the Act. This is an improvement on the current principle of 'oversight'.

The ACL thus agrees that the proposed rules would enhance regulatory independence and that the emphasis on candour and a duty to provide information for assurance would lead to fewer disputes between it and its Regulatory Body.

Question 2

Does the proposed guidance provide sufficient detail to help you to interpret and comply with the proposed IGR? Please provide specific comments on any areas of the guidance where further information would improve clarity.

The ACL broadly agrees that the proposed guidance gives sufficient detail to enable it to interpret and comply with the proposed IGR.

However the ACL has concerns in respect of the Guidance for Rule 4 – Regulatory Autonomy. The guidance provides no definition of 'influence' that the Approved Regulator can/cannot have upon the regulatory body. This is a departure from the current IGR which refers to 'undue influence'.

The guidance makes a referral to an exception where the Approved Regulator may submit a response to any consultation which the regulatory body may choose to hold. Whilst the guidance states that the LSB would 'expect' a regulatory body to hold a consultation in respect of significant changes, the guidance does not assist in what should constitute significant.

The ACL's concern being that the proposed rules will remove all influence it may have on the Regulatory Body's priorities and strategy relative to other stakeholders.

Question 3

Is there any reason that your organisation would not be able to comply with the proposed IGR within six months? Please explain your reasons.

The ACL has concerns about the six-month deadline, given that the work required to comply with the new IGR will be being undertaken by voluntary members of the ACL's Council. We do however take some comfort from the fact that at the stakeholder meetings reassurance was given on this point; that extensions would be considered on an individual basis.

Question 4(a)

Beyond the usual resources allocated to compliance with the IGR what, if any, additional resource do you anticipate you will need: (i) to assess compliance with the proposed IGR and then to make changes to come into compliance, if any are required; and (ii) to comply with the IGR on an ongoing basis?

The ACL does not presently believe that any additional resources of note will be required to comply with the proposed IGR. However ACL would reiterate the point previously made that, as an organisation our resources are far more limited than that of other Approved Regulators. Therefore we would reserve the right to address this point further.

Question 4(b)

Do you agree with our assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the proposed IGR?

Providing that the number of disputes and disagreements reduces in the manner in which the LSB's assessment suggests, then the ACL agrees that the cost of compliance will likely be reduced.

Question 5

Please provide comments regarding equality issues which, in your view/experience, may arise from implementation of the proposed IGR.

The ACL does not believe that any issues in respect of equality will arise out of the implementation of the proposed IGR.

The Association of Costs Lawyers
Monday 21st January 2019

Bar Council response to the Legal Services Board (LSB) consultation paper on the Proposed Internal Governance Rules

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to LSB consultation paper on the Proposed Internal Governance Rules (IGR).[1]

2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Overview

4. The Bar Council considers that the proposed rule changes are *ultra vires* and susceptible to Judicial Review if brought in to force in their current form.

5. If, which is not conceded, the rules are *intra vires*, the proposed rules are too prescriptive. They do not cater for the widely differing governance arrangements and structures currently in place across the ten Approved Regulators (AR).

[1] LSB consultation paper on the Proposed Internal Governance Rules 2018

6. The proposed rules attempt to force structural separation, thereby thwarting the intention of Parliament when it enacted the Legal Services Act 2007 (LSA07).

7. The language used in the proposed IGR replaces the concept of "prejudice", the terminology used in the LSA07, with the concept of "influence". If implemented in their proposed form, the rules would significantly reduce the scope for the Bar Council to engage with, and make representations to, the BSB and would undermine the Bar Council's ability to discharge its statutory assurance duties in relation to the BSB. The term "reasonable" which appears in Rule 10 is ambiguous. It could precipitate disputes about the definition of this term in a multitude of situations.

8. There is, in our view, insufficient evidence on which the proposals made by the Legal Services Board (LSB) have been made to justify the proposals for change which are, in any event, beyond the power of the LSB. Further, there is no evidential basis derived from the current relationship between the Bar Council and the BSB which could reasonably be relied upon to justify the nature and extent of the proposed rule changes.

9. The Bar has always been in favour of high quality regulation. It is entitled to look to its regulator to ensure that the arrangements for regulation of the Bar enable a strong and independent profession, operating to high standards, to flourish. This is in the public as well as the consumer interest. The proposed IGR could disconnect the BSB from its regulated community to such an extent that it would reduce the credibility of the regulator with the profession. This is damaging to the ethos of the profession and its maintenance of professional standards.

10. Under the current governance arrangements, the BSB is able to operate both independently, efficiently and cost-effectively, to the benefit of consumers as well as the profession. These arrangements, which have worked well over several years with the benefit of experience, demonstrate the value of the current IGR and the risks that would be created by the proposed changes. The benefits claimed for the proposed rule changes would be far outweighed by the uncertainties, costs and disruptive effects which could be expected to flow from the changes.

11. The existing shared services model is effective and represents good value for money.

12. Rules 2 and 5 of the proposed IGR sit uneasily with rule 11.

13. If implemented in their current form, the proposed IGR would create a situation in which the Bar Council would remain accountable to the profession for setting the level of Practising Certificate Fee (PCF) but would have very limited control over the

PCF requirement. The BSB would decide how much PCF it requires (currently over 70% of the total collected) with virtually no oversight by the Bar Council.

14. If implemented, the proposed rules would disrupt the core activities of both organisations and put at risk the delivery of permitted purpose activities.

Main concerns

15. The proposed rules run counter to Parliament's intention in the LSA07 for Approved Regulators to be able to have a split function and to share services (with appropriate safeguards in place to prevent undue influence of representative interests on regulation), as well as legitimate interest in the regulation of the profession through the discharge of its duty to assure performance of regulation of the profession. As such, it is the opinion of the Bar Council, which has been confirmed by leading Counsel, that the proposed IGR are *ultra vires*. That is to say, they are unlawful. The LSB signal this departure from the intention of the LSA07 when it states in its draft guidance document that:

> "it is highly desirable that the regulatory body has its own legal personality for the purposes of compliance with rule 1 - overarching duty".[2]

16. It is not a requirement of the LSA07 that the regulatory arm of an Approved Regulator should be functionally and legally distinct from the Approved Regulator. Sir David Clementi and the LSA07 draftsmen understood there to be a connection of interests between the representative and regulatory side of an Approved Regulator. This common interest is to protect the reputation of the profession by ensuring its members uphold high ethical standards, in the public interest.

17. The regulatory framework created by the LSA07 was designed to provide a proportionate and flexible framework that would only require LSB enforcement, in the exercise of its oversight responsibilities, if there were failings that needed to be resolved. This point was emphasised during the course of the evidence given to the Joint Committee on the draft Legal Services Bill on 24 June 2006. Bridget Prentice MP (the Parliamentary Under-Secretary of State, Department for Constitutional Affairs) emphasised the following:

> "It is important that it is proportionate. Where the approved bodies are operating effectively, *the LSB will leave them to get on with that job properly*. Equally - and this is important for consumers - where a body is falling down on their operation, the LSB has the ability to deal with that in an appropriate fashion.

[2] Annex B- LSB Guidance in Internal Governance Rules, p12

> That gives good flexibility. It may be, for example, that the LSB simply has to remind a regulatory body of what they should be doing right through to taking a much more serious response if they are very negligently falling down in their duties." (emphasis supplied) [3]

18. As we will set out in this response, the proposed IGR take away this flexibility and create a heavy-handed framework that unjustifiably bolsters the LSB's oversight role, whilst simultaneously diminishing the AR's legitimate role to that of 'residual' assurance. This is not what was intended by Parliament.

19. In the absence of a full Ministry of Justice review of the LSA07 and the wider regulatory framework, the LSB has focussed on pushing organisational separation rather than the functional regulatory independence mandated by the LSA07. There is an erroneous perception that the representative bodies seek to compromise the regulatory functions of their front-line regulators and that the two sides are in regular dispute. We strongly refute any suggestion that this reflects the position of the Bar Council and its relationship with the BSB. We wish to emphasise the common interest of both organisations in upholding the professional standards of barristers, in the public interest. The working relationship which has developed over several years under the existing IGR between the Bar Council and the BSB has enabled the BSB to discharge its regulatory functions under the LSA07.

20. At the same time the Bar Council has fulfilled its role as Approved Regulator and in the delivery of permitted purpose activities.[4] These range from supporting law reform and the legislative process to the promotion of the protection by law of human rights and fundamental freedoms. The work carried out by the Bar Council in these areas, for example by supporting the Government and the profession to understand the implications of Brexit, are of constitutional importance. The significance of this point was underscored by immediate past Chair of the Bar Council, Andrew Walker QC in his letter regarding the IGR to the Chair of the LSB on 21 December 2018:

> "[T]the proposals provide another example of failing to pay sufficient regard to the crucial constitutional role of the legal profession, and to the role and importance of the Bar Council in that respect…… That role has several aspects, in addition to our restricted role in regulation under the Act. In particular, it includes upholding the rule of law and the public interest and supporting and promoting the regulatory objectives within the profession, as well as

[3] Extracts from Hansard During the course of the evidence to the Joint Committee on the draft Legal Services Bill on 24 June 2006, https://publications.parliament.uk/pa/jt200506/jtselect/jtlegal/232/6062603.htm

[4] The permitted purpose activities are provided for at s. 51 of the LSA07

representing the views and perspective of the profession to those to whom the activity of regulation is delegated. We do this in part, of course, by supporting and encouraging the work and ethos of the profession itself to the same ends. Alienation between the BSB and both the Bar Council and the rest of profession would be more than just deeply regrettable."

21. We reiterate the point we have made on many occasions that there is little recent evidence of the BSB's regulatory independence being compromised by the Bar Council or of there being an issue of public perception of a lack of independence. In so far as the LSB considered it necessary in 2013 to investigate the relationship between the Bar Council and the BSB, the investigation and its outcome demonstrated that the existing regulatory apparatus operated as it was intended to, with the investigation finding no detriment of substance to the BSB's independence. As explained in our response to the initial consultation on the IGR, the subsequent development of a Protocol for ensuring regulatory independence between the Bar Council and the BSB was designed to bolster the arrangements for ensuring independence of the regulator under the existing IGR. The operation of the Protocol is regularly monitored.

The proposed IGR are an attempt by the LSB to achieve structural and legal separation of the representative and regulatory elements of the Approved Regulator without any lawful basis. This attempt is indifferent to the consequences for both sides of the organisation (particularly for the representative function). It would introduce unnecessary cost and, as a result of the uncertainty that would be created by the introduction of new rules, it would create the potential for significant disputes where none exist under the current arrangements. This would impact on the ability of the Bar Council and the BSB effectively to represent and regulate the profession (respectively), and ultimately would not be in the public or consumer interest. We firmly believe that operational regulatory independence is being achieved under the current arrangements, in keeping with the LSA07.

22. If implemented, the proposed IGR would create significant disruption to the operations of the Bar Council and Bar Standards Board. In short, the new IGR would present senior management with a significant distraction from the important work of both sides of the General Council of the Bar.

23. In discharging the Bar Council's statutory duties as an AR under the LSA07 we undertake a process of continuous review with the BSB to ensure that our arrangements for effective governance are in good order and ensure regulatory independence. For example, Practising Certificates, which were formerly signed only by the Bar Council Chief Executive, are now signed jointly by both the Chief Executive of the Bar Council and the BSB Director General. The BSB's Constitution was recently amended to enable the Board to operate with a smaller board. We continuously scrutinise the efficiency of shared services. By way of example, we have, with the

agreement of the BSB, outsourced payroll and print services and made significant savings.

24. These measures, voluntarily undertaken, demonstrate that we do not need a radical new set of IGR to effect change and that we are able continually to review and improve governance arrangements under the current framework. Our current approach can fairly be described as collaborative and incremental. As a result, disputes and disruption to both organisations are minimised. This allows both parts of the organisation to get on with their core functions whilst at the same time ensuring robust compliance with the LSA07.

25. We acknowledge that in the past the quality of a limited number of shared services has been an issue for the BSB. However, the impact of these shortcomings has affected both groups and we have been just as keen as the BSB to remedy the issues. Operational delivery problems do not mean that the policy of sharing services is necessarily a bad or inefficient model. Rather they mean we need to work together to make improvements, as we are doing.

26. The shared services model is effective, efficient and represents good value for money as resources and expert knowledge are shared, economies of scales are generated, and complexity is reduced. Appropriate information can be shared with safeguards in place to protect the BSB's regulatory independence. Both sides of the organisation benefit from this arrangement and the profession receives a quality of service from its regulator and representative body at a lower cost.

27. The Bar Council and BSB have established effective and efficient ways of ensuring that, for a small profession which is predominantly a referral profession and which, crucially, does not permit barristers to handle client money, appropriate arrangements are in place to enable the BSB to regulate the profession independently, as required by the LSA07. As outlined in the Bar Council's response[5] to the first consultation issued by the LSB on the IGR,[6] the BSB and Bar Council established a protocol[7] for ensuring the Bar Council does not exert any undue influence on the regulatory operations of the BSB and we believe this to be working, a sentiment echoed by the BSB in their response to the initial consultation on the IGR:

> "Since the 2013 LSB investigation of the Bar Council and the BSB, and the introduction of the Protocol for ensuring regulatory independence which

[5] https://www.barcouncil.org.uk/media/637440/bar_council_response_to_lsb_igr_consultation.pdf
[6] https://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/2017/IGR_consultation_doc_-_final_version.pdf
[7] https://www.barcouncil.org.uk/media/264804/bar_council_and_bar_standards_board_protocol_-_final.pdf

resulted from that investigation, we have had few concerns or disagreements directly impinging on regulatory independence matters concerning policy development or decision taking. The BSB has had no cause formally to report any matter of concern to the LSB. None of the 30 or so instances referred to in the consultation paper has involved the BSB."[8]

28. Consequently, we find the evidence base for the proposed changes to be lacking in relation to the Bar. It is disproportionate to apply the same rules to all ARs, regardless of whether there are problems with the existing system of regulation or not, especially when the new system generates significant and potentially damaging change and is more prescriptive. We do question whether the LSB is complying with its duty under the LSA07 to have regard to principles under which regulatory activities should be proportionate and targeted only at cases where action is needed.[9]

29. We anticipate that implementation of the proposed IGR in their current form in April 2019 would consume considerable staff and Officer effort when the Bar Council can least afford it. We are dealing with a number of key challenges facing the legal services sector: the lamentable state of the publicly funded justice system; making the case for reform of legal aid; responding to the potential impact of Brexit on legal services; assessing the implications of the huge court reform programme on access to justice; pursuing major initiatives to support the regulatory objectives with regard to equality and diversity and social mobility as well as a number of very significant internal change programmes that are supported both by the Bar Council and BSB. Even if it is not doing so by design, it could be argued that in proposing its rule changes the LSB is interfering with the representative function of the AR, an action which is prohibited by the LSA07.[10]

30. Notwithstanding that we oppose the new IGR on the fundamentally flawed basis on which they have been designed, if the *vires* was upheld, there are several points we wish to make on the proposed rules before turning to the consultation questions as set out below.

Rule 1 - The Overarching Duty

31. The LSA07 does not prohibit the Bar Council as AR from having any i***nfluence*** over the regulator as this rule seeks to do. Instead, the LSA07 clearly states that the AR must not ***prejudice*** the regulatory functions of the regulator. Prejudice implies some harm and is much narrower than "influence". Use of the wider term "influence" is therefore inappropriate and goes beyond what the LSA07 envisaged. Failure to

[8] BSB Response to LSB consultation in IGR
[9] LSA07 s.3.(3)(a)
[10] LSA07 s.29.(1)

respect the important difference between these two concepts (which are reflected in the language of the LSA07) is a serious flaw in the proposed rule changes.

32. The Bar Council must have the ability to make representations to the BSB in order to discharge its assurance role, particularly with regard to budget setting. The current arrangements for budget setting allow Bar Council scrutiny of planned regulatory activities, overseen by the joint (Bar Council and BSB) finance committee. The Bar Council must comply with s.28(3)(a) of the LSA07 which is designed to ensure that regulatory activities are "transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed". This scrutiny and ability to make representations is also important because the Bar Council is responsible both for setting the PCF level (subject to LSB oversight) and is accountable to the profession for the performance of functions and the delivery of services as the AR. The Bar Council must ensure that BSB budget proposals are not unreasonable, whilst recognising the need to "take 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".[11] In our opinion the current process works, and it works well.

Rule 2 - Duty to delegate

33. The first provision under rule 2 requires ARs to delegate the discharge of regulatory functions to a "separate body". However, the LSA07 provides that the single AR will have two functions that work "so far as is reasonably practicable", independently. If the LSB intends the regulator, whether expressly or implicitly, to be legally distinct from the AR, which it has suggested would be "highly desirable",[12] that clearly goes beyond the regulatory structure created by the LSA07. As mentioned earlier, enforcing that change directly or indirectly would be *ultra vires.*

34. The second provision under rule 2 would seem implicitly to limit the ability of the AR to share services with the regulator and contrasts with rule 11 which permits such sharing of services in certain circumstances. This is because the rule constrains the AR's permitted role by preventing the AR from having any function save what is reasonably necessary to obtain assurance that the regulatory body is acting in compliance with s.28 of the LSA07. Again, this appears to go further than the legislation permits since the LSA07 allows the AR to retain a role in the sharing of services provided that in doing so there is no prejudice to the regulatory functions required of the AR under s.28 and that the separation of functions has been undertaken so far as is reasonably practicable.

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[11] LSA07 30(3)(a)

[12] Annex B- LSB Guidance in Internal Governance Rules, p12

35. In the guidance document (p11) the LSB is overly prescriptive as to what information it would be "reasonably necessary" for the AR to demand from the regulator to fulfil its compliance role.

Rule 4 - Regulatory Autonomy

36. The prohibition on ARs attempting to influence the regulator's determinations on a variety of its matters including governance and structure, except through responding to consultations, which the regulator may choose not to issue, is very restrictive. We consider this to go beyond the restrictions permitted by the LSA07 which provides that an AR is entitled to influence determination provided that in doing so it does not prejudice the regulator from complying with the requirements of s.28 of the LSA07.

37. In the guidance note[13] the LSB asserts that it is right that regulators should be able to make changes to regulatory arrangements free of influence from ARs. However, it is right and proper to represent the views of the profession to the regulator, including on regulatory arrangements, just as any other third party would. For example, we responded[14] to the BSB's consultation on its s.69 order consultation to express our view that gaining this new power of intervention in relation to BSB-authorised bodies and persons was disproportionate to the regulatory risk posed and, therefore, unjustified. When making representations to the regulator, we should not be in a worse position than any other third party by virtue of being the profession's representative body.

38. We currently engage with the BSB in accordance with a Protocol for Regulatory Independence[15] (a record of all interactions is kept), through fortnightly meetings between the Chief Executive of the Bar Council (CEO) and the Director General of the BSB (DG) and meetings at least every two months between the Officers and CEO of the Bar and the Chair, Vice-Chair and DG of the BSB. The latter forum is called the Chairs' Committee and is underpinned by the Joint Committee Standing Orders that incorporate the IGR. Minutes are taken, approved by both parties and retained. There are also regular meetings between the Bar Council's Director of Policy and the BSB's Director of Strategy and Policy to ensure that business plans do not duplicate effort and cost. This dialogue helps maintain cooperation, prevents duplication and overlap, removes any surprises and ultimately, prevents disputes. It would be very inefficient, ineffective and potentially wasteful of limited resources if we could no longer engage with each other in this way.

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[13] Annex B- LSB Guidance in Internal Governance Rules, p20

[14] Bar Council response to the 'Section 69 Order to modify the functions of the Bar council' consultation paper

[15] https://www.barcouncil.org.uk/media/314543/bar_council_and_bar_standards_board_protocol_141204.pdf

39. We consider it is be entirely legitimate for the profession's lead representative body, acting within the scope of the LSA07, to question the BSB about its use of the Practising Certificate Fee so that we can discharge our own statutory duty under the LSA07 to seek and obtain assurance that appropriate use of the profession's money is being made in relation to their regulatory activities.

Rule 5 - Prohibition on Dual Roles

40. It is not clear how far this rule extends and which people are affected by it. We would be seriously concerned if, for example, the Directors of the Bar Council and BSB shared services teams were caught by this rule as it would make the shared service model, with all its attendant benefits, impossible to operate. If this were the case, there would also be a clear conflict between this rule and the possibility of shared services which is provided for in rule 11. It would mean that, once again, the rule goes further than is permitted under the LSA07. The whole purpose of facility sharing was to ensure that where prejudice was not going to occur through the sharing of resources, economies of scale could be achieved, costs saved and ultimately a lower cost of regulation in the interests of the consumer.

41. The other group of people potentially affected are those sitting on a small number of joint committees: the Emoluments Committee, the Finance Committee and the Audit Committee. These committees are governed by their own Joint Committee Standing Orders which are reviewed annually and underpinned by the seven principles of public life. They have a clear and narrow mandate. They have a balance of representative and regulatory members (including Lay members) as well as quorum rules to ensure that decision making is fair and takes account of the views and interests of both regulatory and representative interests. As touched on above, these committees fulfil many important functions, for example providing accountability for the organisation's spending, monitoring risk and reviewing the relationship between the Bar Council and BSB. As such, they are essential to the delivery of the Bar Council's assurance role. Disbanding one or more of them would seriously undermine the Bar Council's governance arrangements and lead to inefficiencies and increased disconnection between barristers and their regulator. This could impact on the BSB's credibility with the profession and undermine its ability to regulate since it would be further removed from the profession.

Rule 7 - Governance Lay Composition

42. Rule 7 does not exclude barrister involvement in the BSB Board but it is a matter of concern to us that it does not mandate such involvement. This means that there is potential for the BSB to exclude barristers' expertise entirely from its Board. Whilst we are reassured to some extent that the BSB currently has no intention of doing this,

a change in personnel could lead to a change of approach and exclusion of barristers from the Board. Barrister input to the BSB Board is vital both in terms of ensuring credibility with the public and the profession and for securing the profession's cooperation with the regulator. Crucially, it also helps to ensure that the regulator's policy making is informed by the experience and expertise of the profession. Therefore, if the proposed rule changes were implemented, we would seek assurance that there would continue to be barrister presence on the BSB Board, at the current level, through amendment to this rule.

43. Our second concern in relation to rule 7 is the requirement that in circumstances where the Chair (who must be lay, as stipulated in the BSB constitution) is absent, the Acting Chair must also be lay. This rule would prevent the Vice-Chair of the BSB, who is usually a barrister, or indeed any other barrister Board member from chairing the meeting. We see no good reason to require the Acting Chair to be a lay person. We think this provision is overly prescriptive and misunderstands the role of a Chair; to ensure the meeting progresses efficiently and democratically. It also disempowers the current Vice-Chair and risks damaging the credibility of the Board with the profession. Consequently, we suggest that the LSB removes this provision from the draft rules.

Rule 8 - The Regulatory Board: Appointments and Terminations

44. We consider rule 8(2) to go beyond the scope of s.30 of the LSA07 since it contains an absolute prohibition of influence or involvement in the appointment, re-appointment and termination of BSB Board members, whereas the LSA07 uses the narrower language of "prejudice".

Rule 10 - Regulatory Body Budget

45. This rule is problematic because it limits the role of the AR in shaping the budget of the regulator unless the regulator formally consults. We are concerned that there is no obligation in rule 10 for the regulator to consult. Hence there is the possibility that the ability of the Bar Council critically to appraise the BSB's budget could be removed altogether. A complete prohibition on the Bar Council to make representations on or influence budget formulation, without prejudicing regulatory decision-making, goes beyond what is permitted by the Act.

46. If the ability of the Bar Council to influence the budget of the BSB is limited in this way, the LSB ought to include a rule that requires the BSB to consult each year on its proposed annual budget. This would be more closely aligned with the LSA07. However, removing this rule altogether would be preferable.

47. The Bar Council is currently responsible for submitting the Bar Council and BSB Practising Certificate Fee application to the LSB for approval each year and as such the joint Finance Committee plays a key role in shaping the BSB budget, ensuring that the BSB receives reasonable resources (as provided for at s.30(3)(a)), whilst also ensuring the Practising Certificate Fee, for which the Bar Council is responsible for collecting from the profession, is kept at an acceptable level. This scrutiny and influence is important because any significant increase in the PCF could be passed on to consumers and have a detrimental effect on their ability to purchase legal services.

48. We note the ability of the Bar Council to "question the information supplied by the regulatory body where it has reasonable grounds to do so" as provided by rule 3(2)(a) but it is unclear how this would operate in practice and whether it would compel the regulator to make adjustments to its budget. The test of reasonableness is not defined and obviously susceptible to differing interpretations. There is too much uncertainty implicit in this provision for it to allay our concerns regarding the budget setting process under the new rules. If this rule were to be implemented, further clarity would be required from the LSB.

49. The question remains as to which body would decide what the BSB reasonably requires. Under the current arrangements it is the Bar Council but it is unclear who will take on this role in future. Again, clarity from the LSB would be required.

50. The proposed IGR creates an uncomfortable situation where the Bar Council remains accountable to the profession for the PCF level but retains almost no control over the level at which it is set. There is also a reputational risk. There may also be a temptation for the Bar Council to reduce its own budget in order to reduce the overall PCF level if the BSB budget is increased disproportionately in order to keep levels acceptable to the profession, to whom it is accountable. This would have a consequent impact on Bar Council's ability to deliver the s.51 non-regulatory permitted purpose activities.[16]

Rule 11 - Shared Services

51. We have already highlighted the contradiction between this rule and rule 5 (prohibition on dual responsibilities). It is almost impossible to envisage how any services could be shared with a complete prohibition on anybody from the representative side contributing to the functions of the regulatory side. An additional hurdle to achieving shared services would be the power of veto of the regulatory side which means that it could dictate the terms of any sharing agreement simply by threatening not to agree unless its demands were met in full. This rule would give

[16] LSA07 https://www.legislation.gov.uk/ukpga/2007/29/section/51

rise to the risk of misuse of the rule for leverage, with accompanying risk of detriment to the position of the representative side.

52. We consider that the requirement to gain permission from the LSB to share services is too onerous and that it should be removed. It should be sufficient that the representative and regulatory side agree to share a service.

53. The Bar Council shares a number of services with the BSB, including Information Services, Finance, Human Resources, Project Management Office, Facilities Management and Records because both bodies are relatively small[17] (reflective of the small size of the profession they represent, compared, for example, to solicitors). It is logical to pool resources and achieve efficiency savings as well as avoid duplication. This naturally contributes towards reducing the cost of regulation, in which the LSB has a particular interest.

54. Both the BSB and Bar Council have access to a higher level of skills than they would have available to them in a conventional embedded services function. If they had to obtain these services separately, to replicate the level of expertise and service available to each organisation would cost considerably more. This would be caused by the replication of costs such as licences, property, insurance and utilities where the combined weight of the organisation creates a synergy where they are able to get more value for money than if they were completely separate operating entities.

55. These benefits are precisely what the LSA07 had sought to achieve by permitting shared services. It would seem sensible to consider the size and purchasing power of both organisations when weighing up what is "reasonably practicable" in the context of ensuring separation of decision making about regulatory and representative functions under s.30(1)(b) of the LSA07.

56. The relatively new Customer Relationship Management (CRM) system is a good example of how we can effectively share a service of value to both organisations with appropriate structures and protections in place to prevent any incursions into the BSB's regulatory independence.[18] The purpose of this system is to handle all data

[17] As at 10 January 2019 there are 80 BSB staff, 33 Bar Council staff and 31 staff in shared resources group - a total of 144

[18] MS Dynamics CRM was selected in part due to the ability of the system to segregate business units. This works through the use of database entities and user permissions, which are configured to permit access to areas of the CRM which are relevant only to the purpose for which an individual or a team needs to use it. For example, most BSB staff have access to the disciplinary findings and case management modules. All Bar Council staff are excluded from these modules and have no access to the content held in that section of a record. The permissions for each section have been carefully worked through with each business unit, paying particular attention to the BSB's need for regulatory independence.

related to barristers, entities and alternative business structures. It supports a wide and growing range of functions across both Bar Council and BSB including, to name a few, authorisation to practice, barristers' training and education history and disciplinary findings.

57. Both organisations agree with the degree of separation that was built into the CRM system. The Bar Council is simply unable to access the BSB's regulatory data. The system is sufficiently flexible to allow for change in line with each organisation's needs. It achieves economies of scale as it uses a single platform and shares costs on licences, software, maintenance and development. It also provides a single source of truth and improves the quality of information as it is more controlled and audited as well as being GDPR[19] compliant. The CRM enables the Bar Council and BSB to undertake a programme of continuous improvement because it consistently seeks and achieves savings and efficiencies in the provision of services.

58. It is vital that the Bar Council can access up to date information on the profession since without this it cannot make evidence-based policies and deliver activities that seek to meet the regulatory objectives, for example improving access to justice and encouraging an independent, strong, diverse and effective legal profession. Disaggregating the CRM system would place these activities at risk.

59. Rule 11 is also a matter of concern because the interests of the regulator are being favoured over those of the representative body owing to the fact it gives the regulators a right to veto the sharing of services. As the LSB states in the guidance to rule 11:

> "Sharing the service is effective and appropriate for the regulatory body to discharge its functions. Whether or not the proposed service meets this requirement is primarily a matter for the regulatory body to determine."[20]

60. This shows a substantial disregard for the financial impact of any change to the current arrangements about shared services on the representative body and consequently its ability to discharge its representative functions under the LSA07. These representative functions are critical for the discharge of the regulatory objectives. If new disaggregated services led to a significant increase in cost there might have to be cuts to Bar Council's staff and operations. This would clearly impact its output, including delivery of permitted purpose activities that are in the public interest.

61. If shared roles were made redundant, it is possible that we would lose some key staff who have built up their knowledge of the sector as well as the organisation and

[19] General Data Protection Regulations

[20] Annex B- LSB Guidance in Internal Governance Rules, p 30

its culture, and who are critical to the efficient and effective operation of the Bar Council. Their loss would result in significant disruption.

62. As a representative body for a profession of only 16,000 members, the Bar Council representative group is small, currently numbering only 33 staff. It is unlikely to be financially viable to have, for instance, an in-house HR function. We would be concerned that an outsourced service would operate at arm's length, lack the cultural understanding of the organisation and be of inferior quality. Additionally, it would likely cost more.

63. If the Bar Council were able to retain an in-house HR function it is unlikely to be able to afford an HR Director, given its size. This could result in a lower level of expertise and again, an inferior quality service, which may negatively impact retention and recruitment and eventually, the ability of the Bar Council to function effectively.

64. If the BSB had its own HR function it might also require its own legal personality in order to employ staff and contract with a third party (in the event that if it outsourced that function). This would lead to legal and organisational separation, which was not the structure envisaged by the LSA07, nor is it a requirement of the LSA07.

Consultation Questions

65. Our answers to the following questions posed by the LSB are predicated on the assumption – which we challenge – that the proposed rules are lawfully made. Our answers are not taken to concede our opinion that the proposed rules in their current form are *ultra vires*.

Question 1: Do you agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement? If not why not?

66. No. We do not consider that they will make a significant difference to the BSB's ability to discharge its regulatory duties independently of the Bar Council as the BSB is already able to do this under the current IGR. As we said in our initial consultation response earlier this year:

> "the structural set up and working relationship between the Bar Council and BSB currently serve effectively to secure regulatory independence."[21]

[21] https://www.barcouncil.org.uk/media/637440/bar_council_response_to_lsb_igr_consultation.pdf, p3.

67. Neither the LSB nor anybody else has pointed to any recent evidence of the Bar Council having compromised the regulatory functions of the BSB.

68. As outlined earlier in this response, the Bar Council has already voluntarily engaged with the BSB to implement some changes that have increased the independence of its regulatory functions. This process is on-going, and we are always very conscious of, and committed to, complying with the existing IGR and our own Protocol on Regulatory Independence.

69. There is a risk of significant conflict and disruption to the business of both sides of the organisation if the BSB took the new IGR to its extreme and, for example, decided it no longer wished to share any services with the Bar Council.

70. We would expect compliance with the IGR to be most onerous in the transitional period as the new rules are lengthy and complex and the new protocols and reporting systems required by them will take time to establish and bed in. It is reasonable to assume that the broader the changes, the longer it will take to achieve compliance.

Question 2: Does the proposed guidance provide sufficient detail to help you to interpret and comply with the proposed IGR? Please provide specific comments on any areas of the guidance where further information would improve clarity.

71. As we detailed in our response to the first consultation on the IGR we welcome the flexibility afforded by the current rules. Any new rules should be sufficiently flexible to enable the individual circumstances of each AR. It was never the intention of Parliament in the LSA07 that 'one size should fit all' in the regulation of the day to day affairs but rather that there should be a sufficient margin of appreciation to reflect the differences in the nature of the services provided by the various legal services providers to be regulated by the Act. Any guidance which accompanies any new rules should provide clear, illustrative examples that aid implementation without fettering the discretion of ARs.

72. We have already highlighted some examples where more clarity from the LSB would be helpful. Some more areas that would benefit from additional clarity include:

- Rules 2 and 5 of the new IGR sit uneasily with rule 11 for reasons already mentioned.

- New terms such as "materially involved", which is critical to the operation of rule 5 need further examples because the LSB's interpretation of it is critical to whether it is compatible with rule 11 and ultimately whether services can continue to be shared.

- In Rule 10 a definition of "reasonable" is required. It cannot be left undefined and vulnerable to differing interpretations. Ambiguous terms could lead to conflict which we would wish to avoid.

- The waiver system needs to be clearly laid out as we were only made aware of it in the roundtable meetings held in December 2018 with Approved Regulators. Clarity is needed on the processes and timings.

- The question remains as to which body will decide what the BSB reasonably requires when setting the BSB's budget. Under the current arrangements it is the Bar Council but it is unclear who would take on this role in future. Again, clarity from the LSB is required.

Question 3: Is there any reason that your organisation would not be able to comply with the proposed IGR within six months? Please explain your reasons.

73. Almost certainly. However, the answer to this question is driven by the scale of change sought. This will not be known until the final rules (subject to any amendment, for example to address the fundamental concern we have raised about *vires*) are published and the number of shared services affected becomes clear. Even if only minimum change were required, a six-month implementation period would be far too short. The reality of the situation is that we are operating at full capacity and cannot take on significant organisational change without disrupting mission-critical business to a large degree.

74. If, at the other end of the spectrum of change, the BSB wished to disaggregate a number of currently shared services, this would take significant time to plan and execute. It would involve costing alternative options for service provision to the Bar Council, procurement, entering into new contracts, drawing up new job descriptions, recruitment, redundancies, contingency planning and unpicking shared systems, including for example, two different pension schemes. There is potential for the requirement for a 90-day consultation period for restructures and redundancies such is the scale of the potential change (on top of other already agreed restructuring projects) and this would elongate the whole process further. These would be complex and time-consuming tasks. It is highly unlikely they could all happen simultaneously alongside the core business of the organisation and the challenges it faces in the current very uncertain operating context.

75. These difficulties are further compounded by the fact that both the Bar Council, BSB and Resources Group have a number of resource intensive projects underway. For example, the Information Services team is involved in an information management programme, the Finance team is undergoing a financial improvement programme, the Facilities Management team is undertaking a very significant office

refurbishment project. Meanwhile, the BSB is restructuring its Regulatory Operations and has a project focusing on Future Bar Training. Shared services underpin all these projects and any disruption to shared services will have a knock-on effect on these projects with the potential for significant financial loss and disruption.

76. Compliance with the proposed IGR will also consume a significant amount of the time of senior staff when it can least afford it owing to the current political context. The Bar Council is working hard to assist the Government and profession to understand and mitigate the impact of Brexit as well as working with the Government on new criminal legal aid schemes. We are heavily involved in HMCTS's huge court reform programme as well as various complex initiatives impacting on the Criminal, Family and Civil Bar. The Bar Council's engagement in these pieces of work cannot simply stop. The Bar Council also has a considerable amount of planned work with various partners spanning social mobility, education and training, international, ethical and professional standards and equality and diversity, to highlight only some areas of work. It would not be in the public interest to place these activities in jeopardy. The implementation of the proposed IGR would coincide with the UK leaving the EU which will inevitably demand even more attention by Bar Council office holders and senior executives than hitherto.

77. Our ability to plan for change is compromised by the fact that the BSB would have ultimate decision-making power in relation to shared services.

78. It will be impossible to implement the proposed IGR in six months. Without conceding the lawfulness of these proposed rule changes, we would request that the LSB consider extending the implementation period to a total of not less than 24 months. It would be in the interests of all concerned not to rush this process, to get it right first time and, where possible, to try and retain existing staff and expertise.

Question 4(a): Beyond the usual resources allocated to compliance with the IGR what, if any, additional resource do you anticipate you will need: (i) to assess compliance with the proposed IGR and then to make changes to come into compliance, if any are required; and (ii) to comply with the IGR on an ongoing basis?

79. The answers to these questions depend largely on what rule changes are actually implemented and what the BSB wants to do in terms of splitting currently shared functions and the cost implications of these. As a general point we wish to state that at this stage we have not been able to comprehensively evaluate the full resource impact of the proposed changes. Suffice it to say at this stage as follows.

80. In terms of assessing compliance with the proposed IGR, we anticipate that this will require significant time of senior managers in the Bar Council and Resources Group.

81. Planning and making the changes will be considerably more resource intensive and will inevitably impact business as usual. Whilst we have not had the opportunity to undertake an in-depth impact analysis or costing (because of time constraints and the lack of clear scope of the changes), we provide some insight into costs to both the finance team and Information Services below. Please note that these are just two of five shared resource teams.

82. The Finance team, under a new Finance Director, is currently working to deliver financial stability and improvement to processes and controls, which have been weak for some time. Its workload and team size have been efficiently planned for the year ahead to deliver these improvements. The team will then reduce to a more appropriate operational level. It is possible that the additional workload created by the proposed IGR could delay the Finance Improvement Programme by at least six months. For the 2019/20 finance year this would amount to an additional £100k (staff costs). For each additional six-month delay there would be a £100k cost. Other anticipated savings to the procurement process and CRM, anticipated to be approximately £300k per year, would also be delayed. Therefore, each delay of 6 months could cost a total £250k. The costs of delays to the BSB projects have not been calculated.

83. Whilst it is very difficult to provide precise figures, such is the uncertainty of the scale of the task ahead of us, Information Services estimates it would need to dedicate at least two, if not three, people for four months to assess compliance. This exercise could cost around £70K. Costs for implementing the proposed IGR for Information Services alone could be anything between £100K and £1M, depending on how far reaching the changes are and how quickly they happen.

Question 4(b): Do you agree with our assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the proposed IGR? Please provide details of your assessment of the costs and actions associated with the initial assessment of compliance under the transition period and your estimation of the difference in the ongoing cost of compliance with the proposed IGR compared to the existing IGR.

84. No. There is no way that cost of compliance would reduce and there may well be disputes (where none exist at present) as the new rules create uncertainty about responsibilities and accountabilities. The more pragmatic the rules are, accepting differences between the various professional bodies and governance arrangements, the less likely disputes will be.

Question 5: Please provide comments regarding equality issues which, in your view/experience, may arise from implementation of the proposed IGR.

85. If the implementation of the proposed IGR increases costs as anticipated (for both the BSB and Bar Council), this could be passed on to the profession through the PCF. The high and increasing costs of becoming a barrister and the real terms cuts in publicly funded work are already having a negative impact on equality and diversity and social mobility in the profession: any additional cost through the PCF will only compound the problem. This is not in the public interest which seeks a more representative and diverse profession in order better to represent those it seeks to serve.

86. If the Bar Council lost access to the currently shared CRM system and all the barristers' data that it contains, including valuable data that allows us to monitor equality and diversity issues, there would be a serious negative impact upon our ability to form evidence-based policies and deliver interventions that seek to encourage a diverse profession. Aside from its importance as a regulatory objective, an increase in diversity is important for the public, the profession and the judiciary to thrive and, as we have said, to serve consumers of barristers' legal services and the public interest generally.

Bar Council
22 January 2019

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BAR STANDARDS BOARD

REGULATING BARRISTERS

Bar Standards Board

Response to the Legal Service Board's Consultation*: Proposed Internal Governance Rules*

General

1. The BSB welcomes this consultation and the proposed new Internal Governance Rules (IGRs.) We have for some time been supportive of the principle of greater separation between representative and regulatory bodies in the public interest, whilst acknowledging there is little current or medium-term scope for legislative change to *require* that to be taken to its full extent.

2. The BSB considers that its regulatory decision making is independent of the profession and the Approved Regulator (AR) which has delegated its regulatory functions to the BSB. The operating model that has existed under the current IGRs has however had an impact on our effectiveness and efficiency and, therefore, has at times not allowed us to operate, consistently, to the standards that we would wish to achieve as a regulator in the public interest.

3. Achieving the greatest levels of actual and perceived separation within the current LSA07 (the Act), whilst continuing to adhere to the "better regulation" principles (and especially proportionality) is therefore an objective the BSB supports.

4. We agree with the underlying principles in the proposed new IGRs and will seek to move to compliance as soon as practicable. However, the BSB has long-standing shared service arrangements with its AR, the General Council of the Bar ("Bar Council") which will require transformation, and we must be proportionate and cost effective in doing so, having due regard to the impact on all affected parties and in particular on individual employees.

Responses to Specific Questions

Question 1: Do you agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement? If not, why not?

5. Broadly, yes. A more detailed commentary on each rule and implications for the BSB and Bar Council (in the BSB's view) follows:

Rule 1: The overarching duty

6. The re-statement of s30 of the Act is helpful.

Rule 2: Duty to delegate

7. We welcome the additional clarity given by this rule to the extent of delegation which the AR must execute, and we agree that the AR role should remain residual and one of assurance.

8. We also welcome the new duty on the AR to inform the regulatory body of any "decision, plan or other arrangement" which might undermine the discharge of

regulatory functions. This is an important provision where the AR has exercised its right to choose not to establish the regulatory body with a separate legal personality as it assists with, for example, the proper management of risk.

Rule 3: Provision of assurance to approved regulator.

9. We welcome the increased clarity that this rule fosters. The BSB considers that all of the information that its AR might reasonably require to perform its assurance role is already routinely made entirely public e.g. through publication of quarterly and annual reports in relation to regulatory performance.

Rule 4: Regulatory autonomy

10. We welcome the enhanced clarity afforded by this proposed rule. It will contribute to improved efficiency and to the public perception of the independence of regulation.

11. The BSB will nevertheless continue to regard the representative body for the profession it regulates as a key stakeholder when we are determining what our regulatory arrangements should be and when we decide our priorities and strategy. Good regulation in the public interest requires the support and legitimisation of those who are regulated. The BSB already imposes on itself a duty to consult publicly and will continue to do so.

Rule 5: Prohibition on dual roles

12. The BSB sought clarification of the guidance underpinning this rule from the LSB, which has been provided and made public by the LSB, consequent on which we welcome this rule in principle and especially as it might apply to our current governance arrangements and elected Office Holders in the AR.

13. We note, however, that it has significant operational implications for the BSB and Bar Council, which are addressed in response to questions 3 and 4 below. We also refer to paragraph 4 above and our general comment about the impact on individuals and their roles and employment. It is very important, therefore, that the LSB takes account of specific circumstances in assessing transition to compliance with this rule.

Rule 6 Individual conduct.

14. We welcome this proposed rule as it elevates the importance of ensuring that all involved in the AR and regulatory body appreciate the importance of the IGRs, and especially where the regulatory body has no separate legal personality and any services are shared.

Rule 7: Governance: **Lay composition**

15. We do not object to the drafting of the Rule as regards composition of the regulatory body. However, the supporting guidance is excessive in appearing to require not only lay majority but lay chairing of any meeting where a regulatory decision falls to be taken. This misunderstands the role of the chair of any given meeting and we do not agree with it.

16. The BSB has had a lay majority since 2011 and a lay Chair since 2015. We are always mindful of the composition of any given meeting of the BSB (and its committees.) However, we do not agree that it is necessary for all those meetings at which decisions are taken to be chaired by a lay person. We consider such an approach to be needlessly prescriptive. It does not acknowledge that the role of a person chairing such a meeting (in principle and in practice) is to convene and achieve consensus and objectives without undue influence on others present.

17. The guidance as drafted might also imply that non-lay members of the regulatory body are not impartial, trusted individuals who have been appointed for their independence of thought and action in the same way as lay members. This is not the case. All our members are capable of appropriate chairing of meetings in the occasional absence of the appointed lay Chair. There should be no IGR or guidance that prevents them from doing so.

Rule 8: The regulatory board: appointments & terminations

18. The BSB welcomes this proposed new rule as it will enhance transparency and efficiency and public perception of the independence of the regulatory body.

19. However, as we have noted above, a principle of good regulation is the legitimisation of the regulatory body by those who are regulated and, accordingly, the BSB would always expect to consider the views of the representative body in relation to generic aspects of the requirements for Board appointments and would expect to prescribe that in its appointment procedures. We think that the guidance supporting this rule needs to be amended to make clear that such consultation with the representative body by the regulatory body is permissible. Requiring LSB authorisation of that consultation is overly-bureaucratic and unnecessary, especially given the terms of the rule as drafted.

Rule 9: Regulatory resources

20. It might be argued that a rule which does no more than re-state a statutory provision is not needed. However, the restatement, and the guidance supporting the rule, are helpful and serve to enhance the actual and perceived independence of the regulatory body in an area which is fundamental to that independence: resources.

Rule 10: Regulatory body budget

21. The BSB agrees with this proposed rule.

Rule 11: Shared Services.

22. The BSB welcomes this rule, in principle and as drafted. It is likely to help enhance the public perception of regulatory independence.

23. We note, however, that the supporting guidance is very detailed whilst not in fact catering for the range of circumstances which currently prevail and from which starting point any changes will be set in train: it is attempting a one size fits all approach.

24. Whilst guidance in detail is not unhelpful, we are clear that our route to compliance is complex, not least because of the longstanding nature of the shared services arrangements between the BSB and Bar Council (see also our responses to questions

3 and 4 below). This means that some aspects of the guidance are not appropriate to our circumstances.

We suggest that the guidance needs to make more clear the following principles:

i. If the regulatory body itself is entirely satisfied that any shared service arrangements it has agreed with the AR meet its requirements for efficiency and that its regulatory independence is not compromised, and the regulatory body can reasonably demonstrate this, this must be overwhelmingly persuasive for the LSB in relation to assessing compliance with the IGRs or issuing a waiver from them. The LSB should not substitute its own judgment on the agreed arrangements.

ii. Value for money must be observed in the delivery of any shared services model, balanced of course against the principle of independence. Regard should be had to existing committed investment in delivering currently shared services, to the reasonable return on that investment, and to the whole costs of service delivery in relation to all s51 permitted purposes as well as the obvious regulatory purposes. Arrangements which increase total cost of delivery for little benefit, or which diminish the return on investment already made, or could, in the reasonable view of the regulatory body and the AR, have the effect of rendering unviable the delivery of a service which the AR reasonably requires to be delivered internally in support of s51 activity, must be avoided.

25. In practice this means, for example, that where an AR and regulatory body have made recent, jointly agreed investment in shared premises, it will not be reasonable to interfere with those arrangements if the effect would be to increase financial risk or net cost to either party disproportionately.

Rule 12: Communication by persons involved in regulation

26. We note that this rule merely reflects the statutory requirements and current IGR and have nothing to add.

Rule 13: Candour about compliance

27. We welcome a refreshed mechanism for monitoring compliance as well as the pro-active duty of candour.

28. We expect the LSB's role in this to be proportionate and targeted and to impose no extra or unnecessary burden on either the regulatory body or the AR.

Rule 14: Disputes and referrals for clarification

29. The BSB and Bar Council have always sought to resolve any issues between themselves before reference to the LSB, and will continue to do so. We would expect any expressed view of the LSB on a matter we have brought to their attention would assist us in achieving a resolution with the AR.

Rule 15: Guidance

30. We welcome this rule but consider that provision must also be made for revisions to the Guidance to be made only after consultation with ARs and regulatory bodies.

    See also our response to question 2 below

Rule 16: Saving provisions
Rule 17: exemptions

31. We agree that these rules are necessary and have no further comment.

Question 2: Does the proposed guidance provide sufficient detail to help you to interpret and comply with the proposed IGR? Please provide specific comments on any areas of the guidance where further information would improve clarity.

32. In general, yes. We have made specific comments where we think the Guidance needs adjustment in relation to the relevant rules above and do not repeat those comments here.

33. Guidance needs to be updated regularly, as appropriate, but this should be done only after consultation with ARs and regulatory bodies.

Question 3: Is there any reason that your organisation would not be able to comply with the proposed IGR within six months? Please explain your reasons.

34. We have commented in response to Rule 11 on the current arrangements between the BSB and the Bar Council. The nature and extent of commitments to the existing shared services model and already planned cycles of regulatory work mean that we cannot comply within 6 months.

35. The BSB is rightly leanly resourced and it would be wrong if a regulator had sufficient latent resource available to execute a major internally-focused transformation programme at a few weeks' notice and over only a six-month period. We also have major public-interest strategic policy programmes at the point of implementation simultaneously with the LSB's proposed time frame for compliance with the new IGRs (Future Bar Training and Modernising Regulatory Decision Making). Both of these Programmes of change draw on the shared services currently in place. Further, there are major investment programmes in hand directly in relation to those shared services: a Finance Improvement Programme, an Information Management Programme, and a Property Refurbishment Programme.

36. It would be disproportionate and unreasonable to displace human and financial resource from any one of those commitments to a programme of work to bring about compliance with the IGRs within 6 months. Nevertheless, we currently aim to comply and / or have any necessary exemptions in place by the end of March 2020, subject to its having been possible to agree in principle a new operating model for shared services with the Bar Council by April 2019.

37. It must be stressed that the above time-line to compliance is suggested without detailed scoping and planning having yet been undertaken and in a context where in principle budgets for the 2019/20 year have already been set.

Question 4(a): Beyond the usual resources allocated to compliance with the IGR what, if any, additional resource do you anticipate you will need: (i) to assess compliance with the proposed IGR and then to make changes to come into compliance, if any are required; and (ii) to comply with the IGR on an ongoing basis?

38. On the basis of previous, very high level, work that the BSB has undertaken in relation to greater control of shared services, we estimate potential net new costs of £50-100K to design, implement and then run a model which we think that the LSB ought to consider compliant. It is not possible to be more accurate or provide more detail at this stage because, until the Rules are settled and a new model has been scoped and planned, costings cannot be established comprehensively.

39. We repeat our observations in paragraphs 4 and 24 and our commitment to broad cost neutrality being achieved after any reasonable and proportionate costs of change.

Question 4(b): Do you agree with our assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the proposed IGR? Please provide details of your assessment of the costs and actions associated with the initial assessment of compliance under the transition period and your estimation of the difference in the ongoing cost of compliance with the proposed IGR compared to the existing IGR

40. We agree there is potential, in principle, for costs of compliance, including dealing with disputes and disagreements, to reduce. It is premature to provide detail or certainty, as this will depend on settling an operating model for shared services with the Bar Council. Initial assessment of compliance with the draft Rules has already been undertaken at a high level, so no new cost will be incurred by the BSB in that regard. We anticipate that our preferred revised governance arrangements will bring some efficiencies of time compared to the existing model. We would not want to see those efficiencies undermined by increased costs of LSB oversight.

Question 5: Please provide comments regarding equality issues which, in your view/experience, may arise from implementation of the proposed IGR.

41. We have nothing to add to the LSB's own assessment of equality impacts.

BSB January 2019

Legal Services Board (LSB) Consultation: Proposed Internal Governance Rules

A response by
The Chartered Institute of Legal Executives (CILEx)

January 2019

1. Introduction

1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.

1.2. CILEx is the Approved Regulator (AR) under the Legal Service Act 2007. These regulatory powers are delegated to the independent regulator CILEx Regulation Ltd.

1.3. CILEx benefits from a positive relationship with the LSB and believes that amendments to the internal governance rules (IGRs) will make them more effective than the existing set, and create an environment enabling further incremental improvements towards ensuring true regulatory independence.

1.4. CILEx fully supports the principles set out in the consultation paper, enshrined in the revised IGRs. We believe our recent governance reforms have already put us in alignment with the IGRs and therefore can say that we are not just committed to achieving compliance with the new rules; we are also committed to achieving the greatest possible level of regulatory independence permissible under the current legislative framework. CILEx therefore sees the application of the new rules as a further step towards achieving that ultimate aim.

1.5. In order to achieve this, we believe that there are some elements of the rules and guidance that would benefit from some further clarity. This is particularly the case in relation to the residual role of the AR which could be clearer.

2. Responses to specific questions

Question 1: Do you agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement? If not, why not?

And

Question 2: Does the proposed guidance provide sufficient detail to help you to interpret and comply with the proposed IGR? Please provide specific comments on any areas of the guidance where further information would improve clarity.

2.1. CILEx agrees that overall the proposed rules will enhance the independence of regulatory functions through greater clarity regarding the lines of separation and the terms of the relationship between ARs and their Regulatory Bodies. This

should in itself reduce the number of scenarios which could result in dispute and the complexity of compliance/enforcement issues.

2.2. In particular, CILEx welcomes those amendments which seek to remove outdated or confusing terminology within the current rules. We also support the principle of removal of subjective language and anchoring the rules more firmly to the parameters of the legislation. We do however, think that some of the language contained within the draft rules is still subjective and therefore at risk of alternative interpretations or the source of dispute between ARs and their RBs and we would urge consideration of how such terms could be better defined.

2.3. The most significant example is the continued reference to resources 'reasonably required'. Although the consultation paper and the guidance talk about reasonableness not being subjective but, for example, applied 'in the objective legal sense' or reflecting 'the better regulation principles of proportionality and targeting action only at cases where action is needed', there is little specific to guide the AR as to what might be reasonable or not. Indeed, the guidance suggests that this is not a view the AR should or is required to take in case, stating that for 'an AR who has delegated its regulatory functions, this assessment will be carried out by the regulatory body'[1]. If reasonableness is what the RB says it is, this seems less of an objective application than the IGRs intend.

2.4. Outlined below are those other aspects of the rules and guidance which CILEx considers require further clarity to enhance understanding and promote consistent application of the rules, ensuring compliance and reducing possible disputes arising out of differences in interpretation:

<u>Independence[2]</u>

2.5. There could be greater clarity in the guidance (and possibly Rule 1 itself) in relation how the AR ensures that its representative functions do not 'influence' the regulatory functions delegated to the Regulatory Body (RB). On one reading, 'influence' could be construed as meaning any instance in which the AR communicates with the RB with a view to providing feedback / bringing to their attention issues that require addressing relating to a proposed or actual regulatory arrangement, for example, it is not delivering the outcome it was intended to or it is no longer related to the reality of practice. The AR is uniquely placed to offer the insights and perspective of practitioners; whilst it is of course entirely the business of the RB whether and how it uses that information,

[1] Guidance, page 27

[2] Rule 1 The Overarching Duty

offering it should not be construed as trying to 'influence' the RB negatively and therefore non-compliant with the new IGRs.

2.6. The Act[3] talks in terms of 'prejudice' rather than 'influence'; perhaps reference to and anchoring more thoroughly in the language of the Act might ensure consistency whilst also creating the clarity needed. CILEx is confident[4] that the rule and guidance was not written in a way that would unreasonably inhibit the AR in such a core representative role, but it would be better if that clarification could be in the drafting itself.

Regulatory Resources

2.7. CILEx supports the principle of regulatory autonomy[5] enshrined in the new IGRs and appreciates and supports that proper maintenance of that autonomy comes through the RB having the regulatory resources that it says it needs[6]. CILEx welcomes the reinforcement of the related principle that the RB should set its own budget[7], without interference or influence from the AR, and determine the allocation of its resources.

2.8. In fact, in our view, CILEx has already had some success at ensuring the processes and procedures are in place to achieve this now. We have always taken the view that the RB should be managing its financial affairs itself, and in an effective and proper manner, responsibly, efficiently and with probity.

2.9. CILEx therefore continues to support the principle that the financial husbandry of the RB should be only the RB's business and through the PCF it should have access to the resources it demonstrates it needs and should be left to manage them properly. However, the proposed rules and guidance, as drafted, do not appear to either reflect the fact that each AR has a different financial model/ relationship with its Regulatory Body. Nor do they adequately address the issue of ARs retaining the financial liability and funding requests from the RB outside of the PCF process without any ability for the AR to satisfy itself that the request has not arisen as a result of the RB having failed to budget or manage its resources effectively.

2.10. CILEx acknowledges that there can be situations where unforeseen circumstances arise which may have budgetary repercussions. Such scenarios are problematic to RBs given the accepted principles that RBs should not be

[3] S30
[4] Particularly from the LSB's comments at the 11 December workshop event
[5] Rule 4
[6] Rule 9
[7] Rule 10

budgeting to make a profit on their regulatory income[8] and that they should not be encouraged to build up reserves. However, in such scenarios, the IGR guidance should perhaps make it clear that, unless the scenario is of such severity to compromise delivery of the regulatory objectives, it is reasonable to defer and manage it in the next financial year when budgetary provision can be made thereby limiting the circumstances in which as RB has to seek financial assistance from the AR.

2.11. We consider the current rules/drafting do not support greater independence in this regard as they are capable of being interpreted as enabling the RB to rely on the ability to the AR in year for more resources. Worse still, we believe this creates an unreasonable and unquantifiable liability on the AR which, depending on the scale, could represent a severe risk to its own activities.

2.12. In CILEx's case, the existing mechanism whereby parts of the Group have to bid, with a business case, for funding from a central contingency fund, could be an acceptable model for reference in the guidance. Such a model is not designed to deny funds to the RB but would enable specific analysis and assurance that the discrete funds were required for legitimate reasons and not due to anything going wrong. The arrangement could be enshrined in an appropriate protocol.

2.13. Finally, with regard to resources, whilst the draft rules make it clear the RB must manage its financial affairs independently and without oversight or scrutiny by the AR, it fails to make clear where the accountability and assurance around financial probity does lie. To address this, we would suggest consideration needs to be given to more explicit provisions within the LSB's Performance Review Process relating to the RBs management of financial affairs, effective budgeting and efficient operations.

Shared Services

2.14. CILEx is grateful for the clarification at the workshop event[9] that both the RB and the AR must agree to the (exceptional) provision of shared services and that a waiver must be applied for. It must be right that neither party is disadvantaged by having to enter into an arrangement or forced to accept one on unequal terms.

2.15. For its part, this is an aspect of the proposed IGRs with which CILEx wishes to go as far as possible, having no dual roles and as few shared services as it practicable. This links to CILEx's overarching objective of achieving full

[8] ie should budget only to cover regulatory costs reasonably incurred
[9] 11 December 2018

structural separation/independence in the long term and, in the medium term, achieving the greatest degree of separation/independence as can be achieved under the current regulatory framework.

2.16. In moving in this direction, CILEx recognises that an incremental approach is necessary, with a gradual reduction in the numbers of shared services, and that it is also paramount that any related changes should not adversely affect the Practising Certificate Fee (PCF) i.e. should not increase it. CILEx is perhaps more able to take this line because its finance and governance model is distinctive compared to other AR/RB dependencies, and has subsidised aspects of its regulator's budget for some time.

2.17. That said, the guidance would benefit with more granular clarification in order to ensure the cost/benefit principle in particular is adhered to and that this too is agreed[10] jointly between the RB and the AR.

Saving provisions/Waivers

2.18. The guidance is very light in respect of the process envisaged as part of any system of waivers under the savings provisions[11]. The clarification at the workshop event was helpful but could have gone further given the challenge of attaining compliance in 6 months. It is likely that, in the early stages, the waiver process will be much used and greater detail on that would therefore be very helpful.

PCF Timetable

2.19. Allied to the above point, it has been recognised that the PCF for 2019 has already been set and the 2020 PCF budget will be finalised before the final IGRs are published. However, CILEx believes that the 2020 budget-setting process offers a real opportunity to move towards achieving the greatest extent of independence possible. More explicit guidance about realising that potential as part of that process and the interplay with the waiver system would also be welcome.

Question 3: Is there any reason that your organisation would not be able to comply with the proposed IGR within six months? Please explain your reasons

2.20 CILEx expects to be able to achieve compliance with the new IGRs within the specified six month period providing waiver applications for shared services are able to be considered and receive approval within that time frame, in particular

[10] Perhaps by jointly obtaining quotes for comparable services, as referred to on page 31 of the guidance
[11] Rule 16

in relation to premises and IT systems. For this reason, a greater degree of clarity on the issues referred to above is key. This is particularly the case with getting the waiver process right; inevitably some aspects will be more complex and harder to achieve and could result in increased costs if rushed. Having waivers to fall back on if needed will help the management to compliance. Without that, six months would be very ambitious.

2.21 The need to recognise flexibility is crucial. Even with the best planning in place, there is always the possibility of unforeseen challenges derailing project timelines in ways that could not be reasonably anticipated. The likely resources required to make the changes necessary changes for compliance is one such area of risk; see below.

Question 4(a): Beyond the usual resources allocated to compliance with the IGR what, if any, additional resource do you anticipate you will need: (i) to assess compliance with the proposed IGR and then to make changes to come into compliance, if any are required; and (ii) to comply with the IGR on an ongoing basis?

2.22 CILEx is committed to ensuring any changes should not lead to greater costs either for the organisations themselves or, by extension, by putting pressure on PCF levels. We do anticipate significant staff time being required to fully develop plans to deliver the intended changes including to support waiver applications and to manage the transition away from dual roles and shared services however we are seeking to do this within existing budgets.

2.23 We also recognise though that this will be an area which both the RB and AR will have to monitor and manage closely. In some ways, the new IGRs introduce a greater formality to processes which CILEx and CILEx Regulation are already undertaking in relation ensuring regulatory independence is maintained and regulatory resources guaranteed; however, processes and management take time and the greater degree of specificity introduced by the IGRs in relation to anticipated documentation and evidence etc[12] will inevitably take an initial period of bedding in.

CILEx is confident that the IGR-promoted changes will though be manageable and cost-effective on an ongoing basis.

Question 4(b): Do you agree with our assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the proposed IGR?

[12] For example, those specified in the last paragraph on page 33 of the guidance

2.24 Inevitably, at the early stage, there are likely to be clarifications and differences in interpretation of the new IGRs which will need to be worked through and a significant number of waiver applications given the existing levels of shared services across the regulators. In the medium to long term however, we believe the new IGRs provide a clear and solid framework for ARs and RBs to work within. This is however contingent on attaining the greater level of clarity in the rules and guidance referred to above. Without that, rather than reduce the instants of AR's/RBs going to the LSB with disputes, this risks increasing that likelihood as the rules are capable of different interpretations.

Please provide details of your assessment of the costs and actions associated with the initial assessment of compliance under the transition period and your estimation of the difference in the ongoing cost of compliance with the proposed IGR compared to the existing IGR

2.25 CILEx and CILEx Regulation have already begun more detailed financial modelling which is being tested and analysed at our respective Boards with the support of our financial teams. As stated, we anticipate that this will demonstrate that both assessing and then implementing the changes required to achieve and maintain compliance on an ongoing basis will be manageable within existing PCF levels.

2.26 The accuracy of those financial estimates will only be properly tested during the transitional period, we therefore intend to share more detailed financial modelling as it is developed and on an ongoing basis though that period should this vary from original estimates.

Question 5: Please provide comments regarding equality issues which, in your view/experience, may arise from implementation of the proposed IGR

2.27 CILEx does not expect any specific equality issues to arise as a consequence of changes made to ensure compliance with the new IGRs. As above however, we remain sensitive to the need to keep regulatory costs low and the potential for certain groups to be disadvantaged and will be monitoring and managing this closely.

3. Conclusions

3.1. CILEx is committed to and supports the principles enshrined in the proposed new IGRs. Indeed, our Board is committed to achieving the greatest degree of regulatory independence/separation possible with the ultimate goal of achieving complete structural separation of regulatory functions guaranteeing independence.

3.2. Greater clarity in the language of the new rules and guidance will enable this; without that clarity, particularly in relation to the residual role of the AR, there could, initially at least, be an increased need for LSB intervention to settle differences in interpretation.

3.3. CILEx remains confident that these enhancements to the proposed IGRs can be achieved, would be pleased to assist the LSB in making them and working toward attaining the ultimate goal of true regulatory separation/independence.

For further details

Should you require any further information, please contact;

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21st January, 2019

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Consultation on the Internal Governance Rules

The Chartered Institute of Patent Attorneys (CIPA) is the professional body for patent attorneys in the UK. CIPA is responding to the consultation on the Internal Governance Rules (IGRs) by the Legal Services Board (LSB) in its capacity as an Approved Regulator, as defined in the Legal Services Act 2007 and as the representative professional body for Chartered Patent Attorneys in the UK.

CIPA has delegated its regulatory powers to the Intellectual Property Regulation Board (IPReg), a regulatory body established jointly with the Chartered Institute of Trade Mark Attorneys (CITMA). IPReg is entirely independent of CIPA and CITMA, with its own governance, finance and administration structures. In making this response, CIPA has drawn on its experience of building and maintaining its relationship with IPReg, where the regulatory and representative functions of the two organisations are fully separated.

Influence

We are greatly concerned about the introduction of clauses in the new IGRs which limit or prevent an Approved Regulator's ability to influence the regulatory body. Influencing the regulatory body by raising matters within the Approved Regulator's competence and putting forward the views of its members should not be seen as a negative act. An Approved Regulator must be free to seek to put its expertise at the disposal of the regulatory body in the interests of its members. CIPA's ability to influence IPReg in its role as the professional representative body for patent attorneys in the UK should not be inhibited because it is the Approved Regulator.

The Legal Services Act establishes the principle that an Approved Regulator's regulatory functions must not be prejudiced by its representative functions. This must not be extended, through intent or the drafting of the IGRs, to prevent CIPA from working on behalf of its members to influence IPReg and, indeed, the LSB to bring about improvements to regulation.

CIPA objects in the strongest possible terms to the LSB changing the policy intention of the Legal Services Act by preventing Approved Regulators from attempting to influence the work and activities of their regulatory bodies. CIPA cannot support the IGRs in their current form and we urge the LSB to amend the language in the proposed IGRs. As a representative professional body, it is CIPA's duty to its members and users of the IP system to seek to influence IPReg, the LSB and the Government to ensure that the regulatory regime is fit-for-purpose.

CIPA does not believe that the LSB has the *vires* to deviate from the intention of the Legal Services Act, which only prevents Approved Regulators prejudicing the regulatory process.

CIPA notes that, during the passage of the Legal Services Bill through Parliament, an amendment was proposed to remove the word “prejudiced” from the Bill and to insert instead the phrase “improperly constrained or influenced”. In response, the then Minister stated that it could be reasonable for the Approved Regulator to try to influence the regulatory body’s operations. The Minister went on to say that it was important for the LSB to be able to take appropriate action where it considers the Approved Regulator is allowing representational interests to prejudice the exercise of regulatory functions. The Minister also declared that the use of the word “prejudiced” was correct in the context. We suggest that the IGRs should at least contain a clear statement that nothing in them should be deemed to inhibit an Approved Regulator from making any statement or submission in its representative role that one of its members would be entitled to make in an individual capacity.

CIPA now enjoys a good working relationship with IPReg and CITMA, through monthly meetings between the three Chief Executives and quarterly meetings at Chair/President level. These meetings ensure that there is an understanding of the different perspectives the three parties will have on regulatory matters and we accept that each party seeking to influence the others is a healthy part of that discourse. We do not want to lose the confidence and the momentum we have gained in the last twelve to eighteen months because of the language adopted in the new IGRs.

The regulatory relationship

In an earlier response to the outline proposals for the review of the IGRs, CIPA urged the LSB to take a step back from the detail of the Rules and to reflect on the three-way relationship between the LSB, the Approved Regulators and the regulatory bodies. Issues that have arisen in CIPA’s relationship with IPReg have usually been the result of a lack of clarity in the residual regulatory obligations of the Approved Regulator, in particular where the Approved Regulator’s supervision of the regulatory body begins and ends. We are pleased to see that the LSB has attempted to bring greater clarity to this relationship.

You will be aware that, following counsel’s guidance on the extent of CIPA’s residual regulatory obligations, we embarked on a review of the Delegation Agreement which, in partnership with CITMA, provides the basis for IPReg’s regulatory authority. This review was put on hold when the LSB announced the review of the IGRs. CIPA will need to put in place a new Delegation Agreement to meet the amended IGRs. This should not be particularly problematic, given the degree to which IPReg is independent from CIPA, and we believe that this is achievable within the LSB’s indicative timetable of six months.

Costs and resources

The consultation document asks what additional resources would be required to ensure compliance with the new IGRs. CIPA takes the view that IPReg has in place the resources required to address compliance with the new IGRs, given the framework of independence under which IPReg operates and the recent decision to significantly increase practising fees to address internal resources. In terms of CIPA’s oversight responsibility under the new IGRs, we do not envisage requiring any additional resources to ensure compliance.

We note that the consultation document does not go into any detail about the reporting and monitoring systems the LSB will put in place to ensure compliance with the new IGRs. CIPA takes the view that it is vitally important that the LSB takes a pragmatic approach to monitoring compliance with the IGRs, which is both proportionate and targets only the highest areas of risk. CIPA would be happy to work with the LSB in designing and piloting its reporting and monitoring systems to ensure that these are fit for their intended use and do not place an undue burden on the regulatory body.

In terms of the LSB's belief that the cost of compliance will reduce under the proposed IGRs, it is too early for CIPA to carry out a detailed assessment of costs. We do not believe that there will be significant costs attached to the actions associated with compliance under the transition period, other than any costs related to the review of the Delegation Agreement. Working on the basis that the LSB does not introduce burdensome reporting and monitoring systems, there should be little difference in the ongoing cost of compliance with the proposed IGRs compared to the existing IGRs.

We do not believe that there are any issues relating to equality, diversity and inclusion arising out of the introduction of the new IGRs.

Regulatory assurance

CIPA welcomes the attempt to provide greater clarity on the information required by the Approved Regulator to satisfy itself and the LSB that the regulatory body is complying with Section 28 of the Legal Services Act. We are, however, concerned that there is a degree of ambiguity in the IGRs in terms of the Approved Regulator's need to obtain information from the regulatory body. The LSB states that the Approved Regulator's residual role is to assure itself that the regulatory body is compliant with Section 28 of the Legal Services Act and that, in doing so, the Approved Regulator's activities must not duplicate the LSB's oversight role. Unless the LSB sets out in clear terms exactly how it intends to carry out its oversight role, the Approved Regulator cannot establish the extent of its residual role. The LSB needs to be clear, in both the IGRs and the Guidance, where the boundaries are to avoid duplication or omission of supervision.

The use of language is important when establishing the regulatory assurance relationship between the LSB, the Approved Regulator and the regulatory body. Terms such as "reasonably necessary"', "reasonable grounds" and "objective justification" are open to interpretation. When conflict between the Approved Regulator and the regulatory body occurs, it is often the case that this is the result of differences of interpretation of the IGRs. To be effective, the IGRs must describe the relationship between the LSB, the Approved Regulator and the regulatory body in a way which reduces the risk of a difference of interpretation in the Rules or the Guidance.

Duty to delegate

CIPA acknowledges the principle that the Approved Regulator should delegate its regulatory functions to a separate regulatory body and that, after delegation, the Approved Regulator retains a residual regulatory role. As previously stated, it is the management of the regulatory arrangements between the LSB, the Approved Regulator and the regulatory body which is key to the successful implementation of the IGRs. We believe that we have in place a model which provides for the required separation between the representative and regulatory roles, where IPReg stands alone as a company limited by guarantee that has no shared services with CIPA.

Deviation from the Legal Services Act

There are a number of instances where the IGRs and the Guidance deviate from the underlying principles of the Legal Services Act. The use of the word "influence" as opposed to "prejudice", as previously highlighted, is the most concerning for CIPA but there are other examples. Rule 4 on regulatory autonomy expects the regulatory body to "meet the regulatory objectives in accordance with the better regulation principles". This is not a requirement of the Legal Services Act. It would be better to require the regulatory body to be free to choose how it can best discharge its functions in a manner which is proportionate, appropriate and effective in complying with the Act.

CIPA takes the view that it is important for the LSB to assure itself that the IGRs and the Guidance mirror the Legal Services Act in terms of the regulatory obligations placed on the Approved Regulators and, in turn, the regulatory authority delegated to the regulatory bodies. There should be no or little risk of challenge or conflict arising out of the IGRs deviating from the Act. CIPA urges the LSB to revisit the drafting of the IGRs and the Guidance, taking expert advice where required, to ensure there is absolute conformity with the Legal Services Act.

Disputes and clarification

As you will be aware, CIPA has had the need to refer a number of disputes with IPReg to the LSB for clarification. It is fair to say that this has not always led to an effective resolution of the matter at hand and CIPA will look to the new IGRs in the future should a dispute arise. We are concerned that the proposed wording in both the IGRs and the Guidance does not offer sufficient clarity on the LSB's role in dispute resolution. CIPA and IPReg must be able to refer disputes that cannot be resolved through the mechanism described in the Delegation Agreement and expect the LSB to be effective in the resolution of such disputes.

CIPA is concerned that the LSB is leaving scope for it not to become involved in dispute resolution. There may be good reasons why this is the case but these are not clear in the IGRs and the Guidance and Approved Regulators and regulatory bodies need to know when and how they can ask the LSB to intervene in a dispute. All requests for dispute resolution must be considered by the LSB and a suitable response must be given to the Approved Regulator and the regulatory body, even if that response is an explanation that the LSB cannot intervene in that particular instance.

Appointments to the regulatory board

CIPA agrees that the regulatory body should be able to make appointments to its board that are not prejudiced by the involvement of the Approved Regulator. As the representative body for the regulated community, CIPA will have a view on the skills, experience and behaviours of board members and should be at liberty to influence both the initial recruitment of the Chair and to give feedback to IPReg on the performance of the Chair and the board as a whole. Such discourse is vital to the performance of IPReg and in maintaining effective channels of communication between the organisations. In attempting to detail the need for independent decision-making on the part of the regulatory body, the IGRs must not impede the Approved Regulator's ability to influence with integrity where appropriate.

Please do not hesitate to contact me should you require any amplification or clarification of the observations made in this consultation response. CIPA would be happy to discuss its response with representatives of the LSB.

Yours sincerely

Lee Davies
Chief Executive

CITMA

LSB Consultation – Proposed Internal Governance Rules (IGRs)

The Chartered Institute of Trade Mark Attorneys (CITMA) is responding to the consultation by the Legal Services Board (LSB) in its capacity as an Approved Regulator (AR), as defined in the Legal Services Act 2007 (the Act) and as the representative body for Chartered Trade Mark Attorneys and the wider trade mark and design profession.

In broad terms we support the objectives outlined in the consultation document. The IGRs are an important tool in facilitating effective governance for the benefit of consumers, delivering against the objectives of the Act.

CITMA, as an AR is committed to making the Act work and in the formulation and constitution of IPReg we have developed independent arrangements and separation of our regulatory responsibilities from our representational responsibilities. We are committed to independence and working well with our regulator to fulfil our responsibilities.

Whilst we support the principles of the IGRs we do have some concerns which we believe will impact on the effectiveness of the IGRs, as set out below.

1. Language

1.1 We think some of the language used in the IGRs and guidance could be improved or the context explained for the avoidance of any doubt and misinterpretation.

1.2 The use of the word "influence" in the guidance and rules appears to be negative in context. ARs and representative bodies should be influencing the regulated body in all aspects of its regulatory functions and it is a legitimate activity to be undertaken. Any influence by an AR should be done in an appropriate way, i.e. not forcing any action to be taken, but it is fundamental and is a key responsibility of the AR in ensuring good regulation. Often influence will be positive, providing evidence and insight to the regulated body, from which appropriate action can be taken, such as a change in policy or procedure.

1.3 Regulated bodies should welcome and support influence and use it as a positive mechanism for continual improvements and a way to address known and unknown issues. Under the current drafting of the IGRs and guidance the use of 'influence' is perceived more as a tool to prevent appropriate interaction between the AR and the regulated body, which could potentially be used as a 'blocking' mechanism by a regulated body, without good reason.

1.4 In reality the AR and the regulated body need to work closely together and in the right spirit. A good, close and open relationship provides for effective regulation which will result in the objectives of the Act being delivered. The IGRs should underpin this and at times, the tone in the IGRs and guidance does not encourage this close, but separate working.

1.5 As a practical example, Rule 8(2) indicates that the AR must not influence the determinations or procedures set out in Rule 8(1). There could be legitimate reasons why the views of the AR would benefit the regulated body, for example, the performance of Board members (including the Chair) which may affect re-appointments or provide valuable input into any appraisal.

1.6 There are some inconsistencies in definitions and terminology used between the Act and the IGRs/guidance. We would recommend before any IGRs and guidance are finalised and approved that a thorough cross-reference exercise is carried out to check each provision and definition. The Act should be the document with which definitions are aligned and the LSB should ensure that they are not inadvertently imposing additional duties on regulated bodies or ARs.

2. Clarity

2.1 We have advocated at various meetings and in previous correspondence the need for clarity in any new IGRs and supporting guidance. One area we believe requires greater clarity is the residual role of the AR and the associated role of the LSB, in relation to the role of the regulated body. Having a clear understanding of the boundaries would limit the number of disputes.

2.2 As a practical example, it would be particularly helpful to have, in the guidance under provisions for assurance, a list or further information, setting out examples of what the LSB determines is appropriate information for an AR to receive from the regulatory body to be assured of the discharge of regulatory functions, i.e. financial information in the form of quarterly reports; number of complaints and their outcome. This list would not have to be exhaustive but would help avoid inevitable disagreements between AR and regulated body, or duplication of information with that required by the LSB. This will reduce the potential burdens, particularly on the regulated body.

2.3 In general we feel that some of the proposed rules are still too open to interpretation and that some of the wording is too subjective. This may lead to a continuation of disputes and referrals to the LSB which detracts regulators and ARs from focussing on their core regulatory responsibilities.

2.4 Clarity is particularly essential given the different operational models adopted by ARs and regulatory bodies.

2.5 Whilst the LSB have given verbal assurances about the meaning of certain rules it does not provide safeguards for the future. Changes in personnel can often lead to a different interpretation of subjective rules / guidance. To avoid this, absolute clarity should be provided on the interpretation, or the subjective terms should be reviewed and, where possible, definitive requirements included instead.

2.6 We understand there is a need for flexibility to allow for the different regulatory models adopted by the ARs, however, avoiding misinterpretation must be a key objective.

3. Implementation

3.1 In our opinion the proposed 6 months transition period is too short. Whilst significant progress to work towards full compliance should be made within this timeframe many regulatory bodies and ARs will have other committed work programmes already underway. We would suggest 12 months would be more appropriate and reasonable.

3.2 Based on the drafting of the IGRs and supporting guidance we believe that CITMA and our regulated body will be largely compliant. However, we have held off re-drafting our existing Delegation Agreement, which is out of date, pending the completion of the new IGR exercise. In the past, misunderstandings have arisen due to confusion between the interpretation of the IGRs and the Delegation Agreement and it is important that time is taken to ensure the new Delegation Agreement is fit for purpose. Whilst six months should be sufficient time within which to complete this work it does not allow any room for slippage.

4. Disputes & Referrals for clarification

4.1 We are pleased to see provisions included in Rule 14 setting out the roles and responsibilities of the AR, the regulatory body and the LSB in resolving any disputes. We believe the LSB should be able to adjudicate and provide a determination where there is an impasse between AR and regulatory body. In the past the LSB has not sought to provide any determination which has led to matters continuing for inordinate lengths of time which could have been avoided. We would therefore encourage the LSB to utilise this provision to ensure quick resolution of matters.

4.2 We would also request that in the case where the LSB chooses not to make a determination, it provides an explanation as to why it had decided not to.

5. Specific comments on Rules

5.1 Rule 4(3) (Regulated Autonomy) indicates that the AR must not influence determinations unless there is a consultation by the regulated body. We object to this rule and believe it is important for the AR to be able to provide comments on areas highlighted in the rule without consultation, in particular on priorities and strategy. The rule as currently drafted is too restrictive and limits the ability for the AR to undertake its residual role and ensure that regulation is being delivered in an effective and appropriate way.

5.2 Rule 14 (Disputes & referrals for clarification) does not explicitly state that the regulated body can refer disputes to the LSB. We believe it appropriate for both the AR and the regulated body to have the power to do so.

6. Answers to specific questions in the consultation

Question 1

6.1 We agree that the proposed rules could enhance the independence of regulatory functions, but we would suggest some amendments are required to improve them further and provide greater clarity, as outlined in our comments above.

Question 2

6.2 Covered in our comments above.

Question 3

6.3 We believe we could comply with the 6 month period, but see comments above (section 4).

Question 4(a)

6.4 No extra resource required.

Question 4(b)

6.5 Initial costs in developing a new delegation agreement, but no ongoing costs.

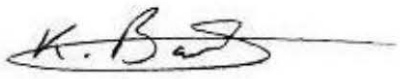
Question 5

6.6 No equality issues identified.

We are grateful for the opportunity to respond to this consultation and we would be happy to discuss any of these points further with representatives from the LSB, if it would be of assistance.

CITMA

For and on behalf of The Chartered Institute of Trade Mark Attorneys.



Keven Bader
Chief Executive
21st January 2019

Legal Services Board

Proposed Internal Governance Rules

A response by
CILEx Regulation

18 January 2019

Introduction

This response represents the views of CILEx Regulation, the regulatory body for Chartered Legal Executives, CILEx Practitioners and legal entities. Chartered Legal Executives (Fellows) are members of the Chartered Institute of Legal Executives (CILEx). CILEx Practitioners are authorised by CILEx Regulation to provide reserved legal activities. CILEx is the professional body representing 20,000 qualified and trainee Fellows and is an Approved Regulator under the Legal Services Act 2007 (LSA). Fellows and CILEx Practitioners are authorised persons under the LSA. CILEx Regulation regulates all grades of CILEx members.

CILEx Regulation is also a regulator of entities through which legal services are provided. It authorises entities based upon the reserved and regulated activities.

CILEx Regulation and CILEx provide an alternative route to legal qualification and practice rights allowing members and practitioners, who do not come from the traditional legal route to qualify as lawyers and own their own legal practice.

Proposed Internal Governance Rules - consultation response.

Response to the LSA consultation

1. Our responses to the questions are as follows.

Questions

Q1: Do you agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement? If not why not?

2. Yes, we welcome and support the intent and principle of regulator independence.

3. In the medium to longer-term the proposed IGR offers clearer boundaries. Therefore, the IGR should minimise disputes.

4. Equally, it is prudent to anticipate likely differences of view in the first years between the Approved Regulators (AR) and Regulatory Bodies (RB) and the potential for needing LSB clarification. For example, under Rule 2 (Duty to Delegate) views on what is, and equally what is not, reasonably necessary for the AR to receive as information.

Q2: Does the proposed guidance provide sufficient detail to help you to interpret and comply with the proposed IGR? Please provide specific comments on any areas of the guidance where further information would improve clarity.

5. There are areas where the guidance seems to propose more than would be implicit in the Rules.

6. For example, at the LSB meeting on 11 December 2018 it was made clear there was no intention to change the Lay Member Rule 7 from the 2014 version. However, reading the statutory guidance could suggest lay composition majority is required for any regulator Board meeting to be quorate, rather than purely a lay member majority board composition.

7. Therefore, it would be helpful if there was a summary schedule of the intended changes from the 2014 IGR.

8. It would be helpful for the guidance to provide more detail on the waiver process, given the six months full compliance expectation means the waiver process is likely to be essential and well-used.

Q3: Is there any reason that your organisation would not be able to comply with the proposed IGR within six months? Please explain your reasons.

9. We are confident that we will be able to fully comply with the proposed IGR. However, given the range of changes needed to achieve full compliance, it may be challenging to achieve full compliance within six months. One example is our annual budgetary arrangements which operate 1 January – 31 December.

10. The assurances the LSB provided at the 11 December 2018 regulators meeting that waivers will be available and the assurance the LSB will place significant weight on the regulator's view when agreeing waivers are helpful. We envisage waivers may be needed with a six months' timescale.

11. A proportionate waiver agreement process which is realistic with regards to the resources of smaller regulators will be crucial.

12. Without waivers supplied in the way described at the LSB meeting with regulators, the time needed for both transition and shared services compliance (or commissioning external alternatives), would make six months highly challenging.

Q4a: Beyond the usual resources allocated to compliance with the IGR what, if any, additional resource do you anticipate you will need: (i) to assess compliance with the proposed IGR and then to make changes to come into compliance, if any are required; and (ii) to comply with the IGR on an ongoing basis?

13. If services remain shared with CILEx then the cost implications are small and relate to the increased duties around procurement, contract management, compliance management and LSB assurance.

14. However, if CILEx Regulation does not share services as part of the CILEx Group, who have the advantage of economies of scale, it is reasonable to anticipate significant additional costs for services like premises, a CRM database, finance, HR, audit, insurance etc. These costs would be largely ongoing costs rather than one-off costs.

15. We anticipate the cost implications, at least in the short-term, can be reduced by continuing to share some services where we are satisfied they do not compromise regulator independence and sharing services is acceptable to the CILEx group.

16. Our aim is to try and make the changes to come into compliance as far as possible through internal staffing, to keep costs down.

17. To comply with the IGR on an ongoing basis, there are more duties in relation to procurement, contract management and compliance evidence which are an additional resource, but this is not viewed as significant. The significant compliance cost risk relates to shared services.

Q4b: Do you agree with our assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the proposed IGR? Please provide details of your assessment of the costs and actions associated with the initial assessment of compliance under the transition period and your estimation of the difference in the ongoing cost of compliance with the proposed IGR compared to the existing IGR

18. We would agree dispute costs benefits should reduce in the medium and long term once the new IGR bed-in.

19. We are currently doing financial modelling, which we anticipate will be available to our 20 February 2019 Board meeting. These can be supplied once our Board are satisfied with the accuracy.

20. The biggest financial risk relates to shared service/dual role costs. At the very least we anticipate a small increase in costs (for example premises). Depending on decisions in relation to shared services/dual roles, it could see a more substantial increase in costs. The financial modelling will provide more specific figures.

21. We are hopeful we can keep these shared services costs to a minimum and are exploring IGR-compliant and appropriate waiver solutions to achieve this i.e. waivers that do not compromise the overall goal of regulatory independence.

22. Even if decisions are taken now to share services which keep costs down, if it is decided at a later point to procure services outside of shared services provided to both CILEx and CILEx Regulation, increased costs cannot be ruled out.

23. There are also more duties in relation to procurement, contract management and compliance evidence under the IGR which are a small additional resource.

Q5: Please provide comments regarding equality issues which, in your view/experience, may arise from implementation of the proposed IGR.

24. We see no specific equality implications per se in the proposed IGR.

25. However, should regulatory costs increase significantly, this could disadvantage some practitioners more than others, such as part-time regulated individuals. Part-time regulated individuals with a protected characteristic may be working part-time out of necessity due to the nature of their protected characteristic (child-care; disability etc).

26. We highlight this point because CILEx practitioners are pre-dominantly female, to highlight where there could, rather than definitely would, be an impact if regulatory costs increased.

27. Any questions relating to this consultation response can be directed to Stuart Dalton, Director of Policy and Enforcement (stuart.dalton@cilexregulation.org.uk).

11 December 2018

Consultation Section
Legal Services Board
One Kemble Street
London

Consultation: Internal Governance Rules (IGRs)

Dear Sirs,

We respond to the LSB consultation on proposed revised Internal Governance Rules.

Before responding, we sought an independent view. In summary, that view was this is an exercise in "*patching holes in the bucket rather than getting a new bucket*."

Question 1: Do you agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement? If not, why not?

Since 31 October 2011 the CLSB has acted as approved regulator of the Costs Lawyer profession under delegated authority of the ACL. The CLSB has managed to achieve a greater degree of separation than most e.g. separate fees for regulation and representation, despite this the CLSB has still experienced issues as a result of that delegated arrangement. Those issues have diverted focus and resource from the CLSB achieving its regulatory objectives. We cannot see how the proposed changes to the IGRs would prevent the issues the CLSB has experienced arising in the future.

Question 2: Does the proposed guidance provide sufficient detail to help you to interpret and comply with the proposed IGR? Please provide specific comments on any areas of the guidance where further information would improve clarity. At the end of the (6m) transition period the LSB will require a certificate of compliance from each approved regulator. This should include details of the steps the approved regulator has taken to review current practices against the new IGR and to provide a self-assessment of its own compliance. Where an approved regulator has a separate regulatory body, a separate certificate of compliance must be submitted to the LSB by

the regulatory body which should include details of how the regulatory body is meeting the obligations in the IGR that apply to it

The guidance provides sufficient detail to enable the CLSB to interpret and comply with the proposed revised IGRs.

Question 3: Is there any reason that your organisation would not be able to comply with the proposed IGR within six months? Please explain your reasons. The initial work by approved regulators and regulatory bodies to comply with the proposed IGR is likely to be the most resource intensive part of implementing them. This work is likely to include:

- **assessment of the new IGR against current practice to determine the scope of changes required and implementation of any changes needed.**
- **review of governance and assurance arrangements, operational practices, including shared services, and the roles of individuals**

The LSB acknowledges that this is not an onerous task for ARs that have already delegated the regulatory function and who have an existing framework for a working relationship with the regulatory body. LSB acknowledges that there may be a need for increased resource to implement these changes.

At present, the CLSB envisages being able to comply with the proposed revised IGR within 6 months.

Question 4(a): Beyond the usual resources allocated to compliance with the IGR what, if any, additional resource do you anticipate you will need: (i) to assess compliance with the proposed IGR and then to make changes to come into compliance, if any are required; and (ii) to comply with the IGR on an ongoing basis?

Based on the degree of separation already achieved between the ACL and the CLSB e.g. separate fees, no shared resources, it does not envisage requiring further resources to implement the proposed revised IGR.

Question 4(b): Do you agree with our assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the proposed IGR?

No. As indicated above, as we cannot see how the proposed changes would prevent the particular issues the CLSB has experienced with the ACL arising in the future. We cannot therefore identify why the revised IGRs would provide a cost reduction for the CLSB.

Question 5: Please provide comments regarding equality issues which, in your view/experience, may arise from implementation of the proposed IGR.

The CLSB does not envisage any equality issues in completing implementation of the proposed revised IGR.

Yours faithfully,

Lynn Plumbley
Chief Executive

Proposed Internal Governance Rules
Consultation by the Legal Services Board
Response by the Council for Licensed Conveyancers

January 2019

Introduction

1. As a legal regulator with no representative function, the CLC agrees with the principles set out in the proposed IGR which follow on the LSB's decision document published in July 2018.

2. The CLC agrees specifically to the removal of the definition of 'Applicable Approved Regulator', since the original justification for introducing the distinction, namely that the then new approved regulators had 'responsibility only for a very narrow range of reserved legal services (i.e. probate services)' and there were 'very few authorised persons regulated by them – i.e. there will be very few accountants that also have authorisation from an accountancy sector approved regulator to perform probate services' have long since fallen away (at pages 13-14).

3. In our Response to the LSB's November 2017 IGR consultation, we said:

    - There is continuing confusion where a representative body continues activities which would usually be characterised as regulatory activities. We gave the example of the Conveyancing Quality Scheme which some solicitors continue to believe is managed by the SRA, rather than the Law Society.
    - 'Independent governance needs to be reinforced by clear financial independence and transparency. As long as a regulator does not have financial independence it cannot be truly independent from its representative body parent'.

4. Responding to the Submissions received following publication of the Law Society investigation report in June 2018 we also said 'All professionals delivering a reserved legal service should be subject to a regime that is independent of representative bodies. Running two different regimes within the legal sector is inequitable, and risks undermining public confidence and reducing the effectiveness of regulation'.

5. It has been our practice since 2010 to appoint a lay chair of the CLC's governing Council. The only amendment the CLC would need to make for it to be fully compliant with the proposed IGR would be to change the definition of Chair in its Appointment Regulations to require the CLC's Council Chair to be a lay person (see response to question 3 below), formalising what has been our practice. We hope this amendment can be effected by an exemption direction, but would welcome confirmation from the LSB on this point.

About the Council for Licensed Conveyancers

6. The CLC was established as a legal regulator by the Administration of Justice Act 1985 and is an Approved Regulator under the Legal Services Act 2007, subject to the oversight regulation of the Legal Services Board. It has no representative function.

7. It licenses and regulates licensed conveyancers and practices in England and Wales in the provision of reserved legal activities, currently conveyancing and probate services, and other non-reserved legal activities, including will writing. It is also a Licensing Authority authorised to license and regulate Alternative Business Structures (ABS). It has no representative function having always been an independent regulator.

8. The CLC's role is to safeguard the public interest and consumers by regulating providers to deliver high quality and accessible legal services.

9. The CLC welcomes the opportunity to respond to this consultation.

CLC's Response to the Questions posed by the LSB in the Consultation

Question 1: **Do you agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement? If not why not?**

Yes.

Question 2: **Does the proposed guidance provide sufficient detail to help you to interpret and comply with the proposed IGR? Please provide specific comments on any areas of the guidance where further information would improve clarity.**

Yes.

Question 3: **Is there any reason that your organisation would not be able to comply with the proposed IGR within six months? Please explain your reasons.**

No. The only amendment which the CLC has identified that it will need to make in order to comply with the proposed IGR (specifically rule 7) is to amend the definition of 'Chair' in its Appointment Regulations 2015 to make it clear that the Chair of the Council must be a lay person.

Question 4(a): **Beyond the usual resources allocated to compliance with the IGR what, if any, additional resource do you anticipate you will need: (i) to assess compliance with the proposed IGR and then to make changes to come into compliance, if any are required; and (ii) to comply with the IGR on an ongoing basis?**

None.

Question 4(b): **Do you agree with our assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the proposed IGR?**

No. To date the cost to the CLC of compliance with the IGR has been negligible.

Please provide details of your assessment of the costs and actions associated with the initial assessment of compliance under the transition period and your estimation of the difference in the ongoing cost of compliance with the proposed IGR compared to the existing IGR

N/A

Question 5: **Please provide comments regarding equality issues which, in your view/ experience, may arise from implementation of the proposed IGR**

The CLC has no comments.

Proposed Internal Governance Rules

1) Do you agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement? If not why not?

Yes, we agree that the independence of regulatory functions would be enhanced under the new Internal Governance Rules (IGR). The approved regulator (the Law Society for example) now has the power to delegate its regulatory functions to the regulatory body (the SRA for example).

Furthermore, under the new rule 13 'Candour with Compliance', an approved regulator must proactively inform the Legal Services Board (LSB) of any issue with compliance which cannot be resolved or has not been resolved in a reasonable time. This promotes independence as the approved regulator is to try to deal with non-compliance, without the LSB getting involved.

We also agree that the new IGR would improve clarity as the new IGR are intended to address problems with the existing IGR. For example, clarity has been provided around the residual role of approved regulators following delegation; the approved regulator with a residual role should receive sufficient information from the regulatory body to be able to satisfy the assurance role. This clarity should solve the problem of misunderstandings about the residual role and disagreements between approved regulators and their regulatory bodies.

Regarding rule 3 'Provision of Assurance to Approved Regulator', we believe that section 2(a) of this rule is unduly restrictive because it places the onus on the approved regulator to prove that it has reasonable grounds to request information. The burden is on the approved regulator to comply with its statutory responsibility and it should have the right to be satisfied it has all the required information from the regulatory body in order to discharge its statutory obligation.

Instead, we believe that the approved regulator should be able to request information from the regulatory body without undue restriction and that the onus should be on the regulatory body to prove that the request is excessive or patently unreasonable, if it declines to respond.

We therefore propose the following alternative wording for section 2(a) of rule 3: "a. may question the information supplied by the regulatory body, however the regulatory body may decline to respond if the request is excessive or patently unreasonable".

2) Does the proposed guidance provide sufficient detail to help you to interpret and comply with the proposed IGR? Please provide specific comments on any areas of the guidance where further information would improve clarity.

Yes, it is helpful how the new rules focus on how approved regulators and regulatory bodies are to achieve the outcomes set out in section 3 of the Legal Services Act 2007, for example, in giving detail on what must be achieved in the delegation by the approved regulator of regulatory functions to separate bodies. An outcome focused approach will aid compliance with the proposed IGR.

It is also helpful how the new rules and guidance clarify the roles of the LSB, the approved regulator and the regulatory body.

3) Is there any reason that your organisation would not be able to comply with the proposed IGR within six months? Please explain your reasons.

As the IGR apply to legal services regulators, we are unable to comment on this question directly as we are not a regulator.

However, regulators will need to take time to internally assess compliance with the IGR and ensure that processes and procedures are embedded within their organisation in order to ensure compliance.

4a) Beyond the usual resources allocated to compliance with the IGR what, if any, additional resource do you anticipate you will need: (i) to assess compliance with the proposed IGR and then to make changes to come into compliance, if any are required; and (ii) to comply with the IGR on an ongoing basis?

The resource required would depend on how closely linked the representative functions of an approved regulator are to its regulatory functions. The stronger the tie, the more resource would be needed to implement the separation.

4b) Do you agree with our assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the proposed IGR?

Please provide details of your assessment of the costs and actions associated with the initial assessment of compliance under the transition period and your estimation of the difference in the ongoing cost of compliance with the proposed IGR compared to the existing IGR.

Yes, we agree that the cost of compliance should reduce under the new rules due to the clearer framework meaning that it is likely that less resource and time will be spent on dealing with disputes and addressing confusion.

We suggest that once all the responses have been received, the LSB undertake and publish a cost/benefit analysis so that the profession can be satisfied that any additional costs are reasonable, proportionate and justified.

5) Please provide comments regarding equality issues, which, in your view/experience, may arise from implementation of the proposed IGR.

It is agreed that that the proposed IGR should not raise any issues in light of the public sector equality duty, as the rules apply to regulators and regulatory bodies rather than individuals.

FACULTY OFFICE
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Mr Ian Wilson
Consultation Co-ordinator
Legal Services Board
One Kemble Street
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WC2B 4AN

21st January 2019

Via email only: consultations@legalservicesboard.org.uk

Dear Mr Wilson

Consultation on the review of the Internal Governance Rules

This letter follows our letter of 14th January and constitutes our formal response to the consultation. Mainly, the proposed revisions to the Internal Governance Rules will not affect the governance arrangements of the Master of Faculties. The Master of Faculties has no representative functions. Generally, we would support the proposals if they lead to an enhancement of regulatory autonomy and independence from representative functions, for those regulators who have them. However, there may be some (we think) unintended consequences from the present proposals which will cause the Faculty Office (on behalf of the Master) some difficulty, but with no real benefit in our case, which we set out here.

Draft Rule 5 - prohibition on dual roles

This is not problematic for us provided that the LSB is not going to deem the majority participation of senior notaries in the Master's Advisory Board to be an infringement of the proposed rule. The Advisory Board has a purely advisory and not an executive role, but it is part of the governance arrangements of the Faculty Office in that it has a constitution which prescribes its membership and is a useful forum in which the Master can test ideas and take advice. The members are a consultative "sounding" board but do not approve policy decisions. If however the LSB were to interpret the proposed IGRs in a way which would prevent the operation of the Advisory Board as currently constituted, we would need to know.

Draft Rule 7 – Governance – lay composition

"The board or equivalent body which makes decisions about how to exercise regulatory functions must be comprised of a majority of lay persons and the chair of that body must be a lay person."

This is problematic in that it would mean that our Qualifications Board must have a lay majority and a lay chair at all relevant times.

The role of the Qualifications Board is to:

- To advise the Master whether a degree or other qualification should be approved by him for the purpose of our rules.
- To advise the Master on the standard of the qualifications of any person applying for admission as a notary.

- To advise the Master on the qualifications and experience of persons applying for recognition that they are eligible for admission as a notary.
- To advise any other body concerned with the administration or regulation of the notarial profession in England and Wales or any part of it on matters relating to qualifications and experience.

In practice the Board is mainly concerned with assessing the legal qualifications and experience of persons who wish to train as notaries and conferring on them a certificate which allows them to enrol in the postgraduate course which ought then to lead onto admission as a notary. While the constitution of the Board does not require that a majority be lawyers, this is in fact the case. The role of notaries on the Board is essential as they are able to advise on what to look for in a candidate's education and practical experience. For instance, a candidate may allege that they are learned in company law, but on inspection the notary may deduce from the application or additional correspondence that the person merely has a knowledge of company formation and not of the provisions of the Companies Act. The Board also relies on non-notaries who have a legal qualification and the past three chairs have all been non-notary legal academics in university lectureships who have combined an understanding of the higher education system with legal learning and give credence to the decision making of the Board.

In light of the key role of lawyers, some of whom may be notaries, on this Board, we need for your arrangements to be flexible to allow this to continue. Practitioners and legal academics are an essential part of composition of this Board. To strip this element out will leave the Board considerably less effective in determining who has the right qualifications and experience to be a good notary. In addition the Board would be likely to lose credibility with the profession which values the involvement of experienced members. All members of the Board required to sign a statement of independence under the IGR and our internal procedures and are aware that they must declare conflicts of interest/loyalty. If you are able to provide a waiver under

the proposed rule 16(1)(c) from this proposed rule 7 in connection to the workings of the Qualifications Board, then our objection would fall away. Otherwise we would be opposed to the definition of "lay" as including all types of lawyers, even if not appointed or regulated by the regulator in which they are working, and whether practising or not.

Finally we presume there is not to be a prohibition on lawyers participating in the administration of the regulatory work of the Master of Faculties. The Master himself is a barrister and a judge but we believe this is covered by primary legislation and would not therefore fall foul of the proposed rules. The Registrar and Deputy Registrar are solicitors with practising certificates, and probably required to be such under legislation, although this is less clear. The present Chief Clerk is a chartered legal executive with a practising certificate (although not actually practising) and his knowledge from many years of conveyancing practice before taking up his role in the Faculty Office is useful. None of these people are notaries and all have signed up to the IGR. If indirectly, there is to be some suggestion of infringement or impropriety in any of this, we should need to know, as we would be against such proposals on the basis that they would not be workable or beneficial. We do not anticipate that the purpose of the rules is to prevent these people from carrying on in their offices and jobs, but there can be no risk that happens by the back door.

Again, such a concern could be addressed by making the definition of "lay" less restrictive, so it only applies to lawyers who are regulated by the relevant regulator and so could be potentially conflicted.

Yours sincerely,

IAN BLANEY

Deputy Registrar

RESPONSE TO THE LEGAL SERVICES BOARD'S

CONSULTATION PAPER ON

THE INTERNAL GOVERNANCE RULES

18 January 2019

INTRODUCTION

1. The Honourable Society of Lincoln's Inn (the Inn) is an unincorporated association of students, barristers, judges, and others connected with the law and its practice, and is one of the four Inns of Court of England and Wales. Its membership consists of (i) students, namely those who have been admitted to membership with a view to call to the Bar; (ii) hall members, namely those who have been called to the Bar, and who may be in practice at the self-employed or employed bars; and (iii) Masters of the Bench (commonly known as Benchers), namely barristers, judges and others who are elected to membership of the Inn's governing body (Council).

2. The Inn's principal public interest functions are:

    a. to call to the Bar of England & Wales those of its student members who are appropriately qualified to be called, in accordance with the requirements of the Bar Standards Board: the right of the Inns of Court to call and disbar is recognised in the definition of 'barrister' contained in section 207 of the Legal Services Act 2007;

    b. through the provision of education and training, and by the award of scholarships and the giving of other forms of financial help, to assist student members to qualify for call to the Bar and to assist them and newly called barristers to attain and maintain excellence in the conduct of their practices, including promoting the highest standards of professional ethics: in this way, the Inn contributes to achieving the Act's regulatory objectives by encouraging an independent, strong, diverse and effective legal profession (section 1(1)(f) of the Act) and by promoting and maintaining adherence to the professional principles (section 1(1)(h) and 1(3) of the Act); and

    c. through its own educational and collegiate activities, and through its membership of the Council of the Inns of Court (COIC) and involvement in the Inns of Court College of Advocacy (ICCA), to provide leadership, guidance and coordination in relation to the pursuit of excellence in advocacy: this further contributes to the Act's regulatory objectives by supporting (and realising) the constitutional principle of the rule of law, improving access to justice, protecting the interests of consumers, and encouraging the maintenance of an independent, strong and effective Bar in England and Wales (section 1(1)(b), (c), (d) and (f)).

3. In performing its principal functions as set out above, the Inn works with both the Bar Standards Board and the Bar Council. The consequences of any changes to the Internal Governance Rules (IGR) that result in a different relationship between the regulatory and representative bodies, or increase the costs of internal governance, potentially affect the Inn and its members.

4. This response is submitted on behalf of the Inn by its Regulatory Panel. Membership of the Panel comprises: Professor Stephen Mayson (Chairman), His Honour Crawford Lindsay QC (a retired judge), Sir Matthew Nicklin (a justice of the High Court), Mary Kerr (Under Treasurer of the Inn), and Timothy Lyons QC (a barrister in private practice, and member of the Inn's Bar Representation Committee). For the purposes of this consultation response, the Panel was further assisted by Mark Ockelton (Vice President of the Upper Tribunal, Immigration and Asylum Chamber), and Dr John Carrier (former Dean of Graduate Studies at LSE, and former lay member and chair of the Education Committee of the Bar Standards Board).

CONSULTATION RESPONSE

5. There will be other respondents to the consultation who have more detailed knowledge and experience of the working and practical consequences of the proposed IGR. Accordingly, we confine our response to:

   a. Questions 1 and 2 (paragraphs 6 to 13); and

   b. comments on the drafting of the proposed rules and on the proposed Guidance (paragraph 14).

QUESTIONS 1 and 2:

6. We note that in its response to the outcome of the IGR consultation of November 2017, and in the proposed IGR now being consulted on, the Legal Services Board (LSB) has addressed the issues that this Panel raised in its submission dated 1 February 2018.

7. Accordingly, in response to Question 1 of the current consultation, we agree with the principles that the draft rules propose, and agree that these would enhance the independence of regulatory functions and improve clarity, hopefully leading to fewer disputes and more straightforward compliance and enforcement. However, we offer several comments and points of drafting in paragraph 14 below in relation to the details of the proposed IGR.

8. In response to Question 2, we believe that, subject to the points of drafting raised in paragraph 14 below being reflected in the proposed guidance, those guidance notes should provide sufficient detail to help approved regulators and regulatory bodies to interpret and comply with the proposed IGR. There does, however, appear to be an incorrect reference to 2010 in paragraph 7 of the Introduction.

9. There is, however, one significant point of substance that we wish to make about the proposed IGR. As we would have wished, the language of the revised IGR conforms more closely to that in the Legal Services Act 2007. Nevertheless, during the passage of the Legal Services Bill through Parliament, the responsible minister was concerned to emphasise that "prejudice" in the context of regulatory independence was intended to suggest a higher threshold than "influence". In the House of Commons Committee Stage of the Bill, an amendment was moved to substitute 'improperly constrained or influenced' for 'prejudice': see *Report of proceedings of 6th sitting of the House of Commons Public Bill Committee on the Legal Services Bill*, columns 222-223. In response (and as a result of which the amendment was withdrawn), the Parliamentary Under-Secretary of State for Justice, Bridget Prentice MP, said:

> A lot of consideration has gone into the use of the word "prejudiced" in the clause. It has been argued that it would not be unusual for representative bodies to seek to influence regulatory decisions, if it is in the interests of their members to do so. As the approved regulator is the body recognised in the Bill as responsible for both representative and regulatory functions, I would argue that it should accept certain responsibilities as part of that role. It might be reasonable for the representative arm to try to influence regulatory decisions, but it is important that the [LSB] is able to take appropriate action where it considers that the approved regulator is allowing representational interests to prejudice the exercise of regulatory functions. It is important to ensure that the [LSB] is able to act where, for example, the actions of the representative side discredit the regulatory arm, resulting in damage to consumer confidence. [The clause] is necessarily and deliberately wide in definition to ensure that the [LSB] is not prevented from taking such appropriate action. Therefore the use of the word "prejudiced" is correct in the context…. To suggest that the [LSB] may use its powers only where exercising the representative functions has "improperly constrained or influenced" the regulatory functions implies that there may be

> circumstances where it is "proper" for representative interests to constrain or influence regulatory functions. I do not think that that is appropriate. Furthermore, the proposed formulation suggests that there must be an element of wilfulness, but again that might not be the case. There might be no intent whatsoever on the part of the regulator, but that does not mean that the [LSB] should be prevented from acting if necessary. I understand that these are often very fine definitions, but "prejudiced" is more appropriate than "improperly constrained or influenced", because the latter wording would narrow the definition just a little bit too much.

10. There are a number of Rules in the proposed IGR where the word 'influence' has been used rather than 'prejudice', and in our view this creates some potential difficulties in the practical operation of an approved regulator's representative functions. It is, rightly, the intention and purpose of the IGR to secure the appropriate degree of separation and independence between an approved regulator's representative and regulatory activities. By emphasising in the IGR a greater degree of such separation, the LSB must expect that the representative activities might potentially be discharged more vigorously in the future.

11. It must, by definition, be a key role and responsibility of a representative body to be vigilant and vocal on behalf of its members. As a consequence, we should expect the representative activities of an approved regulator actively to seek to influence the deliberations and outcomes of the regulatory body. This was recognised by the Minister (cf. paragraph 9 above) when she acknowledged that it might be "reasonable for the representative arm to try to influence regulatory decisions".

12. In this sense, therefore, it should in our view be expected that representative bodies will seek to influence the decisions of the relevant regulatory body. What is important, in the language of the Act, is that in doing so the representative body must not prejudice the exercise of the regulatory functions of the regulatory body. The words 'influence' and 'prejudice' therefore have different meanings for the purpose of the 2007 Act and correspondingly for the IGR, and the distinction should be maintained. We reflect this view in our suggestions for drafting amendments in paragraph 14 below.

13. For these reasons, we believe that the statement in paragraph 7(3) of Section 1 of the LSB Guidance should also be amended. The paragraph rightly observes that the ability of an approved regulator to infringe the exercise of regulatory functions by its regulatory body should be limited. However, for the reasons articulated above, we believe that this limitation should more accurately be expressed in terms of the Act's use of 'prejudice' and not the LSB's use of 'influence'.

THE DRAFTING OF THE PROPOSED IGR

14. We would make the following comments, and suggestions for amendments, in relation to the drafting of the proposed rules in Annex A of the Consultation Paper:

    (a) In the ***Definitions***:

        (i) add: "Consumer Panel The Consumer Panel established by the Legal Services Board in accordance with section 8 of the Act"

        (ii) neither the Legal Services Board nor the OLC are defined as referred to: since the proposed IGR are made by the Board under statutory powers referred to in the IGR, we see no need for a definition for the Board itself

        (iii) substitute: "OLC The Office for Legal Complaints established by section 114 of the Act"

        (iv) given that 'Services' appears in the IGR in different contexts (Legal Services Board, legal services, and shared services), either substitute "Services (in the context of shared services)", or alternatively move this definition to a new sub-rule of Rule 11 ("For the purposes of this Rule, 'services' means …")

    (b) In ***Rule 1***:

        (i) at the beginning of sub-rule (1), for "Each", substitute "An"

        (ii) for the reasons outlined in paragraphs 9-12 above, we suggest that in sub-rule (1), "influenced" is replaced by "prejudiced" to ensure that the intention of Parliament is accurately reflected in the IGR

        (iii) we also believe that the language of sub-rule (2) should reflect that in section 30(1) of the Act, perhaps as follows:

            "In particular, an approved regulator must have arrangements in place to ensure:

            a. that the exercise of regulatory functions is not prejudiced by its representative functions; and

            b. that decisions relating to the exercise of regulatory functions are so far as reasonably practicable taken independently from decisions relating to the exercise of its representative functions, and are consistent with Section 28 of the Act."

        (iv) in sub-rule (3), for "Each", substitute "An"; and substitute for the reference to "subsection (1)" either "sub-rule (1)" or "Rule 1(1)"

        (v) given that the perception of prejudice or lack of independence is likely to be as detrimental to achieving the intention of the Act in sections 28 and 30, we invite the Board to consider the addition of a new sub-rule:

            "(4) In discharging the overarching duty, an approved regulator must consider whether any of its arrangements or practices might give rise to a risk that the exercise of its regulatory functions could reasonably be perceived as lacking independence from its representative functions."

(c) In ***Rule 2***:

(i) in sub-rule (1), for "Each", substitute "An"

(ii) the IGR refer to 'a', 'the' and 'its' regulatory body: accordingly delete "the" from the parentheses at the end of sub-rule (1)

(iii) in sub-rule (2), for "the approved regulator", substitute "an approved regulator"; and after "role", insert "in relation to those functions"

(iv) the IGR only refer to 'a' or 'its' residual role: accordingly delete "the" from the parentheses at the end of sub-rule (2)

(v) in sub-rule (3), for "The approved regulator", substitute "An approved regulator"

(vi) in sub-rule (3), after "makes", insert "or intends to make" (to allow for earlier warning or notice to the regulatory body)

(vii) in sub-rule (3), after "plan", insert ", communication" (to make it clear that a regulatory body should also not be undermined or discredited by public or other comment, as would appear to be the intention from the Minister's response during the Committee stage of the Legal Services Bill recorded in paragraph 9 above, where an approved regulator's actions or public statements might be perceived as 'discrediting' its regulatory body and lead to LSB action)

(d) In ***Rule 3***:

(i) in sub-rule (1), for "Each", substitute "A"

(ii) in sub-rule (2), for "The approved regulator", substitute "An approved regulator"

(e) In ***Rule 4***:

(i) in sub-rule (1), for "The regulatory body", substitute "A regulatory body"

(ii) in sub-rule (2), "the regulatory body", substitute "a regulatory body"

(iii) for sub-rule (3), substitute:

"(3) An approved regulator with a residual role must not influence these determinations except that, if the regulatory body conducts a consultation, then the approved regulator's views may be taken into account."

(f) In ***Rule 5***:

(i) the same notion is differently expressed as "involved in a material way" and "materially involved": we do not believe that the Guidance draws any meaningful distinction between the two, and therefore suggest that the same expression should be used in both sub-rules (preferably the former)

(ii) in sub-rule (1), for "the approved regulator", substitute "an approved regulator"

(g) In ***Rule 6***, for the opening words, substitute "An approved regulator must ensure that any individual,"

(h) ***Rule 7***: the Guidance states that this rule applies to every approved regulator, but rule 17b then exempts from rule 7 an approved regulator with only regulatory functions. We presume that the LSB intends that the requirements of rule 7 should apply both to approved regulators with only regulatory functions and to the regulatory bodies of other approved regulators. We therefore suggest that (adopting the heading of rule 8) rule 7 is substituted as follows:

"A regulatory board must comprise a majority of lay persons and the chair of that board must be a lay person."

To the Definitions, also add:

"Regulatory Board	The governing body of a regulatory body or (in the case of an approved regulator with only regulatory functions) of an approved regulator"

(i) In ***Rule 8***:

(i) we see no reason why the substance of rule 8(1) should not apply to all approved regulators, and accordingly propose the substitution of:

"(1) A regulatory board must determine and carry out its procedures for appointing, re-appointing and terminating members of the board, including the chair, assessing their remuneration and carrying out appraisals."

(ii) in sub-rule (2), for "The approved regulator", substitute "An approved regulator"

(j) In ***Rule 9***, we believe again that this could be expressed in a way that more closely matches the wording of the Act, as follows:

"An approved regulator must take such steps as are reasonably practicable to ensure that it provides such resources as are reasonably required for or in connection with the efficient and effective exercise of the regulatory functions."

(k) In ***Rule 10***:

(i) in sub-rule (1), for "The regulatory body", substitute "A regulatory body"

(ii) in sub-rule (2), there is a reference to "must not influence" (which raises the issue referred to in paragraphs 9-13 above), and to "if" the regulatory body conducts a consultation. There is probably no other issue of such concern to practitioners as the level of the practising certificate fee (PCF) that they are required to pay. They would, we think, reasonably expect their representative body to be both vigilant and vocal on their behalf.

It seems to us that the proposed Rule 10 seeks (or at least can be read as having intended) to restrict the ability of an approved regulator in the discharge of its representative functions, not necessarily to be vigilant, but certainly to be vocal on behalf of its members in relation to the regulatory body's budget and the effect that this might have on the PCF charged to practitioners. Indeed, Rule 10 could be read as *preventing* any efforts by the representative body to influence the outcome – and arguably this amounts to the sort of interference in representative functions by the LSB that is prohibited by section 29(1) of the 2007 Act.

On such an important issue as the regulatory body's budget, and the direct financial effect that this will have on authorised persons through the PCF, we would expect that a consultation should be required rather than be optional and that it would be entirely "reasonable for the representative arm to try to influence" the outcome (cf. paragraph 11 above).

We therefore invite the LSB to substitute the following for the draft sub-rule (2):

"(2) In formulating its budget, a regulatory body must consult with and take account of the views of an approved regulator with a residual role.[1]

(3) In fulfilling their functions under this Rule, the regulatory body and the approved regulator with a residual role must, in accordance with Rule 1, ensure that the exercise of regulatory functions is not prejudiced by its representative functions."

(l) ***Rule 11*** is problematic. The intention is clear and correct, but there is a fundamental difficulty in Rule 11(1)a. An approved regulator with a residual role and its regulatory body might well agree that their shared services do not undermine or otherwise infringe the separation of functions. However, were a consumer to visit or call the regulatory body and find, for example, that it shared the same reception area or switchboard as the representative arm, the natural perception that both remain close to each other is difficult to counter. The consumer's further inference that, accordingly, such closeness means that the regulatory body is not truly independent, or is perhaps favourably disposed towards the representative arm's members, could be difficult to displace. Thus, although the approved regulator and its regulatory body might have agreed that such sharing does not undermine the separation of functions, a consumer and the public at large might reasonably come to the opposite conclusion. The IGR do not take this perception into account, other than in the 'overarching duty' in Rule 1, which is subject to the proviso 'so far as reasonably practicable' (unless our suggested addition to Rule 1 in paragraph 14(b)(v) is adopted).

(m) In addition, the wording of the draft ***Rule 11*** introduces terminology that is not used in the Act, as well as a number of questionable additional requirements over and above those made by the Act. It was such a situation in relation to the current IGR that in part has led to the need to revise and reissue the IGR. In particular, we are not persuaded that the requirement introduced in the draft IGR and reinforced in the draft guidance that the sharing must be necessary for efficiency and "must provide a material cost-saving overall" is desirable. Our belief is that effectiveness, rather than cost, must be the overriding criterion.

The approved regulators and their regulatory bodies have different scale and available resources. We do not consider that it would be inherently wrong or undesirable (as appears to be the conclusion from the draft) for the arrangements as between an approved regulator and its regulatory body to lead to a higher aggregate cost than some alternative arrangements: they should be allowed the discretion to reach a conclusion for themselves about which, on balance, is the most effective to discharge their respective functions.

In addition, sub-rule (2) assumes that shared services will always be made available from the approved regulator to the regulatory body. We do not see that this should always be the case, and suggest that the IGR should be flexible in their language so as to anticipate a different arrangement.

1. We note that the consultation process adopted and responses received would also form part of the LSB's consideration in the approval of the resulting PCF in accordance with Rule 11(a) of the LSB's Practising Fee Rules 2016.

(n) We therefore offer an alternative formulation of draft ***Rule 11*** for the Board's consideration:

"An approved regulator with a residual role and its regulatory body may share services provided that they[, and the Legal Services Board if required,] are satisfied that:

a. such sharing is compatible with the requirements of Rule 1;

b. in considering and complying with its obligations under Rule 9, the approved regulator has considered other reasonable arrangements for providing resources, including assessing the risks to the requirements of Rule 1 and the mitigation of those risks;

c. the terms on which such sharing takes place permit the effective exercise by the regulatory body of its regulatory functions; and

d. the terms and basis on which such sharing take place, and the associated costs of provision, are no less favourable to either of them."

(o) In ***Rule 12***, there is again some divergence between the language of the Act and the draft IGR. We would therefore suggest the substitution of:

"(1) An approved regulator and a regulatory body must have arrangements in place which ensure that persons involved in the exercise of regulatory functions are, in that capacity, able to make representations to, be consulted by and enter into communications with the Legal Services Board, the Consumer Panel, the OLC and other approved regulators.

(2) In particular, these arrangements must enable such persons to notify the Legal Services Board where they consider that their independence or effectiveness is being or will be prejudiced."

(p) In ***Rule 13***, at the beginning of sub-rules (1) and (2), for "Each approved regulator", substitute "An approved regulator and a regulatory body"

(q) In ***Rule 15***, for "each" substitute "an"

(r) We do not believe that ***Rule 17*** is necessary. In any event, Rule 17b is incorrect because Rules 7 and 8(1) can and should apply to all approved regulators. With the exception of Rules 7 and 8(1), the rules referred to in draft Rule 17 cannot on their wording apply to an approved regulator with only regulatory functions. This means that there is nothing from which such an approved regulator needs exemption. If it is thought desirable to retain something along the lines of Rule 17 'for the avoidance of doubt', the heading should be changed to remove reference to exemption, and Rule 17b should be amended to refer only to Rule 8(2).

SUMMARY

Question 1: Do you agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement? If not why not?

We agree with the principles that the draft rules propose, and agree that these would enhance the independence of regulatory functions and improve clarity, hopefully leading to fewer disputes and more straightforward compliance and enforcement. However, we offer several comments and points of drafting in paragraph 14 above in relation to the details of the drafting of the proposed IGR.

Question 2: Does the proposed guidance provide sufficient detail to help you to interpret and comply with the proposed IGR? Please provide specific comments on any areas of the guidance where further information would improve clarity.

We believe that, subject to the comments and points of drafting raised in paragraph 14 above being reflected in the proposed guidance, those guidance notes should provide sufficient detail to help approved regulators and regulatory bodies to interpret and comply with the proposed IGR. There does, however, appear to be an incorrect reference to 2010 in paragraph 7 of the Introduction.

The Honourable Society of Lincoln's Inn, Lincoln's Inn, London WC2A 3TL

ICAEW
REPRESENTATION 11/19

PROPOSED INTERNAL GOVERNANCE RULES

Issued 18 January 2019

ICAEW welcomes the opportunity to comment on the Proposed Internal Governance Rules (IGRs) issued by the Legal Services Board (LSB) in October 2018.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 152,000 chartered accountant members in over 160 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

This response dated 21 January 2019 reflects the views of ICAEW as a regulator. ICAEW Professional Standards is the regulatory arm of ICAEW. Over the past 25 years, ICAEW has undertaken responsibilities as a regulator under statute in the areas of audit, insolvency, investment business and most recently Legal Services. In discharging our regulatory duties it is subject to oversight by the FRC's Conduct Committee, the Irish Auditing and Accounting Supervisory Authority (IAASA), the Insolvency Service, the FCA and the Legal Services Board.

Amongst ICAEW's regulatory responsibilities;

- It is the largest Recognised Supervisory Body (RSB) and Recognised Qualifying Body (RQB) for statutory audit in the UK, registering approximately 2,800 firms and 7,500 responsible individuals under the Companies Act 2006.
- It is the largest Prescribed Accountancy Body (PAB) and Recognised Accountancy Body (RAB) for statutory audit in Ireland, registering approximately 2,800 firms and 7,500 responsible individuals under the Republic of Ireland's Companies Act 2014.
- It is the largest single insolvency regulator in the UK licensing some 800 of the UK's 1,700 insolvency practitioners as a Recognised Professional Body (RPB).
- It is a Designated Professional Body (DPB) under the Financial Services and Markets Act 2000 (and previously a Recognised Professional Body under the Financial Services Act 1986) currently licensing approximately 2,200 firms to undertake exempt regulated activities under that Act.
- [It is a Supervisory Body recognised by OPBAS for the purposes of the Money Laundering Regulations 2007 dealing with approximately 13,000 member firms.]

It is designated an Approved Regulator and Licensing Authority for probate under the Legal Services Act 2007 (the Act) currently accrediting approximately 300 firms to undertake this reserved legal activity.

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INTRODUCTION

GENERAL

1. ICAEW welcomes the LSB's initiative to improve the existing IGRs. While at the time of responding to this consultation, ICAEW is still unaware of the outcome of its application for judicial review of the Lord Chancellor's decision on ICAEW's application to broaden its regulatory role, it is fair to say that ICAEW has suffered more than any other legal service regulator in recent times from the belief or perception of others, including the Lord Chancellor, that compliance with the existing IGRs is not of itself sufficient assurance in relation to a regulator's governance arrangements.
2. ICAEW has always believed in the importance of the independence of its regulatory function; not only from a statutory perspective where it is authorised by statute to act as a regulator of a number of regulated services but also in the conduct of its members in the unregulated services they provide to the public including accountancy and tax services through the imposition of obligations and disciplinary rules through the membership contract. This approach has been reinforced in recent years through a restructuring of the governance around ICAEW's regulatory functions as a result of implementing the recommendations made in an independent review.
3. ICAEW is proud of its record so far since being authorised to regulate the provision of probate services in 2014. As the LSB knows, over 300 ICAEW firms have chosen to obtain probate licences to start offering probate services to their clients. This is considered to have been an important development for consumers as it has provided them with the opportunity to obtain seamless assistance at a time of great sensitivity and vulnerability from one regulated professional who can deal with the obtaining of probate and then move seamlessly into the work involved in estate administration. It was pleasing to see that LSB's own research[1] noted that consumers are keen to obtain advice from their accountants on key issues concerning them.
4. ICAEW believes that, in light of all of the regulatory objectives in section 30 of the Act, it is important that ICAEW and other professional accountancy bodies remain part of the regulatory framework for legal services. This is because many of the firms regulated by us for probate are relatively small and many would give up this line of work rather than take on the additional compliance costs of dealing with two regulators if ICAEW were to withdraw from its regulatory role as a result of any difficulties in complying with the final version of the new rules. For the reasons set out below, ICAEW does not believe that this will be the case. However, ICAEW does have concerns about the overall approach which has been taken in producing the Rules and Guidance and in the lack of clarity in some of the key terminology used.

APPROACH

OUTCOMES-FOCUSED / PRINCIPLES-BASED?

5. ICAEW is disappointed at the decision taken by the LSB to produce prescriptive rules, and even more prescriptive guidance, which seems to run directly contrary to the outcome of the initial consultation on changes to the IGRs and the expressed intent for the LSB to ensure that the new Rules would be principles-based and outcomes-focused. The clear focus would appear to be on the 'inputs' to the governance arrangements of the legal service regulators and on prescribed ways of ensuring the independence of their governance arrangements rather than defining key principles and allowing the regulators to adjust their existing arrangements in whichever way works most practically and efficiently for them in order to be able to demonstrate to the LSB that it complies fully with that principle.

[1] The Legal Needs of Small Businesses 2013 – 2017 https://research.legalservicesboard.org.uk/wp-content/media/FINAL-Summary-Small-Business-FEB-18.pdf

6. In ICAEW's dealings with its other oversight bodies, ICAEW has found that an 'outcomes-based' approach enables the oversight body to direct the bodies in the preferred direction of travel, but gives the regulatory body flexibility in how the ultimate outcomes are achieved. Good examples of outcomes-focused / principles-based oversight can be seen in the operation of IAASA and OPBAS, two of ICAEW's other oversight regulators. Those oversight regulators recognised that their authorised regulators all had vastly different structures which had been developed over time and in accordance with the wishes of those bodies' other oversight regulators and that a focus on inputs and the imposition of prescribed rules could potentially render as suddenly inadequate, a structure or mode of operation in the regulatory function which had operated successfully and without concern from other oversight regulators for many years.

7. ICAEW believes that the level of prescription does not just cause problems in compliance for it but that difficulties will be caused to other regulators too. For this reason, ICAEW would request the LSB to re-consider the overall approach and whether it should re-formulate some of the Rules and Guidance into principles with the onus on the regulators to demonstrate that they comply. Another issue with the prescriptive approach is that some of the key terms in the Rules and Guidance, for example, "regulatory body" will mean different things to different bodies and, depending on what part of an AR in a unitary body is determined to be the "regulatory body" will depend on the degree to which compliance with the Rules will be possible or desirable.

8. The LSB itself has issued some practical required outcomes in some of its section 55 and section 162 reporting and the diversity obligations, where ICAEW have approached the objectives from a different expected angle yet satisfied the LSB that it had achieved its key objectives. The more detailed approach applied to the IGRs is therefore slightly at odds with the LSB's previous regulatory stance, and in our view has been to their detriment as an effective practical document.

9. There is also the management of reputational risk to consider; under the framework to date the risk if anything goes wrong lies with the relevant AR, and the Ministry of Justice (MoJ) and the LSB can as supervisors indicate where key outcomes have not been achieved by the body and censure it accordingly. If the supervisory rules are over prescriptive, there is a danger that the failing would be seen as lying with the LSB and the MoJ as it could be interpreted as indicating weaknesses in their guidance rather than the performance of an AR. A less prescriptive framework allows the LSB to determine direction of travel but gives the ARs options in approach, allows scope for innovation and keeps the reputational risk away from government.

COMPLIANCE WITH THE ACT?

10. ICAEW is concerned that the requirements imposed by many of the Rules do not reflect either the requirements of Section 30 of the Act or the clear intention of Parliament. Section 30 states that [emphasis added]:

    "*The Board must make rules ("internal governance rules") setting out requirements to be met by approved regulators for the purpose of 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.*"

11. The section does not include any prohibition against "influence" from the representative functions in a unitary body. Despite this, Rules 1, 4, 8 and 10 all contain a prohibition against influence. A particular concern is that "influence" is the focus of Rule 1 which is clearly the most important Rule as it contains the overarching duty. In contrast, and inconsistently with the rest of the Rules but consistent with section 30, Rule 12 refers to "prejudice".

12. The importance of the distinction between "prejudice" and "influence" and the degree of consideration of this specific issue at the time the Act was introduced can be seen by the fact that it was the focus of two debates in Parliament on the wording of this section of the Act when the original choice of "prejudice" was challenged with a suggestion that the Government change it to "influence". In the Public Bill Committee's examination of the Bill for this Act the Parliamentary Under-Secretary of State for Justice (Bridget Prentice) dealt with this point specifically[2]:

    "A lot of consideration has gone into the use of the word 'prejudiced' in the clause. It has been argued that it would not be unusual for representative bodies to seek to influence regulatory decisions, if it is in the interests of their members to do so. As the approved regulator is the body recognised in the Bill as responsible for both representative and regulatory functions, I would argue that it should accept certain responsibilities as part of that role. It might be reasonable for the representative arm to try to influence regulatory decisions, but it is important that the board is able to take appropriate action where it considers that the approved regulator is allowing representational interests to prejudice the exercise of regulatory functions. It is important to ensure that the board is able to act where, for example, the actions of the representative side discredit the regulatory arm, resulting in damage to consumer confidence. Clause 29(2) is necessarily and deliberately wide in definition to ensure that the board is not prevented from taking such appropriate action. Therefore the use of the word 'prejudiced' is correct in the context. …I understand that these are often very fine definitions, but 'prejudiced' is more appropriate than 'improperly constrained or influenced', because the latter wording would narrow the definition just a little bit too much."

13. During an earlier debate in the House of Lords on 22 January 2007 the use of the test of "prejudice" was also discussed.[3] During this debate the then Under-Secretary of State for Justice (Baroness Ashton of Upholland) said the following:

    "The word "prejudiced" is an appropriate word. We seek to ensure that the regulatory arm is aware of the influence placed on it; in other words, the representative arm will not necessarily do anything other than quite reasonably and quite rightly lobby on particular issues and do things that are designed to take forward the representative functions. I have no difficulty with that at all.

    The issue for me is how the regulatory arm knows that it has been influenced. I suggest that the onus is on those who are being influenced to know that they have been influenced. We have chosen that word because it is not about improper behaviour at all; it is about asking, "Do you know that you have been influenced and are you aware of the fact that, with two arms, one is operating on the other?" that is why "prejudiced" is used; it does not suggest that something untoward has happened.

    Members of the Committee will recognise that on occasions one is lobbied by people one knows well on issues with which one is familiar. When looking at regulation, you have to be clear that you know you have been influenced and can justify its nature. That is the way I have approached the matter."

14. ICAEW is concerned from its reading of section 30 that Rules 1, 4, 8 and 10, as presently drafted, would be ultra vires of the Act. It is also concerned that the LSB should be seen to be introducing prohibitions which are clearly contrary to the intentions of Parliament at the time the Act was introduced. ICAEW believes that careful consideration should be given to the final wording of Rules 1, 4, 8 and 10 before they are introduced.

[2] Hansard, Public Bill Committee, 6th Sitting, col. 222 19 June 2017

[3] https://publications.parliament.uk/pa/ld200607/ldhansrd/text/70122-0013.htm

15. Aside from the legal issues thrown up by the prohibitions on "influence", ICAEW are disappointed that the LSB considers that any "influence" from the representative functions should be avoided. The measured and controlled interaction which aids ICAEW in the performance of its regulatory function could be significantly compromised by following the Rules as they stand. As was recognised by the Ministers in the quotes above, influence, by way of lobbying or otherwise, can have a beneficial impact. Indeed, the imposition of regulations and rules without properly taking into account any practical issues which would be thrown up, or without first understanding possible unintended consequences for those working in practice, is neither efficient nor the way to introduce effective regulation.

16. By preventing the regulatory body from interacting with the representative functions (which, for ICAEW, include a well-respected Technical Strategy Department), the Rules will deny the regulatory body from access to technical expertise and know-how which could result in poorer quality decision-making. It will also increase the costs of operation of the regulatory body as it would either have to employ more in-house experts or pay for the expertise from a third party rather than tap into the expertise present within the technical departments of representative functions. The success ICAEW has had in meeting the LSB's objectives on, for example, diversity and CMA recommendations has been through engaging with relevant experts within the representative functions. Indeed, the LSB's Diversity outcome number 3 requires the regulatory body, among other things, to "*collaborate with… the representative body*" and the new Rules would seem to prevent such interaction and collaboration.

17. A major difficulty with the current IGRs has been that the legal status to act as a regulator has been granted not directly to the regulatory body but to the whole professional body where the applicant is a unitary body. In the case of ICAEW, the legal status of regulator for probate has been conferred on ICAEW which is governed by ICAEW Council and where, in accordance with the arrangements set out in ICAEW's application, the responsibility for the discharge of the regulatory functions was immediately delegated to the Probate Committee supported by ICAEW's Professional Standards Department. However, the responsibility and legal risk has remained with ICAEW's Council which, operating through the ICAEW Board, has the responsibility to ensure that regulatory tasks are being carried out in accordance with the legislation. It does not, therefore, appear to be practicable or logical for the new Rules to limit the degree of interaction.

COMPLIANCE WITH THE REGULATORY OBJECTIVES?

18. While ICAEW does not disagree with the focus in Rule 1 on the importance of the independence of the regulatory functions, and notes the reference to the eight regulatory objectives in section 28 of the Act, it is concerned that, the Rules as a whole appear to strive for independence above everything else, including the objectives and the application of the five Hampton Principles. For example, the introduction of prescriptive rules impacting the governance structures of bodies whose governance structures have been deemed by other statutory oversight regulators as being fit for the regulation of (arguably) riskier regulated services (in ICAEW's case, audit, insolvency and investment business) could potentially risk a diminution in competition if a regulator were to give up its legal services regulator role and those it regulates were to choose to give up rather than deal with the additional compliance cost of dealing with two regulators.

REMOVAL OF DISTINCTION BETWEEN AR AND AAR

19. ICAEW welcomes the decision to remove the two tier system presented by the AR and AAR classifications. ICAEW believes that this was an artificial and unnecessary complication in the existing IGRs and that, with one tweak (converting our Probate Committee to lay majority rather than lay parity where the lay Chair has a casting vote) our governance complied with the requirements for both an AR and an AAR. ICAEW has been concerned to note that some media reporting has sought to portray the categorisation of the professional accountancy bodies as AARs to be providing bodies like ICAEW with an advantage and allowing it to have more relaxed governance arrangements. The abolition of the distinction will remove this perception and ICAEW welcomes this.

LACK OF CLARITY RE NEW TERMINOLOGY

20. ICAEW is also concerned at the lack of clarity around the new terminology used in the Rules and Guidance. A consequence of the decision to produce prescriptive rules is that the Rules seek to impose obligations on various parties, particularly the "regulatory body".

21. The lack of clarity as to which part of ICAEW would be deemed to be the "regulatory body" in the application of the Rules has led to various meetings during the consultation period between directors and senior managers in ICAEW's Professional Standards Department and LSB staff to gain a greater understanding as to how the Rules would apply in practice to ICAEW, in particular what would be considered to be the 'regulatory body' in ICAEW's current structure. ICAEW has concluded from its analysis of the Rules and from the discussions at the recent meetings that the 'regulatory body' would be regarded as PSD and the Probate Committee (as the regulatory board for legal services) collectively.

22. While greater clarity in the Rules would have been helpful, the difficulty in applying in identifying what is a regulator's 'regulatory body' will not be a problem unique to ICAEW and this is the unfortunate consequence of producing prescriptive rules rather than providing a set of principles and expected outputs which the bodies would have to demonstrate however they were organised

23. Another area where ICAEW would like to see greater clarity in terminology is in relation to what is meant by "involved in a material way" in Rule 5 particularly in light of the Guidance; "*there will be cases in which the materiality of the role is clear, such as a member of a decision-making committee or an individual elected to represent a particular group of regulated persons*". It is not clear to ICAEW whether the fact that the PSD Executive Director is a member of the main ICAEW board, like all other Executive Directors with operational responsibility for the divisions of ICAEW, would infringe this Rule. The PSD Executive Director is clearly involved in a material way in the operations of PSD and, therefore, this Rule may be breached if the ICAEW board were to be regarded as a "decision-making committee" for the representative functions rather than recognised as the board of the unitary body and if the PSD Executive Director's role were to be considered "material". At the most recent meeting with LSB staff, this particular concern was raised and a distinction appeared to be drawn by LSB staff between merely sitting on a board of a unitary body and acting in a material way to promote the interests of the representative functions which has provided some assurance.

24. While ICAEW agrees that a Rule preventing a person who is materially involved in the representative functions from being a member of the governing body of the regulatory body, would enhance the independence of the regulatory functions (and ICAEW's own internal governance rules prevent this), it would appear to be contrary to the interests of the regulatory body to be deprived of the insight provided by the current arrangements through the PSD Executive Director being provided with information regarding future plans of the institute and having the ability at an early, formative stage to indicate potential concerns about the way in which any future plans may undermine or impact the regulatory body and its functions. If this was intended to be prohibited, ICAEW would request the LSB to re-consider this and, if it was not intended to be prohibited, the LSB is asked to provide clearer guidance with the final Rules.

FINANCIAL INDEPENDENCE

25. ICAEW is surprised to see that the new Rules are not as robust on the sensitive issue relating to the independence of the funding for the regulatory functions. ICAEW understands from the attendance of senior PSD staff at meetings of the various regulators that this is a significant source of friction and undue influence in other bodies where all income is received by the Approved Regulator and has to be allocated separately to the regulatory functions.

26. One of the central tenets of ICAEW's belief that it has independence around its regulatory functions is that PSD's operations are not funded in any way by either the membership or the practising certificate fees which fund the representative functions. PSD's operations are funded by regulatory fees charged to those members and firms who are authorised to carry out regulated services in addition to fines and costs from the disciplinary scheme. The ICAEW Regulatory Board sets the level of regulatory fees for the following year after reviewing the budget drawn up by the PSD Finance Director to ensure that there is sufficient funding to carry out all functions. In the same way, for ICAEW's regulatory functions in relation to probate, the Probate Committee sets the probate licence fees charged to firms after reviewing budgets for the cost of the regulatory functions as they relate to probate. There is, therefore, no question of disputes in relation to the allocation of funding where leverage could be used to influence matters.

27. It seems to ICAEW that, if the LSB was looking to strive for as much independence as was permissible under the Act between representative and regulatory functions, one of the key issues would be the establishment of an independent source of funding and this is not included within the Rules despite the fact that this might increase the independence of operation much more than some of the other Rules which are proposed. Conversely, no recognition appears to be given to the fact that some regulators can demonstrate financial independence as part of their own arrangements to show independence in the conduct of their regulatory functions. While Rule 1 and the saving provisions in Rule 16 seem to suggest some form of flexibility, ICAEW considers that the Rules should expressly make provision for the LSB to take into account arrangements which are in place at one or more regulators which go above and beyond what the Rules are requiring when deciding whether to provide a waiver to a regulator which is unable to comply with the provisions or one or more of the other Rules. Alternatively provision should be made to ensure that such factors can be taken into account and given weight in any future assessment by the LSB of those regulators' compliance with the Rules.

CONCLUSION

28. As a result of the concerns expressed above on the approach which has been taken, ICAEW believes that a less detailed and more flexible approach should be taken in the finalisation of the Rules and a re-consideration as to whether it would be easier and more effective to formulate principles with attendant guidance and put the onus on the regulators to demonstrate that they comply with the principle howsoever they are structured and operate. The final document should continue to remind the bodies of the "what" but not get over-involved in the "how".

29. In the paragraphs below ICAEW set out their overview response to the questions and then address them at an individual level.

RESPONSES TO SPECIFIC QUESTIONS

Q1: Do you agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement? If not why not?

30. As explained in our introductory comments ICAEW believe that the framework is a sensible one. However the lack of definitions in certain areas creates some confusion and doubt. In addition some tendency to over engage in detail results in the outcomes becoming outputs and compromising the statutory objectives and Hampton principles. With tighter drafting and definitions it is believe the IGRs will meet the objectives sought by the LSB.

31. It is noted in paragraph 25 above that the principal source of disputes appears to be the funding of the regulatory body; given the opaque nature of rule 10 ICAEW are not sure this rule cuts to the chase and that therefore the aim of fewer disputes may not be readily achieved.

32. Set out below the individual observations ICAEW have with respect to each of the rules.

Rule 1 – Overarching Duty

33. ICAEW is of the opinion that the wording of this rule will cause uncertainly. Paragraphs 21 - 22 of the consultation document states: "*The overarching duty reflects section 30 of the Act and sets the context for the rest of the IGR…….Whilst the current IGR simply repeat the wording of section 30, the rule sets out the requirements for achieving the outcomes specified in section 30*"

34. Rule 1 does not however accurately reflect the requirements of section 30. As has been noted in the opening paragraphs above, the intent of Parliament and the act was to apply a test that was less rigid and allow a carefully guarded degree of interaction. The tests accordingly should be focused on the undesirable elements of influence (**eg,** prejudicial) rather than the whole of influence. Otherwise the structure of the rule inhibits the effectiveness of other regulatory activity.

Rule 2 – Duty to delegate

Rule 3 – Provision of assurance

35. As the term "Regulatory Body" has not been defined in these proposed rules, for the purposes of responding to this consultation, ICAEW has interpreted it as having the same definition as that used in the current IGRs ie, a body (whether a separate legal entity or not) without any representative functions which must have a regulatory board.

36. ICAEW does however feel that it is important to define the term "Regulatory Body" for the reasons set out in paragraphs below (in response to rule 4) and therefore recommends that the LSB adds this definition to these proposed rules.

Rule 4 – Regulatory autonomy

37. As mentioned above, as the term "Regulatory Body" is central to these rules it needs to be defined. Furthermore, the rules do not appear to distinguish between the roles of the executive and regulatory board of the Regulatory Body and compliance with the rules appears to be assured provided the Regulatory Body carries out its regulatory functions independently without interference or undue influence from the Approved Regulator

38. Whilst ICAEW will have no difficulty in complying with this rule, as its Regulatory Body independently determines the most appropriate and effective way of discharging its functions to meet the regulatory objectives in accordance with the better regulation principles; it is somewhat surprising that the rules do not ensure more independence of the regulatory board within a Regulatory Body from the body's executive.

39. By way of explanation, whilst ICAEW's Regulatory Body's executive determines its own structure and the most appropriate governance arrangements to put in place to ensure independence from its representative arm (Approved Regulator), it has also ensured that its regulatory board is independently appointed (independent of the Regulatory Body as well as the Approved Regulator) and operates independently, determining issues such as governance, priorities, strategy and regulatory arrangements. It is our opinion that such matters should not be for the executive to determine but the independently appointed regulatory board.

40. As the wording of and/or guidance for Rule 4 does not distinguish between the roles of the executive and the regulatory board in a Regulatory Body it is felt this rule is currently unclear which could lead to uncertainty. This point is illustrated below in relation to comments on the guidance to this rule.

Rule 5 – Prohibition on dual roles

41. ICAEW agrees that a rule preventing a person who is materially involved in representative functions from being a member of the board, council or committee which makes decisions about how to exercise regulatory functions would enhance the independence of regulatory functions (Rule 5(2)).

42. However this rule and its guidance is unclear as to whether a person who is materially involved in regulatory functions is considered to be materially involved in representative functions if that person sits on the Board of an Approved Regulator in order to represent the Regulatory Body on that board (Rule 5(1))

Rule 6 – Individual Conduct

43. This is standard procedure for any regulatory body and therefore no further comment is required

Rule 7 – Governance lay majority

44. Whilst the value of lay input is recognised especially for the purposes of external perception, it is equally important that those regulated have confidence in the competence as well as independence of any regulatory body that directs their activity. As was noted in ICAEW's January 2018 representation, the GMC and the Dental Council in 2012 indicated that lay parity achieved the necessary balances for both objectives.

45. It has been noted earlier the difficulties around what constitutes the regulatory body and where the key functions are exercised. The view of ICAEW having taken account of the observations of the LSB, is that the Probate Committee is the key functional area requiring the lay majority and a move to a lay majority can be done should it be necessary.

46. However the IRB which oversees the regulatory function overall, also oversees audit, insolvency and other reserved activity where the oversight bodies are satisfied with existing arrangements. This board is formed of a parity of lay and non-lay members.

47. In practice the lay members (being paid whereas members are not) are more likely to be present and therefore lay majorities apply most of the time. In addition the lay chair of the Probate Committee has a casting vote which is tantamount to a lay majority. If the LSB remains insistent however ICAEW can apply this rule as drafted to the Probate Committee with no significant additional cost

Rule 8 - Appointments and terminations

48. No specific comment on the rule itself

Rule 9 – Regulatory resources

Rule 10 – Regulatory body budget

49. It has been noted above the light touch element of rules 9 and 10 as they pertain to the funding model of the regulatory body. In ICAEW's view this rule does not address the fundamental problems that lie at the heart of the current tensions between the representative and regulatory arms within a unitary body. As a consequence it is believed this weakens attainment of the objectives of the new IGRs as a whole.

Rule 11 – Shared services

50. As ICAEW operates a 'self-financing' model it is free to assess the services and resources it needs and to consider whether the cost of those services is appropriate. As mentioned above, resource considerations, free from outside influence and with particular emphasis placed on meeting statutory and regulatory objectives and requirements, are carefully reviewed and calculated, and form a key cost component of the 'self-financing' model to achieve an appropriate level of annual registration fee.

51. ICAEW's Regulatory Body therefore only shares services where this is appropriate, necessary and efficient, creating synergies and a cost effective delivery model through shared resource, functions and technology such as those related to IT, property etc. This does not undermine or infringe the separation of functions or impede our Regulatory Body's ability to discharge its regulatory functions. Where services are shared there is no difference to the basis as provided to the Regulatory Body or to the Approved Regulator.

52. ICAEW believes that such a 'self-financing' model is an important factor in ensuring there is no interference with or undue influence leading to prejudice on the exercise of regulatory functions by Approved Regulators with a residual role. ICAEW are therefore of the opinion that the proposed IGRs should encourage such a model for other unitary regulators as it would enhance regulatory independence and reduce the risk of disputes.

Rule 12 – Communication by persons involved in regulation

53. ICAEW already has such arrangements in place and therefore has no comment to make on this proposed rule save for the comment made in paragraph x (Rule X) relating to the notification requirements in Rule 12(2)

Rule 13 – Candour about compliance

54. ICAEW has no issues with this rule and therefore no comment to make.

Rule 14 – Disputes and referrals for clarification

55. ICAEW has no issues with this rule and therefore no comment to make.

Rule 15 – Guidance

56. In the issuance of guidance care is required in the wording that it itself does not become prescriptive. The use for example of the words "must" and "should" can be equivalent to law, and "due regard" has an interesting legal series of interpretations. The rules themselves are of course law by virtue of the LSB's powers under section 30. However provided that some of the wording is tightened up and the guidance is not prescriptive ICAEW do not have difficulty with rule 15.

Rule 16 – Saving provisions

57. This is a sensible provision that facilitates the recognition of regulatory process that achieves the overarching objectives whilst in itself not meeting the specific IGR rule. However, this should be only used by exception rather than on a regular basis. This is why the accurate and high level outcomes expressed in the rules themselves should not be too prescriptive and the ARs and the LSB have the ability to recognise effective alternative regulatory models.

Rule 17 – Exemptions

58. ICAEW has no comment to make on this rule.

Q2: Does the proposed guidance provide sufficient detail to help you to interpret and comply with the proposed IGR? Please provide specific comments on any areas of the guidance where further information would improve clarity.

59. In the main the guidance to the rules provides sufficient detail to interpret the rules and ascertain whether ICAEW is ab to comply with them. The guidance to some rules does however lack clarity in specific areas and is also overly prescriptive in others possibly leading to disproportionate cost inefficiency.

60. For example, as outlined above, with regard to the guidance to Rule 4 - regulatory autonomy, this requires clarity regarding the definition of a "Regulatory Body" and the roles and powers of the executive and regulatory board of this body; and with regard to Rule 6 – prohibition on dual roles, the guidance on "material involvement" needs to be clarified to ensure executive representation of a Regulatory Body on an Approved Regulator's Board is not prohibited.

61. Finally, the guidance to rule 11 – share services is overly prescriptive and should be more outcomes focused. The detailed examples in the guidance appear to exacerbate this.

62. Some of the comments made above on the rules themselves also have covered the guidance. However set out below are additional observations held with respect to the guidance for each certain of the rules where applicable.

Rule 3 – Provision of assurance

63. The guidance provides sufficient detail to interpret these rules and ascertain whether ICAEW can comply.

Rule 4 – Regulatory autonomy

64. The guidance on this Rule 4 is also unclear with regard to the definition of a Regulatory Body. The wording of the guidance under the sub-heading *Governance & Structure* states [emphasis added]:

"*Determining its own governance and structure, essentially requires that the* ***regulatory body*** *has control over its constitution including:*

- *Its hierarchy,*
- ***Its decision-making processes,***
- *the make-up of its board(s) and committee(s),*
- *election of members,*
- ***the division of power between those bodies and its executive***
- *its conduct rules, and*
- *terms of reference for its bodies*

65. It is unclear where the control lies. For example who decides on the division of power between the regulatory board and the executive and on the processes for decision-making? ICAEW is of the opinion that the guidance needs to be much clearer on these issues.

Rule 5 – Prohibition on dual roles

66. The guidance on 'material involvement' states: "*There will be cases in which the materiality of the role is clear, such as a member of a decision-making committee or an individual elected to represent a particular group of regulated person.*"

67. ICAEW is of the opinion that it is good regulation to have executive representation of the Regulatory Body on its Approved Regulator's Board as such an executive is more able to assess whether a decision, plan or other arrangement being considered by such a Board is likely to undermine the discharge of regulatory functions and/or prejudice the independence or effectiveness of regulatory functions. Such representation assists with compliance of section 28 and rules 2(3) and 12(2).

68. Membership of an Approved Regulator's Board by an executive of the Regulatory Board should not therefore be considered 'material involvement' in representative functions but the guidance to this rule does not make this clear. The guidance therefore needs amending to add this clarity

Rule 8 - Appointments and terminations

69. For the guidance on this rule ICAEW repeats its concerns about the definition of a Regulatory Body and the need for the guidance to make clear that appointments and terminations should not just be made independently from the Approved Regulator with a residual role but should also be made independently from the executive of the Regulatory Body as outlined in paragraph 64 for rule 4 above. .

Rule 11 – Shared services

70. ICAEW is of the opinion that the guidance on this rule is overly prescriptive and should be more outcomes focused. Giving detailed examples appears to exacerbate this. Such over-prescription does not take into account the different structures of current legal regulators.

Q3: Is there any reason that your organisation would not be able to comply with the proposed IGR within six months? Please explain your reasons.

71. ICAEW currently sees no difficulties in complying with these rules provided the definition of the Regulatory Body is as assumed in this response (see paragraphs 37 - 40). Our regulatory structure and procedures would already comply with the majority of these rules and, where they don't, compliance should be relatively straightforward.

72. With regard to the time required to effect implementation this should be straight forward with the exception of rule 11 – shared services. It is difficult, at this stage, to judge how long a review of shared services will take, particularly as the guidance on this rule is so prescriptive in its requirements. It is noted below that infra-structure changes could take between 18 months to two years to implement. As it is also cost burdensome for a number of reasons and affecting our other areas of regulation it is something that would need a careful application.

73. Some of the comments made above on the rules themselves also have covered implementation issues. However set out below are additional observations with respect to the implementation for each certain of the rules where applicable.

Rule 3 – Provision of assurance

74. ICAEW as an Approved Regulator already delegates its regulatory functions to its regulatory body and only retains a residual role as an Approved Regulator requiring only assurance of compliance with the rules and the Act. Furthermore, mechanisms are already in place within ICAEW's regulatory structure to ensure that ICAEW's Regulatory Body is able to provide sufficient information to ICAEW as an Approved Regulator to give this assurance. Implementation of this rule is therefore not an issue as ICAEW is already compliant

Rule 9 – Regulatory resources

Rule 10 – Regulatory body budget

75. ICAEW's Regulatory Body independently formulates its own strategy, operational plan and resulting budget. The principles of its self-financing model includes income generation and compensation schemes funded largely by levy. Due regard is given to oversight, strategic and market priorities when formulating its operational plan and supporting budget. Resource considerations, free from outside influence and with particular emphasis placed on meeting statutory and regulatory objectives and requirements, are carefully reviewed and calculated, and form a key cost component of the 'self-financing' model to achieve an appropriate level of annual registration fee.

76. Any increase in annual registration fees is discussed and agreed with the Regulatory Board, with the LSB and finally approved by their Chief Executive. Under the transparency initiative, the financial results (in respect of the probate services) are published on the ICAEW.com website each year.

77. The 'self-financing model' of ICAEW's Regulatory Body therefore ensures that there is no interference or undue influence leading to prejudice from the Approve Regulator.

78. However, as the Approved Regulator with a residual role is entitled to assurance of compliance with the Act, the Regulatory Body's budget and resource plans are reviewed by the Approved Regulator.

79. ICAEW therefore in itself has no operational issues with this rule.

Rule 11 – Shared services

80. Concerns on the implementation challenges of this rule are set out in the paragraphs below in response to question 4.

Q4: Beyond the usual resources allocated to compliance with the IGR what, if any, additional resource do you anticipate you will need: (i) to assess compliance with the proposed IGR and then to make changes to come into compliance, if any are required; and (ii) to comply with the IGR on an ongoing basis

81. Overall, as ICAEW's current regulatory arrangement would already appear to comply with the majority of these rules and, where they don't, compliance should be relatively straightforward, there are not any significant resourcing issues anticipated relating to their implementation. This is based on the interpretation that has been made of "regulatory body" and other areas where the drafting is uncertain.

82. However, it is difficult at this stage to assess the additional resources that will be needed to undertake a review of shared services and, where changes are needed, if at all, what resources would be needed to implement them and the cost of such sources and implementation.

83. The potential requirements set out in the rule and supporting guidelines, such as for example, obtaining quotes for comparable services individually in order to make an informed assessment of whether the provision of such services continue to meet the requirements in the IGRs, are excessive and causes problems under red tape legislation in other regulatory areas. They may also not bear successful scrutiny by the Better Regulation Executive.

84. The LSB should note that such requirements will inevitably increase the regulatory fees which will not be consistent with an Approved Regulator's duty under Section 28 of the Act to promote the regulatory principle of 'protecting and promoting the interests of consumers' (onto whom the cost would be passed) and to have regard to the better regulation principle of proportionality. For these reasons it is likely that Approved Regulators will be unable to comply with a number of the ongoing review requirements prescribed in the guidance on this rule as it is likely to result in them breaching their overarching duty to comply with Section 28 of the Act.

Q4(b): Do you agree with our assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the proposed IGR ?

Please provide details of your assessment of the costs and actions associated with the initial assessment of compliance under the transition period and your estimation of the difference in the ongoing cost of compliance with the proposed IGR compared to the existing IGR

85. ICAEW do not agree with the LSB's assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the proposed IGR.

86. ICAEW can see that the proposed rules could lead to a reduction in the cost of compliance for those unitary regulators which have been in numerous disputes with their representative arm (approved regulator) on the interpretation of the IGR and their respective roles under them.

87. However, these rules would not enhance the independence of ICAEW's regulatory functions any more than they currently are as ICAEW's internal governance structure ensures separation of ICAEW's regulatory functions from its representative functions and therefore independence of its regulatory functions. This makes for minimum of dispute and none have been encountered since reorganisation in January 2016. Furthermore, ICAEW's Regulatory Body independently determines the most appropriate and effective way of discharging its functions to meet the regulatory objectives in accordance with the better regulation principles.

88. In addition it is considered that ICAEW's Professional Standards "self-financing" model is an important factor in ensuring there is no interference or undue influence leading to prejudice in the exercise of its regulatory functions by its representative arm (Approved Regulator).

89. As a consequence ICAEW do not feel that the current IGRs required clarity in these areas as the Approved Regulator and Regulatory Body of ICAEW have always been in agreement on what their respective roles are within the current IGRs, that is to say the residual role of the Approved Regulator to be assured of compliance with the Act by the Regulatory Body and the Regulatory Body's role to discharge the regulatory functions that have been delegated to it by the Approved Regulator.

90. ICAEW has therefore never had any disputes or difficulties with compliance with the IGRs and so there will be no cost saving in this respect. Conversely the implementation of these rules as drafted will therefore increase costs for ICAEW which is likely to be, most particularly, in the areas of shared services.

91. The LSB should not underestimate the additional resources that will be required and therefore costs incurred in its requirement for regular IGR reviews and commitment to ongoing compliance. The IGRs are not as straightforward as an initial assessment and then move on. Approved Regulators will need to understand, pre-review each year, manage the LSB annual returns and questions and potentially resource further visits and other compliance related reporting. Not to mention the requirements in relation to shared services to, for example, obtain quotes for comparable services individually in order to make an informed assessment of whether the provision of such services continue to meet the requirements in the IGRs.

92. The LSB is accordingly urged to note that such requirements will inevitably increase the regulatory fees which will not be consistent with an Approved Regulator's duty under Section 28 of the Act to promote the regulatory principle of 'protecting and promoting the interests of consumers' (onto whom the cost would be passed) and to have regard to the better regulation principles of proportionality. For these reasons it is likely that Approved Regulators will be unable to comply with a number of the ongoing review requirements prescribed in the guidance on this rule as it would mean breaching their overarching duty to comply with Section 28 of the Act and section 21 of the Legislative and Regulatory Reform Act 2006.

93. In terms of evaluating the financial impact overall this is difficult to attempt when the overall framework and intent is unclear. ICAEW applies other statutory regulation to the firms it regulates (for example over two thirds of the firms it regulates for probate are also regulated for audit) and mechanisms required by the LSB which are not appropriate under the FRC governance guidelines may duplicate costs of licensing and monitoring in these respective areas, potentially involving annual additional costs in excess of £50,000 for those regulatory tasks alone.

94. Separately at a support level an estimate of an assessment of compliance rests largely with a more detailed in in depth review of shared services provided to support the effective operation of Professional Standards. This ranges, for example, from managing the supply of coffee, office space and web presence through to pension management, finance, HR, IT and cyber-security. An estimate of effort to review this set-up and consider alternatives, in addition to internal staff time and expertise, is £50,000. The up-front cost of change is difficult to estimate but far in excess of a £50,000 one-off assessment. As there are a number of beneficial consolidated arrangements, and these operating across differing contractual timeframes, ongoing annual compliance cost is estimated at £25,000 pa.

Q5: Please provide comments regarding equality issues which, in your view/experience, may arise from implementation of the proposed IGR.

95. For the most part ICAEW agree with the LSB's assessment on equality that there appear to be no material impacts from an equality perspective.

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18 January 2019

Dear Neil

Thank you for the opportunity to respond to the LSB's consultation on new IGRs and the associated statutory guidance. We welcome the LSB's intention to provide more certainty about the extent to which regulatory and representative functions must be separated. In particular, we support the proposals that the regulatory body must determine its own governance, structure, priorities and strategy and that ARs must not participate in the appointment or termination of regulatory Board members. We consider that these proposals clarify significantly the boundary between regulatory and representative functions.

However, we do have concerns about:

a. the drafting of some of the proposed Rules, in particular the use of language that differs from the Legal Services Act 2007 ("**LSA**");

b. the LSB's view on what are (or are not) regulatory arrangements and the subsequent impact on the approach to delegation; and

c. the lack of detail about the assurance role that ARs will have. We consider that clarity about this is key to reducing the likelihood of disagreements about an AR's legitimate responsibility. Our view is that the LSB has not provided sufficient clarity about the relationship between the LSB's oversight role and an AR's assurance role. Without this, there are likely to be continuing disputes about what type of information should be provided to the AR by the regulatory body.

Annex A sets out our detailed response to the consultation questions on: whether we agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement (question 1); and whether we consider that the proposed guidance provides sufficient detail to help us to interpret and comply with the proposed IGR (question 2).

On the other specific questions that were asked, our response is:

- Question 3: Is there any reason that your organisation would not be able to comply with the proposed IGR within six months? Please explain your reasons.

  Our current view is that the main change that we will need to implement will be to negotiate a new Delegation Agreement with CIPA and CITMA. At the moment, six months appears to be a reasonable time within which to conclude those negotiations.

  We may also need to request from the LSB a waiver from some of the requirements of Rule 11 (Shared Services) because we currently sub-let premises from CITMA. As we have no other shared services and are likely to be moving offices later this year, this is unlikely to be an onerous process and should therefore be able to be completed within six months.

- Question 4(a): Beyond the usual resources allocated to compliance with the IGR what, if any, additional resource do you anticipate you will need: (i) to assess compliance with the proposed IGR and then to make changes to come into compliance, if any are required; and (ii) to comply with the IGR on an ongoing basis?

  Our current view is that these issues will not require additional resources *providing* the LSB does not introduce (either initially or on in future) a complex reporting system for assessing compliance. It is essential that the LSB adopts a proportionate and targeted approach to monitoring compliance through its regulatory performance framework and ensures that it does not impose undue reporting burdens on smaller regulators.

- Question 4(b): Do you agree with our assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the proposed IGR? Please provide details of your assessment of the costs and actions associated with the initial assessment of compliance under the transition period and your estimation of the difference in the ongoing cost of compliance with the proposed IGR compared to the existing IGR.

  There will be an initial cost for us to negotiate a new Delegation Agreement (which may include obtaining external legal advice) and in conducting any required risk assessments. But our current view is that, once those have been completed, the cost of compliance for IPReg will not change materially under the proposed IGRs *providing* the LSB does not introduce (either initially or on in future) a complex reporting system for assessing compliance. It is essential that the LSB adopts a proportionate and targeted approach to monitoring compliance through its regulatory performance framework and ensures that it does not impose undue reporting burdens on smaller regulators.

- Question 5: Please provide comments regarding equality issues which, in your view/experience, may arise from implementation of the proposed IGR.

  We have not identified any equality issues.

Once the LSB has published the final IGRs and Guidance, we suggest it should consider whether it needs to review its enforcement policy to ensure that it is consistent with the residual assurance role of the ARs. Although the LSB has stated that it will be able to take enforcement action directly

against a regulatory body,[1] our view is that this merits further consideration in the context of an AR's residual assurance role.

I would be very happy to discuss our response with the LSB.

Yours sincerely

Fran Gillon

Chief Executive

[1] LSB: Combined note of December 2018 IGR workshops. LSB response to question 7.

Annex A

Overarching duty (draft Rule 1)

1. We consider that it is helpful to have an overarching duty to which ARs and regulatory bodies are subject. However, in our view this duty should adhere strictly to the requirements of the Legal Services Act 2007 ("**LSA**"). This would reduce the scope for confusion that is inevitably introduced if the drafting of statutory rules and associated guidance differs materially from the LSA's drafting.

2. The LSA imposes a requirement on the LSB to make IGRs for the purpose of *ensuring* that:

    a. the exercise of an AR's regulatory functions is not *prejudiced* by its representative functions; and

    b. decisions relating to the exercise of regulatory functions are *so far as reasonably practicable* taken independently from decisions relating to the exercise of representative functions.[2]

3. We are concerned that the effect of the current drafting is to change the policy intention of the LSA because they seek to prohibit the *influencing* by ARs of regulatory functions.[3] In our view, it is a legitimate activity of ARs (and representative bodies generally) to seek to influence regulatory bodies'/ decisions (and those of policy-makers more widely). Although behaviour that seeks to influence a regulatory body's activities may become prejudicial, the judgement as to whether that has occurred must necessarily be case-specific.

4. We note that during the passage of the Legal Services Bill, an amendment was proposed that would have removed the word "prejudiced" and inserted "improperly constrained or influenced" in its place.[4] Hansard shows that, during the Committee discussion of the proposed amendment, the then Minister noted that it could be "reasonable for the representative arm to try to influence regulatory decisions" but that it was "important for the [LSB to be] able to take appropriate action where it considers that the [AR] is allowing representational interests to prejudice the exercise of regulatory functions". The Minister also stated that "the use of the word 'prejudiced' is correct in the context".[5]

5. We now have a good working relationship with CIPA and CITMA. This is evidenced by monthly meetings between the three CEOs and quarterly meetings at Chair/President level. We see these as important to ensuring that we understand CIPA and CITMA's views on particular issues and would not want to have to abandon them because they are an opportunity for the ARs to seek legitimately to influence us.

6. Against this background, we therefore encourage the LSB to adhere to the LSA's requirements and draft IGRs whose purpose is to *ensure* that regulatory functions are not *prejudiced* by representative functions.

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[2] LSA section 30(1) – emphasis added

[3] This concern also applies to other instances in the draft IGRs and Guidance that seek to prohibit an AR from *influencing* the regulatory body.

[4] https://publications.parliament.uk/pa/cm200607/cmbills/108/pb1081906.11-17.html - see proposed amendment to Clause 29

[5] https://publications.parliament.uk/pa/cm200607/cmpublic/legal/070619/pm/70619s02.htm - see discussion on Clause 29

7. Other similar drafting concerns with this Rule are:

    a. The inclusion of representative "interests" in the prohibition.

    This term is not defined and we consider that this may be confusing given that the definition of "representative functions" in the LSA includes "the interests of persons" regulated by the AR;[6]

    b. The use of definitions for "regulatory arrangements" and "regulatory functions" that differ from the definitions in the LSA.

    The LSB asserts that: (a) the delegation of regulatory functions, and (b) the residual role to be assured of compliance with LSA s28 are regulatory arrangements/regulatory functions.[7] However, the LSB has not provided any analysis to support this assertion.

    Following the principle set out above that the Rules (and Guidance) should adhere to the drafting of the LSA, we suggest that, if the LSB can provide a convincing analysis to support this assertion, a preferable approach would be to use the LSA's definitions in the IGRs, but state in Guidance that it would not be "reasonably practicable" for an AR's decisions about: (a) delegation of regulatory arrangements, and (b) assurance of compliance with LSA s28, to be taken independently of its representative functions;

    c. The Guidance states that ARs have a duty "to *promote* the regulatory objectives".[8] The actual duty in LSA s28 is for an AR "so far as reasonably practicable to act in a way (a) which is compatible with the regulatory objectives and (b) which [it] considers most appropriate for the purpose of meeting those objectives".[9] We encourage the LSB to adhere closely to the drafting of the LSA in order to avoid introducing requirements that go beyond an AR's statutory duties.

Duty to Delegate (draft Rule 2)

8. We support the principle that the discharge of regulatory functions must be delegated to a separate, regulatory body and that, after delegation, the AR retains only a "residual role".

9. We have found that the model that IPReg, CIPA and CITMA operate, in which IPReg is a company limited by guarantee and has no significant shared services with either AR, generally operates well. However, it would be helpful if the LSB made clear in its guidance that, in CIPA and CITMA's case, delegation does not have to be to two separate bodies – a continuing requirement to have separate patent and trade mark regulatory boards would fetter our ability (under Rule 4) to determine our own governance and structure.

10. Please also see our comments on draft Rule 3 concerning the AR's residual role after delegation.

[6] LSA s27(2)
[7] Draft Guidance page 6
[8] Draft Guidance page 8 – emphasis added
[9] LSA s28(2)

Provision of assurance to AR (draft Rule 3)

11. The LSB states that an AR's residual role is to assure itself that the regulatory body is compliant with LSA s28 (the regulatory objectives and better regulation principles) and that the AR's activities must not duplicate the LSB's oversight role, for example in assessing regulatory performance. As we have stated in our covering letter, this issue is absolutely key to reducing the likelihood of disputes about an AR's legitimate role. It is not clear how the information that the LSB has suggested should be provided to the AR by the regulatory body actually relates to the requirements of LSA s28. It is therefore not clear to us how this information would help to inform an AR's analysis of whether it can be assured that LSA s28 is being complied with. By way of examples, the draft Guidance states that:

    a. in order to be assured that a regulatory body is compliant with LSA s28, it would be "reasonably necessary" for the AR to receive information about: (1) governance arrangements, (2) arrangements for financial management and control, and (3) systems and processes for risk management and internal audit.[10] Although we can see that information about these matters could provide assurance to the AR about the regulatory body's continuing viability, it is not obvious how that information relates directly to compliance with the regulatory objectives and/or better regulation principles. The information that it is suggested is "reasonably necessary" is relatively narrow in its focus, whereas the matters covered by the regulatory objectives and the better regulation principles are extremely wide – and subject to legitimate differences of view as to their meaning. In our view, therefore, significantly more explanation is needed about what the LSB sees as the link between the suggested information and the requirements of LSA s28. It would also be helpful for the LSB to explain why it does not see matters such as processes for risk management and internal audit as being solely for consideration by the regulatory body's Board;

    b. the Guidance suggests that the regulatory body must provide sufficient information to the AR about its compliance with Rule 6 (Individual Conduct), Rule 7 (Governance: Lay composition) and Rule 13 (Candour about Compliance).[11] It would be helpful if the LSB explains what it considers to be the link between information relating to compliance with these specific Rules and the regulatory objectives and better regulation principles in LSA s28.

12. The LSB's draft Guidance states that the regulatory body must provide information "as a part of the AR".[12] This is not the case for IPReg – we are not "part of" CIPA or CITMA. We suggest that this phrase is removed.

13. There appears to be some contradiction in the draft Guidance about who determines the information that the regulatory body provides to the AR. On page 14, the draft Guidance states that "it is not purely for the regulatory body to determine what information is required" (and then provides examples of the circumstances in which an AR can request information). However, on the next page, the draft Guidance states that "the regulatory body must assess what information is reasonably necessary for the AR to be assured of compliance". Greater clarity is therefore required on this issue.

[10] Draft Guidance pages 10-11 in relation to the Duty to Delegate (draft Rule 2)
[11] Draft Guidance page 14
[12] Draft Guidance page 14

14. On a related matter, although we appreciate that the LSB wants to provide as much certainty as possible in the Guidance about the basis on which information must be provided to the AR, the tests of "reasonable grounds" and "objective justification" are complex legal concepts. As such, they are likely to lead to differences of opinion between the regulatory body and the AR about whether requests for information are compliant with the IGRs. One of the examples given of reasonable grounds for an AR to question the information provided by the regulatory body is where "the level of detail is inadequate for the AR to comply with *other statutory obligations*" (emphasis added).[13] In the context of the specific policy objective of the IGRs (set out in LSA s30(1)), we question whether there can be legitimate requests for information to aid an AR's compliance with obligations that are not in the LSA (or other sector-specific legislation concerning regulatory arrangements/functions).

Regulatory autonomy (draft Rule 4)

15. In terms of the drafting of this Rule, following the principles set out above, we consider that it is preferable to adhere to the drafting of the LSA, rather than risk imposing additional duties on regulatory bodies and ARs. So, in this draft Rule, rather than expecting the regulatory body to "meet the regulatory objectives in accordance with the better regulation principles" (which are not the requirements in the LSA s28), it would be better to simply state the Rule as:

    > *The regulatory body must independently determine the most appropriate and effective way of discharging its functions to comply with the requirements of LSA s28(2) and s28(3).*

16. Similarly, the draft Guidance states that LSA s28 requires that the discharge of regulatory functions "follows" the regulatory objectives.[14] It also states the need to "work towards the regulatory objectives" and "observe the better regulation principles".[15] These phrases do not reflect the requirements in the LSA.

17. The requirement to be "accountable" needs to be included in the list of better regulation principles on page 18 of the draft Guidance.

Prohibition on dual roles (draft Rule 5)

18. We have no specific drafting comments on this Rule or Guidance.

Individual conduct (draft Rule 6)

19. We have no specific drafting comments on this Rule or Guidance.

[13] Draft Guidance page 15
[14] Draft Guidance page 18
[15] Draft Guidance page 20

Governance: lay composition (draft Rule 7)

20. We suggest that it would help to reinforce the importance of having a lay majority if the IGRs also required a lay majority and Chair on a regulatory body's sub-committees (or similar), in particular those dealing with disciplinary matters.

The Regulatory Board: Appointments and Terminations (draft Rule 8)

21. Whilst we support the policy objective of ensuring that the regulatory body controls all elements of is governance, we are concerned about the absolute prohibition on the AR having any involvement in the appraisal process for the Chair of the regulatory body.[16] We consider that it may be appropriate for the regulatory body to request feedback on its Chair's performance from senior representatives of the AR. However, it must be for the regulatory body to decide whether to do so and the extent to which that feedback influences the appraisal.

Regulatory Resources (draft Rule 9)

22. IPReg currently derives most of its income from practising fees and controls its own budget; it does not remit any money from practising fees to CIPA or CITMA for permitted purposes. We therefore consider that we currently have the autonomy we need in terms of our budget and resources. However, we nevertheless consider that it is essential that there is clarity in this Rule about regulatory resources and do not consider that the current drafting achieves this.

23. In order to achieve this clarity, we would again encourage the LSB to adhere closely to the LSA's requirements. The LSA states that the IGRs must require each AR to:

> "*take 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 regulatory functions"[17]

This statutory requirement has been changed in the draft Rule to an obligation on an AR to "*provide* such resources as are reasonably required for its regulatory functions to be efficiently and effectively discharged" (emphasis added).

24. This drafting appears to create a contradiction with the draft Guidance which states that the assessment of what resources are reasonably required will be carried out by the regulatory body where an AR has delegated its regulatory functions.[18] Whilst this approach is consistent with the LSB's overall policy objectives, we do not consider that it is consistent with the Rule as currently drafted.

25. We suggest that retaining the wording of the LSA in the Rule would be preferable. The LSB's Guidance would then set out what it considers to be reasonably practicable steps that an AR could take to achieve compliance with the Rule – these could include delegation to the regulatory body of the assessment of what resources are reasonably required.

[16] Draft Guidance page 26
[17] LSA s30(3)(a) – emphasis added
[18] Draft Guidance page 27

Regulatory body budget (draft Rule 10)

26. We have no specific drafting comments on this Rule or Guidance.

Shared services (draft Rule 11)

27. We have no specific drafting comments on this Rule or Guidance.

Communication by persons involved in regulation (draft Rule 12)

28. We have no specific drafting comments on this Rule or Guidance.

Candour about compliance (draft Rule 13)

29. We fully support the policy objective of this draft Rule. However, it would be helpful for the LSB to explain why it considers that the powers that it already has under LSA s55 are insufficient to enable it to gather information about compliance with the IGRs. Notwithstanding that point, in the draft Guidance, the LSB states that the requirement to respond "promptly" to requests for information from the LSB means "within a maximum of 10 clear working days".[19] The draft Guidance also states that the requirement to respond "fully" means "providing the information requested in full and any further information which is directly relevant".[20] The Guidance later states that a "reasonable time" for remedying a breach of the IGRs is "subject to an overall time limit of three months".[21] We suggest that the LSB should moderate the drafting of the Guidance to make clear that these are indicative timescales only.

30. In terms of notifying the LSB about non-compliance, it would be helpful if the Guidance made clear that the regulatory body can also inform the LSB about non-compliance. As drafted (notwithstanding the provisions in draft Rule 12: Communication by persons involved in regulation) the onus appears to be solely on the AR.[22]

31. In terms of rectifying non-compliance, we would like further clarity about whose responsibility it is to remedy a breach. The example given in the draft Guidance is of a decision being taken by a regulatory board that did not have a lay majority or lay Chair. The draft Guidance states that the AR would have to consider how that situation arose and takes steps to ensure that it does not recur, for example "by update training to members of the board and/or amendments to its procedure for arranging board meetings to ensure a lay chair or majority at every meeting in future". We accept that in the example given, there would be a need for IPReg to report the matter to CIPA and CITMA. However, we do not consider that it would be appropriate for CIPA or CITMA to be involved in organising "update training" for IPReg's Board members. Nor would it

[19] Draft Guidance page 33
[20] Draft Guidance page 33
[21] Draft Guidance page 34
[22] Draft Guidance page 34

be appropriate for them to seek to make amendments to IPReg's procedures to ensure a lay majority and Chair since these are to be decided independently by IPReg.

Disputes and referrals for clarification (draft Rule 14)

32. It would be helpful if the Rule itself (rather than the Guidance alone)[23] made clear that the regulatory body can also refer disputes to the LSB.

33. We found that the example given of where the regulatory body and the AR have been unable to resolve a dispute about the lay make-up of a regulatory board to be confusing.[24] Other draft Rules require a lay majority (draft Rule 7) and require the regulatory body to determine independently its Board appointments (draft Rule 8). The AR should not, therefore, be playing any role in these activities and it is not clear why a dispute between the AR and the regulatory body could arise.

34. In terms of whether the LSB responds to any referral for clarification, although we understand that the LSB may not wish to consider an issue in detail, we would nevertheless expect the LSB to explain why it has decided not to respond.[25] It would therefore be helpful for the LSB to make explicit in the Guidance that it will do so.

Guidance (draft Rule 15)

35. We have no specific drafting comments on this Rule or Guidance.

Saving provisions (draft Rule 16)

36. We have no specific drafting comments on this Rule or Guidance.

Exemptions (draft Rule 17)

37. We have no specific drafting comments on this Rule or Guidance.

[23] Draft Guidance page 36
[24] Draft Guidance page 36
[25] Draft Guidance page 37

Law Society of England and Wales response to the LSB consultation on Proposed Internal Governance Rules

January 2019

Introduction

1. The Law Society of England and Wales ("the Society") is the professional body for the solicitors' profession in England and Wales, with over 170,000 registered legal practitioners. The Society remains unequivocally committed to its role as an Approved Regulator under the Legal Services Act 2007 ("the Act") and to ensuring that it continues to comply with the Act. It is the Act which sets the context for the relationship between the Law Society and the SRA, determining that regulatory bodies like the SRA sit within the governance structure of approved regulators like the Law Society, subject to the independence rules in section 30.

2. The Legal Services Board (LSB) also has an important role under the Act, exercising its powers in a way that is, and is perceived to be, independent and fair. Transparency is at the heart of trust in the legal profession, and it is important that both the public and the profession can have confidence in the Approved Regulators, the Regulatory Bodies, and the LSB as an impartial overarching regulator.

3. The Society has a considerable level of concern that the new proposed Internal Governance Rules (IGRs) do not set out a clear enough framework for settling future complaints and may arguably create a context in which disagreements are more likely to arise.

4. We note the LSB's previous public pronouncements that *"the current lack of full independence between the legal services regulators and their associated professions is unlikely to be sustainable"*[1]. However, it remains the framework set out in the Act which the LSB must implement through its IGRs. We are deeply concerned that some of the changes proposed in the consultation are inconsistent with the Act.

5. We have two fundamental concerns, and other more detailed points. The first fundamental concern is that the revised IGRs would not be consistent with section 30 of the Act, which makes clear that it is "prejudice" which must be prevented by the IGRs. We believe that the IGRs as drafted would go far beyond the requirements of section 30, and inadvertently interfere with legitimate public interest and representative activities. As such it could pose a risk to certain regulatory objectives.

6. The second fundamental concern relates to the distinction drawn between "oversight" and "assurance". We are concerned that limitations placed upon the Society would prevent it from carrying out the approved regulator role as intended by the Legal Services Act.

7. One of the aims of this revision of the IGRs is to achieve clarity. The Society wants clarity in respect of its role as approved regulator. We are concerned that the changes proposed would not achieve that.

[1] A vision for legislative reform of the regulatory framework for legal services in England and Wales (September 2016).

Inconsistency with section 30 of the Act

8. Section 30 of the Legal Services Act is as follows (our bold):

> "*Rules relating to the exercise of regulatory functions*
>
> *(1) The Board must make rules ("internal governance rules") setting out requirements to be met by approved regulators for the purpose of 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.***
>
> *(2) 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.*
>
> *(3) The internal governance rules must also require each approved regulator—*
> *(a) to take 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;*
> *(b) to make such 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.*
>
> *(4) The first set of rules under this section must be made before the day appointed by the Lord Chancellor by order for the purposes of this section."*

9. We believe that rule 1(1) of the proposed IGRs is inconsistent with section 30 of the Act. It says:

> *"Each approved regulator has an overarching duty to ensure that decisions relating to its regulatory functions are not influenced by any representative functions or interests it may have."*

10. This introduces the concept of "influence" which goes a great deal further than the first limb of section 30(1) of the Act which is focussed on "prejudice", i.e. the exercise of an undue or negative influence. Even if it is aimed at the second limb of section 30(1) – which requires that regulatory decisions are taken independently from representative decisions – this goes further and wider than what is required or can be justified.

11. The IGRs should go no further than they currently do preventing "prejudice", which could also be expressed as "undue influence". In order for influence to be undue, the influence should be an abuse of the approved regulator role that was envisaged within the Act. The IGRs should not curtail any legitimate activity which is unrelated to the Society's role as approved regulator, nor the right to expect accountability from the SRA to whom it has delegated regulatory functions. The proposed rule 1(1) is a significant departure from both the Act and from the existing IGRs.

12. The Law Society's legitimate influencing activities are a healthy part of the regulatory arrangements, and a core part of the Law Society's representative functions. However, the proposed rules would appear to put the Law Society in a worse position than any other stakeholder in carrying out legitimate influencing activities. Rule 1(1) is not the only example of this. It is also evident in:

    a) Rule 4(3), which precludes approved regulators from influencing regulatory determinations except in the context of a consultation.
    b) Rule 10(2), which precludes approved regulators from influencing budget and resource decisions, except in the context of a formal consultation.

13. Wide-ranging restrictions on legitimate influencing activities are inappropriate given the fact that it is representative bodies like the Law Society who are in many instances best placed to articulate the potential impact on the regulated community of a proposed regulatory decision. Because the Rules, as drafted, would only permit the Law Society to influence regulatory determinations through responding to a consultation, it could preclude many of the Society's activities, including for example:

    a) Writing a letter to the SRA, to highlight concerns regarding how a rule is being applied in practice, or to highlight unintended consequences;
    b) Publishing articles or press releases on regulatory issues outside of a formal consultation window;
    c) Encouraging the SRA to take a different approach, if in our opinion they are taking steps which would undermine public trust in the profession;
    d) Meeting informally or formally with staff from the SRA to put forward views on behalf of members of the profession;
    e) Writing to our membership to raise a concern or express criticism regarding an SRA initiative or policy position, (save where the Society is entitled to receive and does receive the relevant information only in our capacity as approved regulator);
    f) Council members and other members meeting with the SRA or speaking out publicly on behalf of those they represent.

14. The above list of functions are legitimate representative activities that must not be prohibited by the IGRs. We would also argue that the proposed rules, as drafted, unduly interfere with our proper representative functions in a manner that is specifically proscribed by section 29(1) of the Act.

> *(1) Nothing in this Act authorises the Board to exercise its functions in relation to any representative function of an approved regulator.*
>
> *(2) But subsection (1) does not prevent the Board exercising its functions for the purpose of ensuring—*
>
> *(a) that the exercise of an approved regulator's regulatory functions is not prejudiced by its representative functions, or*
>
> *(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.*

15. This is something that needs to be corrected within the proposed rules themselves, and not by assurances made by the LSB that there is no intention to restrict representative functions. Therefore, we propose that the rules be changed to ensure that an approved regulator is not in a worse position than any other stakeholder who is looking to legitimately influence regulator determinations. Specifically:

    a) It is "undue influence" (or prejudice) that should be prohibited by the IGRs, rather than simply "influence". Before it could be considered to be undue, the influence would need to be exerted through the Society's governance arrangements, and go further than the Society's legitimate role. Rule 1 should be amended on this basis;
    b) Rule 4(3) and Rule 10(2) should be deleted, as it is not appropriate for the LSB to say how a representative body like the Society carries out its influencing role, provided that the Society is not exerting undue influence;
    c) Rule 6 should be clarified, to provide reassurance that Law Society Council members are able to speak out against SRA proposals in their representative capacity;
    d) We would suggest that in addition to the above changes, the LSB considers including an explicit acknowledgement within the IGRs that legitimate influencing activities are expected within the representative function.

The approved regulator's role

16. The Act gives ultimate responsibility for complying with the Act to the approved regulator, not the regulatory body. It is therefore implicit in the Act that approved regulators, like the Law Society, must be able to hold regulatory bodies, like the SRA, to account.

17. The proposed IGRs suggest that the role and responsibility of the Society would be reduced to a residual role by providing that the approved regulator is entitled to be assured that the regulatory body is discharging regulatory functions correctly. This would mean that the Society continues to carry organisational and financial risks whilst accountability for the regulatory activities would lie elsewhere.

18. According to rule 3 of the proposed IGRs, the regulatory body must only supply "sufficient information to the approved regulator with a residual role as is reasonably required for the approved regulator to be assured of the regulatory body's compliance with section 28 of the Act". Then Rule 3 imposes further limitations on the assurance role, for example only allowing questions to be raised where there is "reasonable grounds to do so"[2]. This is despite the fact that ultimate responsibility for complying with the Act rests with the approved regulator, and it is only the approved regulator that the LSB can take enforcement action against.

19. The proposed 'reasonableness' test brings with it a great deal of uncertainty, and leaves the Society in a precarious position in attempting to fulfil its duties under the Act. If we take a narrow interpretation of the information that should reasonably be required for assurance, in order to avoid breaching rule 3 of the IGRs, then we may not go far enough to be assured of the SRA's compliance with the Act. If we ask sufficient questions to be confident in our assurance role, then there is a risk that that the SRA and LSB will interpret some of these questions as going beyond what is reasonably required.

20. The LSB has not set out any framework against which it will interpret the words "reasonably" and "reasonable" in Rule 2(2), 3(1) and 3(2)a). The implication within these rules is that the approved regulator must accept what the regulatory body says at all times as being, complete, accurate and correct. The rules do not take account of the less than optimal situations which inevitably arise in complex organisations. It would be easy for a regulatory body to assert that it has provided the information necessary, even if that is not a reasonable position, thus placing the approved regulator in the position of having to defend a complaint. Further, the LSB has not set out how it would discharge the oversight role that it would reserve to itself, what performance indicators it would adopt and how that would be reported.

21. The Society is concerned by any limitations on the approved regulator being able to question information supplied by the regulatory body or being able to object to a request from the regulatory body on the grounds that it is unreasonable or excessive.

22. We do not believe that the LSB has taken into account the increased risks that the proposed IGRs would impose and which run counter to parliamentary intentions and the design of the Act. We do not consider that the LSB is entitled to reduce the authority of the approved regulator in the way it suggests.

Shared services and requests for resources

23. Having set out these fundamental concerns, we have other issues to raise. The first relates to the restriction on shared services. Rule 11: Shared Services, states:

> *11(1) An approved regulator with a residual role and its regulatory body must not share any services unless they are in agreement that:*
>
> *a. this will not undermine or otherwise infringe the separation of regulatory and representative functions;*
>
> *b. this is effective and appropriate for the regulatory body to discharge its regulatory functions; and*

[2] Draft Rule 3(2)(a).

c. this is necessary to be efficient and reasonably cost-effective.

24. The Shared Services rule would prohibit the sharing of services between the approved regulator and the regulatory body except in certain circumstances. This alters the status quo and the Society believes the proposed approach on shared services is onerous to the Society and is disproportionate. We also have concerns that the proposed rule (a) may force some services to be shared that don't need to be; and/or (b) may give the regulatory body the ability to insist on duplication of services even where this is not (in the view of the approved regulator) the most cost-efficient solution.

25. Turning to Rule 9: Regulatory Resources:

> *"Each approved regulator must provide such resources as are reasonably required for its regulatory functions to be efficiently and effectively discharged."*

26. This does not reflect the current IGRs which state that the Approved Regulator should take 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. No reasons to support the change are given.

27. Therefore, can the LSB clarify:
    a. why the resource is no longer tied into and aligned to an approved plan and budget;
    b. what the phrase "reasonably required" in rule 9 will mean; and
    c. that an approved regulator will not have to provide resources requested if it considers the requested resource to be disproportionate.

28. Further, it is not clear how the LSB would interpret the word "reasonably" in Rule 9 in the event of a dispute.

29. We would also expect that, given the potentially serious cost implications of the proposals in relation to shared services, the LSB should confirm that it will carry out an impact assessment before making any final determinations on the IGRs.

Resolving disputes

30. In our view, it should be incumbent on <u>both</u> the approved regulator and the frontline regulator to resolve disputes speedily and efficiently. Rules 12-14 could make clear that this responsibility exists for both parties, not only for the approved regulator. For example, rule 14 could be amended to make clear that if either the approved regulator or the regulatory body becomes aware of a potential dispute, it is legitimate to bring it to the attention of the other party, and try to resolve the dispute before it is referred to the LSB. This would have two benefits. First, it would avoid the need for disputes to be escalated if an informal resolution is possible. Second, in cases where a dispute cannot be resolved between the parties, it would ensure that the question which is eventually referred to the LSB focuses only on the remaining issue(s) that cannot be resolved through dialogue.

31. However, as noted earlier, in some respects the proposed rules would make it more difficult for the approved regulator to raise a concern with the regulatory body than it would be for another stakeholder or practitioner. It must be possible for an approved regulator to raise an issue with its regulatory body, in order to resolve a potential

dispute, without this being perceived as seeking to inappropriately influence a regulatory determination.

32. We also note that the LSB's regulatory performance assessments process document sets out a range of measures to assess the performance of regulators. This process may lead to the LSB independently identifying concerns that dovetail with those of the approved regulators, or that are themselves the subject of a dispute between approved regulator and regulatory body. This adds weight to the importance of regulatory performance assessments.

Conclusion

33. In conclusion, we contend that the current proposals are disproportionate and, in places, inconsistent with the Act. The proposals carry with them substantial risk to the capacity of the Society to carry out its representative role and its assurance role effectively.

34. Our starting position is that rules need to be changed, as opposed to oral assurances being given by the LSB. Where it is possible, we have set out changes that we would propose to the draft rules. However, the changes proposed below do not resolve all potential issues. In some cases, and the distinction between oversight and assurance is one such example, we ask the LSB to fundamentally reconsider its approach.

35. Without prejudice to the points of principle above, we believe the following rules would require particular attention:

Rule	Change recommended
Rule 1	The rule should be amended so that it makes clear that undue influence of decisions regarding regulatory functions is the mischief, as opposed to any influence. It should be made clear that the IGRs do not preclude legitimate influencing activities that any other stakeholder could undertake. It should make clear that influence would only be considered undue if the Society abuses its unique governance position over the SRA to have influence that goes beyond the role intended in the Act.
Rule 3	The LSB should provide a greater ability for the approved regulator to intervene where it feels that there may be a poor outcome otherwise. The definition of assurance should be reconsidered, so that it is (a) clearer, and (b) does not preclude the Society from carrying out its statutory role.
Rule 4	Rule 4 (3) should be deleted.
Rule 6	The LSB should clarify in its statutory guidance that this rule would not preclude individuals such as Law Society Council members from speaking out publicly on regulatory matters, on behalf of the profession they represent.
Rule 8	Rule 8 (2) should be amended so that it makes clear that it is the approved regulator unduly influencing determinations or procedures which is the mischief as opposed to influencing.
Rule 9	The LSB should clarify that the word "reasonably" in rule 9 means that an approved regulator does not have to provide resources requested if it considers the requested resource to be wholly disproportionate.
Rule 10	Rule 10(2) should be deleted.

	If the LSB takes the view that a consultation on budget must be undertaken by the regulatory body, this should be made clear in the rule itself.
Rule 11	Rule 11 should be amended to take account of the comments we make in paragraphs 23 – 29.
Rule 14	Should be amended to clarify that approved regulators and regulatory bodies can seek to resolve potential disputes informally before referring the matter to the LSB.

Liverpool Law Society

Proposed Internal Governance Rules

LLS represent over 2500 members of the legal profession in the Merseyside area. Members are solicitors, barristers and academics. This paper has been produced by the Society's Regulatory committee.

Question 1

Do you agree that the proposed rules would enhance the independence of regulatory functions and improve clarity leading to fewer disputes and more straightforward compliance/enforcement? If not why not?

We agree the objective behind the proposed rules and we agree that providing a clear and understandable framework and perimeters within which the regulatory body and the representative body is required to operate ought to lead to fewer independence-related disputes and make compliance and enforcement speedier and easier. However, we are concerned that the rules which govern the provision of assurance to an approved regulator are overly restrictive and could inhibit an approved regulator's ability to discharge its statutory obligation to promote the regulatory objectives and to have regard to the better regulation principles in discharging its regulatory functions.

Rule 3: Provision of Assurance, prevents an approved regulator from questioning the assurance provided by the regulatory body unless it has reasonable grounds to do so. It is therefore incumbent upon the approved regulator to demonstrate it has reasonable grounds before requesting additional information or clarification of the information provided. We consider this unduly burdensome. To obtain the necessary assurance that its regulatory functions are being discharged correctly and in compliance with its statutory duty under s28 of the Act, the approved regulatory must be allowed to question the information supplied without having the onus of demonstrating that it has reasonable grounds to do so. Moreover removing the requirement to demonstrate reasonable grounds, given the safeguards provided for at rules 3(b) and 3(c) would not infringe the independence or effectiveness of the regulatory body or result in undue influence over the approved regulator's regulatory functions.

Question 2

Does the proposed guidance provide sufficient detail to help you to interpret and comply with the proposed IGR? Please provide specific comments on any areas of the guidance where further information would improve clarity.

Please see response to question 1 above. Our primary position is that IGR 3(a) should be reworded to remove the requirement to demonstrate reasonable grounds with the regulatory body instead having the opportunity to object to the provision of further information in the event the request is disproportionate or unreasonable or infringes its regulatory independence. If the rule is left un amended and without adequate guidance as to what represents reasonable grounds this is an area ripe for disputes. The current draft guidance offers little assistance. It is there stated that it would not be "reasonably necessary" for the provision of assurance for the information supplied by the

regulatory body to minute detail or evidence day to day adherences but both are extreme examples. Whilst it is accepted that the guidance cannot cater for every scenario some further examples would assist.

Question 3

Is there are reason that your organisation would not be able to comply with the proposed IGR within six months? Please explain your reasons.

This is a question for Chancery Lane.

Question 4(a)

Beyond the usual resources allocated to compliance with the IGR what, if any, additional resource do you anticipate you will need: (i) to assess compliance with the proposed IGR and then to make changes to come into compliance, if any are required; and (ii) to comply with the IGR on an ongoing basis?

This is a question for Chancery Lane.

Question 4(b)

Do you agree with our assessment that the cost of compliance (which includes the costs of dealing with disputes and disagreements) will reduce under the Proposed IGR?

Please provide details of your assessment of the costs and actions associated with the initial assessment of compliance under the transition period and your estimation of the difference in the ongoing cost of compliance with the proposed IGR compared to the existing IGR.

This is a question for Chancery Lane. We observe however that the very fact this question is being asks means that the LSB does not currently have the information it needs to carry out a costs benefit analysis. We suggest that once all the responses have been received, the LSB undertake and publish a cost/benefit analysis so that the profession can be satisfied that any additional costs are reasonable, proportionate and justified

Question 5

Please provide comments regarding equality issues which, in your view/experience, may arise from implementation of the proposed IGR.

We do not consider any equality issues will arise from implementation of the proposed IGR.

Solicitors Regulation Authority

SRA Consultation Response

Proposed Internal Governance Rules

Legal Services Board

17 December 2018

Proposed Internal Governance Rules: Response of the Solicitors Regulation Authority (SRA)

Introduction

1. The Solicitors Regulation Authority (SRA)[1] is the regulator of solicitors and law firms in England and Wales. We work to protect members of the public and support the rule of law and the administration of justice. We do this by overseeing all education and training requirements necessary to practise as a solicitor, licensing individuals and firms to practise, setting the standards of the profession and regulating and enforcing compliance against these standards. We are the largest regulator of legal services in England and Wales, covering around 80% of the regulated market. We oversee some 184,000 solicitors and more than 10,400 law firms.

2. We welcome the opportunity to respond to the Legal Services Board's consultation on Proposed Internal Governance Rules.

Our response

3. We welcome the Legal Services Board's (LSB) consultation on new Internal Governance Rules (IGR). We support the aim of producing clearer, more focused and principles-based rules supported by guidance. The new drafts provide greater clarity in defining the residual assurance role of the approved regulator (AR) and how the Internal Governance Rules (IGR) should be put into effect. We consider that a clear framework is of paramount importance to deliver independent and effective regulation which maintains the trust and confidence of the public.

4. Against that backdrop, and bearing in mind the complex legislative framework within which section 30 operates, we make some recommendations below to reduce opportunities for ambiguity in terms of how the rules should be applied in practice. And in this way to enable ARs and regulators to be able to respond in an agile manner to changes in the regulatory environment over time, without unnecessary discussion or dispute over respective roles and boundaries.

<u>Key recommendations</u>

The identity of the Approved Regulator

5. We suggest that the LSB makes it clear in both the rules and guidance that the AR to whom the rules apply (and who consequentially carries out a residual assurance role) is the regulatory council or board (in our case the TLS Council), and that this does not include – and should not be supported or advised by - any representative arm of the organisation. We consider this is important for a number of reasons: to reduce the risk of duality or potential for influence in respect of material roles; to facilitate a direct and unfettered relationship between

[1] www.sra.org.uk

the regulatory body and the AR; and to enable the representative arm to carry out its lobbying and other roles on behalf of its members, without being constrained by concerns about crossing boundaries established for the AR within the IGRs.

The overarching duty and separation

6. The new overarching duty states that an AR must "separate" its functions "as effectively as is reasonably practicable and consistent with s28".

7. We are concerned that any decision about how effective or "reasonably practicable" any model of separation is risks the AR taking a cautious and incremental approach. Whilst we understand the rationale for seeking to apply the same provisions to all of the approved regulators, which are different in nature, size and structure, we would strongly caution against watering down standards amidst a caution to ensure these are practicable for all. Rather, we consider that the LSB should require all approved regulators to adopt a model that achieves best regulatory practice, whilst retaining flexibility to permit alternative approaches on a case by case basis having regard to what is reasonably practicable in the circumstances.

8. We note and agree with the suggestion in the draft guidance that it is "highly desirable" for the regulatory body to have its own legal personality, and believe that this is consistent with best regulatory practice across sectors: including the statutory health professional regulators, the Financial Reporting Council and the Financial Conduct Authority, amongst others.

9. This would, we consider, deliver the following key features of a truly independent regulator, some of which would be possible without complete separation, but all of which would be facilitated by such a move:

    a. Clear mechanisms for delegation of authority, and the limits of that authority.
    b. The ability of the regulatory body to undertake functions outside of those delegated by the AR, so long as these are consistent with the conditions of the delegation.
    c. The ability of the regulatory body to enter into contracts without involvement of the AR, including terms and conditions of employment and appointments.
    d. Clear distinction between the liability of the AR and that of the regulator: in relation to the latter including in respect of contracts, data protection and ICO registration, and the responsibilities of the Directors of the separate corporate regulatory entity.
    e. Complete autonomy for the regulatory body in the matter of resources - budget setting and managing its balance sheet and reserves - as well as control for both the AR and regulatory body over financial and tax matters providing the opportunity for cost efficiencies which benefit both the public and the profession.

Section 28 of the Act

10. The consultation document explains that in developing the IGR the LSB has drawn more explicitly from section 28 of the Act (which contains the duty for ARs to promote the regulatory objectives and best regulatory practice).

11. We consider this to be extremely problematic. It requires the AR in carrying out its residual role (assessing models of separation, the scope of delegation, and assurance and information requirements) to consider and assess how best to meet and balance the regulatory objectives and how best to achieve the principles of best regulatory practice (the principles that regulation should be transparent, accountable, proportionate, consistent and targeted). These are considerations for the regulatory body, as is highlighted within the consultation document, and inevitably touch on nuanced judgments in relation to regulatory cases and regulatory strategy. Further, it is the LSB that, through its statutory role, has oversight of such matters.

12. The focus on section 28 in the overarching duty, the powers of delegation and the nature of the assurance role presents a real risk of *reducing* clarity, and increasing confusion around the boundaries between the AR's and the regulatory board's roles.

The AR's residual assurance role

13. We welcome the aim to clarify the distinction between LSB's oversight, and the AR's assurance role. In particular, the clarity in the guidance that the regulatory body *is* the AR for the purposes of all obligations related to the functions delegated to it, and that it is for the LSB to assess regulatory performance.

14. However, we consider that the nature and definition of the AR's assurance role is an issue of such fundamental importance for the effective operation of the framework, and with such potential for ambiguity, that it needs to be set out in clear and prescriptive terms in the rules. This comprises essentially an internal control framework to ensure appropriate corporate governance by the regulatory body. As the approved regulator under the Legal Services Act, the AR has a duty to act reasonably and responsibly both in the choice of delegee for its regulatory functions and the manner and scope of that delegation. In our view, this means that it has a legitimate interest in being assured that the regulatory body:

    - is governed in accordance with good practice
    - has sound financial management
    - acts within its statutory powers and the scope of its delegated authority
    - complies with the requirements of oversight bodies (such as the LSB in respect of regulatory performance).

15. The draft guidance is helpful in articulating the information that might be reasonably required by the AR to gain this assurance. It states that this would include information about the regulatory body's governance arrangements, arrangements for financial management and control, and systems and processes for risk management and internal audit – but would not extend to minute or day to day detail.

16. We welcome the idea of a published protocol to avoid ambiguity and disputes, and to enhance transparency. We attach as an annex the protocol agreed last year between the Law Society and the SRA governing the scope of the scrutiny and information available to the Law Society's regulatory oversight committee (the Business and Oversight Board). This is supplemented by a limited reporting role to the Law Society's Group Audit Committee, in respect of the group

accounts and external audit, set out in the Law Society's General Regulations (regulation 32).

17. However, guidance on information requirements cannot qualify or alter the meaning of the rules. As stated above, the reference to section 28 here risks reopening debates that have only recently been settled through the new Law Society General Regulations and the protocol (above) that sits beneath them. And it risks bringing the AR into conflict with the obligation not to request information that would undermine regulatory independence.

18. In light of this, we consider that this is an area in which it is important that clear parameters are in the rules themselves. This clarity in relation to the LSB's expectations and the limits of the ARs liability in this area will help to avoid understandable attempts by the AR to seek over-assurance.

More detailed drafting comments

Prohibition on dual roles

19. We welcome the expansion beyond board members to those holding a "material" role. However, we believe that the focus should be on the materiality of the person's impact upon the delivery of the regulatory functions. To this end, the wording should be expanded further so that instead of prohibiting those with representative functions being a member of the board, council or committee "which makes decisions about how to exercise regulatory functions", this refers to decisions "which affect the exercise of regulatory functions". However, this should not prohibit the AR and regulatory body from the ability to make decisions about how effectively to resource shared services - arrangements agreed under rule 11 should be the subject of an express carve out to this rule.

The duty of candour and reporting mechanisms

20. We welcome the aim of encouraging duty of candour and mechanisms for reporting/enforcing more efficiently and effectively. We note that the rules include an obligation to ensure that all individuals whose roles may be affected by the IGRs are made aware and comply. We suggest this should be extended to those with representative roles (not just those whose role specifically touches on regulation), as those individuals might well be in a position to inadvertently breach the IGRs, if not properly informed.

21. Finally, the obligation to refer disputes to the LSB "before action is taken" could lead to ambiguity if for example the dispute results in in action and a state of limbo arising. The same issue applies in relation to the application of the savings provisions.

Board constitution and appointments

22. We note the new rule prohibiting involvement of the AR in appointment and termination procedures. We would suggest that this should be extended also to prevent involvement more widely with the board's constitution: matters relating to size, composition, and what constitutes a "professional" member, should be for the regulatory board to decide, as should matters of remuneration and terms of office.

23. We note the new requirement that the lay majority applies not just in respect of the board's constitution but also in decision-making/quorum. Whilst we agree with this in principle, we do not agree with the suggestion that if there is a defect, this would require the decision to be retaken. Rather, it is common practice for defects in appointments or decision-making not to invalidate or undermine any business done.

Resourcing issues

24. We consider the rules should go further and suggest complete autonomy for the regulatory board in the matter of resources; setting the budget and managing reserves. The wording of the rule retains the concept that it is for the AR to provide resources as are reasonably required. It is not clear whether the decision regarding what is "reasonable" is for the AR – or the LSB in its approval of the regulatory fee – but risks leaving matters fundamentally in the hands of the AR and inevitably impacts the regulatory body's ability to be autonomous in forming its own budget (albeit that the new rule 10 seeks to provide that the AR should only be involved as part of any consultation). The AR is required to engage in a process of determining what is reasonable and therefore has the opportunity to assess regulatory operations and strategy.

25. In terms of shared services, the rules have introduced a higher burden as these can now only be introduced if (as well as suitably independent and effective) they present a marked cost benefit and the AR and regulatory body agree that this is the case. We would suggest once again that the decision should be a matter for the regulatory body, applying, as it should in any event, principles of good governance and financial management.

Miscellaneous

26. The rules include savings provisions which allow for the rules to be breached where they conflict with primary legislation, and also on the LSB's written authority. We would suggest the latter should only be granted with agreement of or following consultation with the regulatory body. Also, it is not clear why, particularly given the outcome-focused and principles-based rules, it is felt appropriate to allow breaches, otherwise, where "reasonably necessary" to discharge the AR's residual role. This is open to interpretation and likely to result in further ambiguity and dispute about the nature of the role. We suggest that any deviation from the IGRs should only be permitted with the express permission of the LSB under rule 16(1)(c).

27. Finally, we confirm that assuming changes in line with our comments above are made, we consider that we should be able to revise our arrangements to comply with the new rules within the six-month transition period proposed.

Contact details

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Responses to the May 2019 consultation

Respondent

1. The Association of Chartered Certified Accountants (ACCA)
2. The Bar Council (BC)
3. The Bar Standards Board (BSB)
4. The Chartered Institute of Legal Executives (CILEx)
5. The Chartered Institute of Patent Attorneys (CIPA)
6. The Chartered Institute of Trade Mark Attorneys (CITMA)
7. CILEx Regulation (CILEx Reg)
8. The Faculty Office
9. The Honourable Society of Lincoln's Inn
10. The Institute of Chartered Accountants in England and Wales (ICAEW)
11. The Intellectual Property Regulation Board (IPReg)
12. The Law Society (TLS)
13. The Solicitors Regulation Authority (SRA)

Proposed Internal Governance Rules

Supplementary consultation on amendments to proposed Rules 4, 8 and 10 published by the Legal Services Board (LSB)

Comments from ACCA
12 June 2019
Ref: TECH-CDR-1827

ACCA (the Association of Chartered Certified Accountants) is the global body for professional accountants. We aim to offer business-relevant, first-choice qualifications to people of application, ability and ambition around the world who seek a rewarding career in accountancy, finance and management.

Founded in 1904, ACCA has consistently held unique core values: opportunity, diversity, innovation, integrity and accountability. We believe that accountants bring value to economies in all stages of development. We aim to develop capacity in the profession and encourage the adoption of consistent global standards. Our values are aligned to the needs of employers in all sectors and we ensure that, through our qualifications, we prepare accountants for business. We work to open up the profession to people of all backgrounds and remove artificial barriers to entry, ensuring that our qualifications and their delivery meet the diverse needs of trainee professionals and their employers.

We support our **219,000** members and **527,000** students in **179** countries, helping them to develop successful careers in accounting and business, with the skills required by employers. We work through a network of **110** offices and centres and more than **7,571** Approved Employers worldwide, who provide high standards of employee learning and development. Through our public interest remit, we promote appropriate regulation of accounting, and conduct relevant research to ensure accountancy continues to grow in reputation and influence.

Further information about ACCA's comments on the matters discussed here can be requested from:

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GENERAL COMMENTS

ACCA welcomes the opportunity to comment on the proposals to alter elements of the specific sub-rules which are part of Rules 4 (Regulatory Autonomy), 8 (Appointments and Terminations) and 10 (Regulatory Body Budget) in the proposed Internal Governance Rules (IGR) and to work with the LSB in developing an effective set of IGR that are principles-based and focused on achieving the right outcomes.

AREAS FOR SPECIFIC COMMENT

Question 1: Do you agree that the amendment to Rules 4, 8 and 10 as set out in this document should be adopted in the new IGR? Please provide your reasons.

In our response to the consultation on the proposed IGR launched in November 2018, ACCA expressed significant concerns about the use of the word 'influenced' in proposed Rule 1 (Overarching Duty) while the Legal Services Act 2007 (the Act) used the word 'prejudiced' in sections 29 and 30. We believed that the proposed drafting of the IGR went beyond the requirements of the Act, and failed to recognise the intent in drafting the Act.

We are pleased that the Legal Services Board (LSB) has listened to concerns raised by ACCA and other stakeholders about the inappropriate use of the word 'influence' and, by replacing the term '*influence*' with '*prejudice*' in Rule 1, has removed this inconsistency from the proposed IGR.

The amendment to the language used in Rule 1 achieves greater clarity among approved regulators and regulatory bodies and now recognises the intent in drafting the Act, which is to avoid 'prejudice'. As an approved regulator with both representative and regulatory functions, there may be occasions when it will be appropriate for ACCA's representative functions to legitimately influence the regulatory body. As a result of this amendment, opportunities and innovations where the interests of both the regulatory and representative functions are aligned, and where the insights of the regulated population may be valuable, will now be recognised.

We support the inclusion within Rules 4, 8 and 10 (which relate to independent decision making, board appointments, and regulatory budgets) of the proposed alternative sub-rule. The proposed change sets out more clearly the boundary around the approved regulator's use of its 'influence' when acting as a representative body, and removes an unhelpful restriction on the way in which the approved regulator's views can be taken into account. We believe the consequential amendments to Rules 4, 8 and 10 achieve consistency with the revised text of Rule 1 and should therefore be adopted in the new IGR.

At this stage, we do not anticipate any unforeseen or unintended consequences of amending these Rules in the proposed IGR.

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Question 2: Does the proposed revised guidance on Rules 4, 8 and 10 at Annex A provide sufficient detail to help you interpret and comply with the proposed revised versions of Rules 4, 8 and 10? Please provide specific comments on any areas of the guidance for Rules 4, 8 and 10 where further information would improve clarity.

We are broadly supportive of the proposed revisions to the statutory guidance supporting Rules 4, 8 and 10 which reflect the proposed changes to these Rules and provide greater consistency, clarity and brevity. In particular, we welcome the removal of unnecessary guidance and surplus information, for example the removal of inappropriate references to 'influence' from the approved regulator and the limitation relating to regulatory body consultation. However, we believe there is scope for the LSB to identify further opportunities to simplify the statutory guidance supporting all 17 Rules within the IGR.

Furthermore, we reiterate the concerns we raised in our response to the previous consultation in relation the statutory guidance for Rule 4. We note that the guidance, as drafted, continues to state that '*if an AR has provisions in its constitution about the election of members of the regulatory board or recruitment to senior positions in the regulatory body, this must be removed or amended so that sole control lies with the regulatory body itself*'. We believe the use of the word '*must*' changes the status of the guidance, and illustrates the lack of focus on principles and required outcomes in the proposed IGR and guidance.

ACCA is supportive of a principles-based approach to regulation, as this requires regulators to focus on achieving the right regulatory outcomes (and being seen to do so). It also makes approved regulators accountable for having effective (and sometimes innovative) regulatory arrangements. In our opinion, the proposed IGR as a whole contains an extensive set of prescriptive rules and the accompanying statutory guidance is excessively detailed and lacks focus on achieving the necessary outcomes. Therefore, we would encourage the LSB to produce a final IGR and guidance which is simplified and principles-based, in order to achieve effective compliance by the approved regulators and enhance independent regulatory decision-making.

Equality Act assessment

We refer to comments made in ACCA's previous consultation response that an unintended consequence of the IGR and guidance, as drafted, may be increased costs, which must be passed on to the regulated individuals and firms and ultimately to consumers. This would have a disproportionate negative impact on small practices and their clients and may be seen as an equality issue. It may also result in a reduction in competition and diversity in the provision of legal services. Care must be taken to support all the regulatory objectives. In particular, stifling diversity and innovation in the legal services market would have a negative impact in terms of unmet legal need.

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Bar Council response to the Legal Services Board (LSB) consultation paper titled, "Proposed Internal Governance Rules, Supplementary consultation on amendments to proposed Rules 4, 8 and 10"

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the LSB consultation paper titled, "Proposed Internal Governance Rules, Supplementary consultation on amendments to proposed Rules 4, 8 and 10".[1]

2. The Bar Council represents over 16,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator (AR) under Schedule 4 Part 1 of the Legal Services Act (the LSA07) for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

Overview

4. We welcome the supplementary consultation on Rules 1, 4, 8 and 10 and the attempt by the LSB to address some of the concerns we expressed in our response to

[1] Legal Services Board consultation paper on the Proposed Internal Governance Rules, Supplementary consultation on amendments to proposed Rules 4, 8 and 10

the previous LSB consultation titled, "Proposed Internal Governance Rules".[2] We consider that the replacement of the term "influence" with "prejudice" is more closely aligned with the language and intentions of the LSA07 and we support this change. However, the new drafting of the rules raises further and new challenges, which we will outline in our answer to Question 1. Having consulted leading Counsel, we remain of the view that the proposed rules are, despite the changes, *ultra vires* and open to challenge by way of Judicial Review. Furthermore, in the absence of any substantial changes to the other rules that in our view were defective (as expressed in our response to the previous LSB consultation), the IGR remain unlawful.

5. We welcome the LSB's recognition that the Bar Council is permitted by the LSA07 to influence the BSB provided it does not prejudice their regulatory functions (section 30), and that it is uniquely well placed to do this given its long-established knowledge and understanding of the profession. However, the redrafted rules attempt to go further than this. Despite the fact that under the LSA07 the Bar Council is the AR with statutory duties arising therefrom, the proposed rules reduce the Bar Council's role as Approved Regulator to a merely "residual" one, seek to make the regulatory body autonomous as to its own governance, structure, priorities and strategies[3], and prohibit the Bar Council from seeking to influence save in a representative capacity, or from "prejudicing" the "independent judgement" of the regulator. This language (which is repeated in proposed Rules 4, 8 and 10) goes beyond what is permitted by sections 29 and 30 of the LSA07.

6. We are pleased the LSB recognises 'one size does not fit all' and that each AR is unique in its operational arrangements with their frontline regulator. However, such recognition does not extend to rule 11 on shared services. This rule as drafted would give a veto to the BSB over whether to share any services even if the Bar Council (the AR) properly and in compliance with the LSA07 considered such services should be shared. If implemented, the proposed rule would also have a disproportionate impact on the Bar Council given its relatively small size and current set up in which it shares many key services with the BSB, entirely in accordance with the legislative scheme of the LSA07, and in the interests of the consumer[4] because economies are thereby achieved. As outlined in our response to the preceding consultation, we are strongly of the view that this makes the rules incompatible with the regulatory objectives and

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[2] LSB consultation "Proposed Internal Governance Rules"

[3] Proposed Rule 4(2).

[4] Section 1(1)(d) of the LSA07 provides that one of the regulatory objectives is protecting and promoting the interests of consumers.

also risks the representative functions of the Bar Council being compromised. This is contrary to section 29(1) of the LSA07.

7. The Bar Council has repeatedly sought information from the LSB on the number and nature of independence-related disputes and requests for clarification which they have dealt with from ARs and frontline regulators in order better to understand the rationale for the proposed changes to the IGRs.[5] The LSB did not produce this information, despite our requests. This prompted us to submit a Freedom of Information (FoI) request to the LSB seeking this information in May. We recently received the response which details that at least one independence related problem has arisen in relation to five ARs and their frontline regulators which resulted in the LSB providing clarification or intervention. However, these are framed by the LSB as problems, not disputes. The latter would involve disagreement between the AR and frontline regulator. In their response to our FoI request the LSB further reported that 30 independence related issues have been raised in correspondence with them by nine ARs and frontline regulators. Again, we would distinguish between an issue and a dispute. Issues are clearly less serious than disputes. None of these is referenced as requiring LSB clarification or resolution. Accordingly, there is still lack of evidence of independence-related disputes between ARs and their regulatory bodies which have required LSB clarification or resolution.

8. In the absence of such evidence we do not consider that the LSB has made the case for the changes it proposes sufficiently or at all. Indeed, it is reasonable to infer that if the LSB had a sound basis for seeking to inhibit the role of the AR as these proposed Rules do, the factual information we have sought would have been provided by the LSB to support their proposed changes. As we have previously argued, these changes could have significant cost and other burdensome regulatory effects which would be disproportionate and outweigh the benefits claimed for the public and consumer interest.

Question 1: Do you agree that the amendment to Rules 4, 8 and 10 as set out in this document should be adopted into the new IGR? Please provide your reasons.

9. No. We support some of the amendments proposed and detail these below. However, the language used, taken as a whole, is objectionable. This includes limiting the AR to having only a "residual role" and preventing the AR from having an

[5] Legal Services Board consultation paper on the Proposed Internal Governance Rules, Supplementary consultation on amendments to proposed Rules 4, 8 and 10, 2019: 1.

effective say, for example, even in the governance and structure of the regulatory body. The statutory language in the LSA07 (which under section 30(1) refers to regulatory functions being not prejudiced by representative functions) is then broadened so as to prohibit the AR from "prejudic[ing] the independent judgement" of the regulatory body. This is a matter of concern and goes much further than is justified under the LSA07. The basis of these concerns is explained below. We have suggested alternative wording that is compliant with the LSA07 and which we urge the LSB to consider adopting.

Amendments we support

10. The amendments we support are as follows:

Rule 1(1)

Replacement of "decisions relating to" with "the exercise";

Replacement of "influenced" with "prejudiced";

Removal of "or interests".

Rule 1(2)b

Removal of "or interests".

Rule 8(2)

11. The removal of this provision, which we support, recognises the Bar Council's ability to influence BSB board appointments and their termination as part of its representative role (being mindful of section 30(1) of the LSA07), and does not depend on the regulator deciding to consult on such matters in order for the Bar Council to make representations to them. For reasons outlined in our response to the preceding consultation, we view this as an important change of policy.

Rule 10(2)

12. Similarly, the removal of this provision, which we support, enables the Bar Council to make representations about the BSB's budget-related decisions which the previously drafted rules would have prevented us from doing unless the BSB decided to consult.

13. These amendments are more closely aligned with the language, and the intentions of Parliament as expressed in the LSA07.

Amendments with which we disagree

Rules 4(2), (3), 8(2) and 10(2) - the residual role

14. The amended rules have retained the use of the term, "residual role". This is inappropriate. The role of the AR is a dual one: regulatory and representative. The LSA07 imposes statutory duties on the AR which the AR must discharge. It does not require an AR to discharge its regulatory functions through a separate legal entity. Therefore, its role is not residual but rather, primary. The primary role of the AR under the LSA07 (see section 28) is to carry out and discharge its regulatory functions in accordance with the regulatory objectives specified in section 1 of the Act. The problem with the expression "residual role" is that the where the regulatory functions are not delegated to a separate legal entity, as is the case with the Bar Council and BSB, the AR's regulatory functions are limited by IGRs, yet it still owes the statutory duties applicable to ARs under the LSA07.

15. Furthermore, if the AR had delegated to a separate legal entity then the AR would be free to make any representations to that entity, as would any member of the public or stakeholder. However, the effect of the creation by the LSB of the concept of "residual role" would be to constrain what an AR may do in relation to influencing the regulator and put it in a worse position than any member of the public or other stakeholder, including a representative body which has no regulatory function. This is incorrect. The LSB is wrongly seeking through delegated legislation to limit the scope of the powers and functions of those ARs which have not delegated their regulatory functions to a separate legal entity where the LSA07 permits the AR not to have done so.

Rule 4(2) and (3)a are unduly restrictive

16. Rule 4(2) goes further than is permitted by the LSA07. The LSB is seeking by this rule to prohibit the AR from having any role in determining the governance and structure of the regulatory body. There is not even a qualification that the determination should be "so far as reasonably practicable" (the language of section 28). Further, and while it may not have been the intention, when taken literally, and in circumstances where the AR and regulatory body are the same, rule 4(3)a appears to prohibit the AR from doing anything other (emphasis supplied) than acting in its representative capacity to influence determinations as to governance, structure, priorities and strategies for amendments to regulatory arrangements. However, as an AR it would wish, and would be required if the objectives under the LSA07 so

dictated, to influence the determinations undertaken by its regulatory body in the exercise of its regulatory functions.

Rule 4(3)b - "independent judgement of the regulatory body"

17. The language of rule 4(3)b which states that the AR must not, "prejudice or seek to prejudice the independent judgement of the regulatory body" goes further than the language in sections 28 and 30 of the LSA07. The LSA07 prevents the regulatory functions being compromised but says nothing of its "independent judgement" in relation to determinations in relation to regulatory autonomy, including all the matters of governance listed at 4(2). As the rule is drafted the BSB could argue that the Bar Council were seeking to prejudice its independent judgement in a wide range of circumstances, for example if the Bar Council were trying to ensure retention of some barrister members on the BSB Board. This widening of prohibited behaviours by the AR is not reflective of the LSA07 and unduly constrains the Bar Council in its role as the AR.

Suggested remedy

18. As such, although rules 4(3), 8(2) and 10(2) are an improvement upon the language used in the first proposed rules, they are still *ultra vires*. We would suggest the following alternative drafting helps overcome these issues:

> *4(2) In particular, the regulatory body so far as reasonably practicable must determine:*
>
> *(a) its own governance, structure, priorities and strategies; and*
> *(b) whether any amendment to the regulatory arrangements is necessary and, if so, what form that amendment should take.*
>
> *4(3) The approved regulator when seeking to influence these determinations must not prejudice the discharge of the regulatory body's regulatory function.*

19. This problematic terms of, "residual role" and "prejudice the independent judgement" should be removed. It is key that the rules reflect the LSA07 permits the Clementi B+ model which involves the AR having dual functions but with the regulatory functions being functionally independent, so far as is reasonably practicable and not prejudiced by the AR's representative functions. This wording helps achieve that.

Question 2: Does the proposed revised guidance on Rules 4, 8 and 10 at Annex A provide sufficient detail to help you to interpret and comply with the proposed revised versions of Rules 4, 8 and 10? Please provide specific comments on any areas of the proposed guidance for Rules 4, 8 and 10 where further information would improve clarity

20. In the rule 10 guidance section[6] under the heading of "compliance" it is stated, "the AR cannot approve or reject the proposed budget". We disagree. The Joint Finance Committee and Treasurer, governed by the Bar Council and BSB constitutions, have an important role in ensuring that overall costs are kept at a reasonable level which is within the envelope determined largely by the Practising Certificate Fee (PCF) rates and the number of barristers expected to renew their practising certificates within the different categories. The AR currently has power to approve or reject the BSB's budget and it is vital that this power is retained. Under the current arrangements the BSB can challenge their budget with the LSB. Without this power the Bar Council would be placed in the untenable position of being accountable to the profession for the PCF level but with very little control over the level at which it is set owing to the BSB budget forming the majority of the overall budget. We therefore disagree strongly with the wording in the guidance notes and call for it be removed.

21. The definition of prejudice has been removed in the proposed IGR. There is a definition for it in the current IGR and we think that leaving it undefined in the new rules risks creating uncertainty.

Bar Council
12 June 2019

For further information please contact
Sarah Richardson, Head of Policy, Regulatory Issues, Ethics and Law Reform
The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ
Direct line: 020 7611 1316
Email: SRichardson@BarCouncil.org.uk

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[6] Legal Services Board consultation paper on the Proposed Internal Governance Rules, Supplementary consultation on amendments to proposed Rules 4, 8 and 10 2019: 16

BAR STANDARDS BOARD

REGULATING BARRISTERS

Neil Buckley
Chief Executive
Legal Services Board
One Kemble Street
London WC2B 4AN

14 June 2019

Dear Neil

LSB Supplemental Consultation on Proposed IGRs

Summary

This response does not repeat in detail our earlier response to the LSB's consultation in November 2018 which we submitted in January 2019. We note that the LSB "*has deferred making its decision on the final version of the IGR until the close of this consultation when stakeholder feedback from both consultations will be considered together*".

Notwithstanding, the supplemental consultation is narrowly confined to amendments to proposed Rules 4, 8 and 10 and we thus infer that all other proposals made by the LSB in November 2018, whether Rules or Guidance, are likely to be adopted in substantially the same form: otherwise they would need to have been included in the supplemental consultation. We therefore take the present opportunity to draw to the LSB's attention an important point which we made in January 2019 which appears to us not to have been addressed by the LSB in this supplemental consultation and which continues to concern us.

Question 1. Amendments to Rules 4, 8 and 10

We think that overall the amendments proposed are sensible as they are more likely correctly to reflect sections 28 and 30 of the LSA 2007, and in so doing less likely to run counter to section 29. Although we are not asked explicitly to comment, we agree with the proposed new drafting for Rule 1.

The BSB continues to regard the representative body for the profession we regulate as a key stakeholder when we are determining what our regulatory arrangements should be and when we decide our priorities and strategy and the budget that enables us to deliver those. Good regulation in the public interest requires the active engagement of those who are regulated.

Question 2. Proposed revised guidance.

We consider the proposed revised guidance provides sufficient detail to help us interpret and comply with the proposed revised versions of Rules 4, 8 and 10.

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Other related matters

We note that the LSB proposes no further amendments to Rules or Guidance than in relation to Rules 1,4,8 and 10. We continue however to have concerns about the Guidance in relation to proposed Rule 7. We repeat our response to the 2018 consultation:
We do not object to the drafting of the Rule as regards composition of the regulatory body. However, the supporting guidance is excessive in appearing to require not only lay majority but lay chairing of any meeting where a regulatory decision falls to be taken. This misunderstands the role of the chair of any given meeting and we do not agree with it.

The BSB has had a lay majority since 2011 and a lay Chair since 2015. We are always mindful of the composition of any given meeting of the BSB (and its committees.) However, we do not agree that it is necessary for all those meetings at which decisions are taken to be chaired by a lay person. We consider such an approach to be needlessly prescriptive. It does not acknowledge that the role of a person chairing such a meeting (in principle and in practice) is to convene and achieve consensus and objectives without undue influence on others present.

The guidance as drafted might also imply that non-lay members of the regulatory body are not impartial, trusted individuals who have been appointed for their independence of thought and action in the same way as lay members. This is not the case. All our members are capable of appropriate chairing of meetings in the occasional absence of the appointed lay Chair. There should be no IGR or guidance that prevents them from doing so.

Timeline to compliance

We continue to be of the view that the 6 months implementation period originally proposed by the LSB is too short. Our reasons for this were set out in paragraphs 34-37 of our January 2019 response. Although six months has passed since then, the underlying principles remain the same. We therefore continue to be of the view that 12 months is an appropriate period in which to move to compliance, from the point at which the LSB puts the new Rules into force.

Yours sincerely

Dr Vanessa Davies
Director General

cc: Caroline Wallace, Strategy Director – LSB

Jenny Prior,
The Consultation Co-ordinator

Email address: consultations@legalservicesboard.org.uk

11th June 2019

Dear Jenny,

Re Proposed Internal Governance Rules – Enhancing regulatory independence

CILEx is pleased to respond to this supplementary consultation on amendments to proposed Rules 4, 8 and 10. Please accept this letter as that response:

Question 1: Do you agree that the amendment to Rules 4, 8 and 10 as set out in this document should be adopted into the new IGR? Please provide your reasons.

Yes – as CILEx has previously stated, it makes good sense to anchor the revised Internal Governance Rules (IGRs) in the language of the statute. We also believe that the removal of the limitation, that the AR's views can only be taken into account if the regulatory body conducts a consultation, rightly recognises the unique value added by the view of the professional body, looking, as it does, at regulatory issues through the prism of the reality of practice, of those actually working in the legal services market.

Question 2: Does the proposed revised guidance on Rules 4, 8 and 10 at Annex A provide sufficient detail to help you to interpret and comply with the proposed revised versions of Rules 4, 8 and 10? Please provide specific comments on any areas of the proposed guidance for Rules 4, 8 and 10 where further information would improve clarity.

Broadly yes – CILEx believes that the proposed revised guidance on Rules 4, 8 and 10 at Annex A provides ***more*** detail to help to interpret and comply with the proposed revised versions of Rules 4, 8 and 10. However, certain elements may benefit from enhancement. This is in 2 particular respects:

(i) The following highlighted wording (on page 14 of the consultation paper) would benefit from the addition of an example:

"In seeking to influence the regulatory body the role of the AR is strictly limited to when it is acting in its representative capacity."

Although it is helpful and right to clarify that ARs can 'influence' the regulatory bodies, through offering views and offering insights of its members, it is not clear how ARs continue to discharge fully their statutory role, particularly when read in conjunction with the guidance on page 12 of the guidance which states that, after regulation:

"the regulatory body assumes responsibility for compliance with Section 28 of the Act…"

Although the regulatory bodies rightly have responsibility, it is the AR that retains the liability for non-compliance. Words of clarity/assurance around that tension would be welcome.

(ii) The following guidance on page 15 of the consultation paper could also benefit from greater clarity; whilst the sentiment is right, it should be clear that this rule would not in any way act as any impediment to anyone right to whistleblow if such circumstances arose.

If you have any queries in relation to this response, please do not hesitate to get in contact.

Yours sincerely,

Chief Executive Officer
Chartered Institute of Legal Executives

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12th June, 2019

Neil Buckley
Chief Executive
Legal Services Board
One Kemble Street
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Supplementary Consultation on the Internal Governance Rules

The Chartered Institute of Patent Attorneys (CIPA) is the professional body for patent attorneys in the UK. CIPA is responding to the supplementary consultation on the proposed amendments to Rules 4, 8 and 10 of the Internal Governance Rules (IGR) in its capacity as an Approved Regulator, as defined in the Legal Services Act 2007 and as the representative professional body for Chartered Patent Attorneys in the UK.

The consultation documents have been considered by CIPA's Regulatory Affairs Committee and by Council at its meeting on Wednesday 5th June, 2019. Council requested that I provide you with the following comments.

Council was pleased to see that the LSB had listened to the consensus across the Approved Regulators that the word 'influence' should be replaced with 'prejudice'. In CIPA's response to the original consultation we expressed our concerns that there were clauses in the new Rules which would limit or prevent an Approved Regulator's ability to influence the regulatory body. We made the point that influencing the regulatory body by raising matters within the Approved Regulator's competence and putting forward the views of its members should not be seen as a negative act and that an Approved Regulator must be free to seek to put its expertise at the disposal of the regulatory body, in the interests of its members.

Council asked for greater clarity on the proposed changes to Rule 4 - Regulatory Autonomy. Council took the view that only clause (3) (b) is needed under Rule 4 and could not understand the rationale for (3) (a) limiting an Approved Regulator's ability to seek to influence the regulatory body's governance, structure, priorities and strategy in the exercise of the Approved Regulator's representative functions. Rule 4 (3) (b) prevents the Approved Regulator from seeking to prejudice the independent judgement of the regulatory body in these matters and that should be sufficient.

Subject to this point of clarification, CIPA is content that substituting the word 'influence' with 'prejudice' attends to the concerns set out in our initial response to the consultation and will enable CIPA to rightly and properly work with and influence IPReg in its representative role. In general terms, we support the proposed new wording in the Rules and accompanying guidance.

Please do not hesitate to contact me should you require any amplification or clarification of the observations made in this consultation response.

Yours sincerely

Lee Davies
Chief Executive

CITMA

LSB Consultation – Proposed Internal Governance Rules (IGRs)

Supplementary consultation on amendments to proposed Rules 4, 8 and 10.

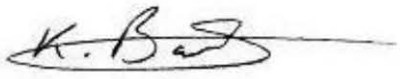
The Chartered Institute of Trade Mark Attorneys (CITMA) is responding to the consultation by the Legal Services Board (LSB) in its capacity as an Approved Regulator (AR), as defined in the Legal Services Act 2007 (the Act) and as the representative body for Chartered Trade Mark Attorneys and the wider trade mark and design profession.

We welcome the proposed changes to Rule 4, 8 and 10, to replace "influence" with "prejudice", as set out in the consultation. In our response to the initial consultation on the IGRs we made clear that we felt the use of the word influence was inappropriate and used in a negative context. There are occasions where a representative body / Approved Regulator may positively influence the regulator for the benefit of the profession and the consumer.

The proposed use of the word 'prejudice' instead of 'influence' is more appropriate and clearer. We would welcome the proposed new wording of the Rules to be adopted into the new IGRs and are content with the proposed changes to the supporting Guidance.

We are grateful for the opportunity to respond to this consultation and we would be happy to discuss any of these points further with representatives from the LSB, if it would be of assistance.

For and on behalf of The Chartered Institute of Trade Mark Attorneys.



Keven Bader
Chief Executive
12th June 2019

Legal Services Board

Proposed Internal Governance Rules

A response by
CILEx Regulation

6 June 2019

Introduction

This response represents the views of CILEx Regulation, the regulatory body for Chartered Legal Executives, CILEx Practitioners and CILEx Authorised entities. Chartered Legal Executives (Fellows) are members of the Chartered Institute of Legal Executives (CILEx). CILEx Practitioners are authorised by CILEx Regulation to provide reserved legal activities. CILEx is the professional body representing 20,000 Fellows and other members and it is an Approved Regulator under the Legal Services Act 2007 (LSA). Fellows and CILEx Practitioners are authorised persons under the LSA. CILEx Regulation regulates all grades of CILEx members.

CILEx Regulation is also a regulator of entities through which legal services are provided. It authorises entities based upon the reserved and regulated activities.

CILEx Regulation and CILEx provide an alternative route to legal qualification and practice rights allowing members and practitioners, who do not come from the traditional legal route to qualify as lawyers and own their own legal practice.

Proposed Internal Governance Rules - consultation response.

Response to the LSA consultation

1. Our responses to the questions are as follows.

Questions

Q1: Do you agree that the amendment to Rules 4, 8 and 10 as set out in this document should be adopted into the new IGR? Please provide your reasons.

2. Yes. We recognise that the LSB is constrained by the Legal Services Act and therefore re-framing the Rules around 'prejudice' as specified in the Act is a necessary change as well as recognising the implications of Section 29 prohibiting the LSB interfering with representative functions.

3. We understand the rationale behind the principle set out in paragraph 4 that the membership body should be neither advantaged, nor disadvantaged. The membership's views, as a crucial stakeholder, need to be understood and heard to shape optimal regulatory policy, systems and practice. The proposed revision addresses the issue of the membership bodies being disadvantaged.

4. Equally, we continue to support the LSB's goal of maximising regulator independence in the public interest.

Q2: Does the proposed revised guidance on Rules 4, 8 and 10 at Annex A provide sufficient detail to help you to interpret and comply with the proposed revised versions of Rules 4, 8 and 10? Please provide specific comments on any areas of the guidance for Rules 4, 8 and 10 where further information would improve clarity.

5. The text highlighted in yellow on pages 14,15 and 16 of the consultation document states, *"In seeking to influence the regulatory body the role of the AR is strictly limited to when it is acting in its representative capacity. The AR must only use its residual role when carrying out its assurance functions and a clear separation must be made, including (but not limited to) in discussions and correspondence."*

6. To remove any risk on ambiguity, the following amendments to this wording might help: *"In seeking to influence the regulatory body the role of the AR is strictly limited to when it is acting in its representative capacity. The AR must only use its residual role in overseeing the regulatory function when carrying out its assurance functions and ~~a clear separation must be made~~ the AR must explicitly make clear whenever it is acting in its AR capacity, including (but not limited to) in discussions and correspondence."*

7. Any questions relating to this consultation response can be directed to Stuart Dalton, Director of Policy, Governance and Enforcement (stuart.dalton@cilexregulation.org.uk).

FACULTY OFFICE
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Legal Services Board
One Kemble Street
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4th June 2019

Via email only: consultations@legalservicesboard.org.uk

Dear Sir or Madam

Consultation on the review of the Internal Governance Rules

Thank you for your supplemental consultation on the above, which closes on 12th June. As the Master of the Faculties does not discharge representative functions we do not have a significant comment on your latest proposals, aside from stating that we have no objection.

We would however like to reiterate that we would wish the points made in our earlier submission made on 21st January 2019 (copy letter enclosed), which did make substantive remarks, to be considered.

Yours faithfully,

IAN BLANEY
Deputy Registrar
Enc.

365408

THE HONOURABLE SOCIETY OF
LINCOLN'S INN

RESPONSE TO THE LEGAL SERVICES BOARD'S SUPPLEMENTARY CONSULTATION PAPER ON THE INTERNAL GOVERNANCE RULES

11 June 2019

INTRODUCTION

1. The Honourable Society of Lincoln's Inn (the Inn) is an unincorporated association of students, barristers, judges, and others connected with the law and its practice, and is one of the four Inns of Court of England and Wales. Its membership consists of (i) students, namely those who have been admitted to membership with a view to call to the Bar; (ii) hall members, namely those who have been called to the Bar, and who may be in practice at the self-employed or employed bars; and (iii) Masters of the Bench (commonly known as Benchers), namely barristers, judges and others who are elected to membership of the Inn's governing body (Council).

2. The Inn's principal public interest functions are:

    a. to call to the Bar of England & Wales those of its student members who are appropriately qualified to be called, in accordance with the requirements of the Bar Standards Board: the right of the Inns of Court to call and disbar is recognised in the definition of 'barrister' contained in section 207 of the Legal Services Act 2007;

    b. through the provision of education and training, and by the award of scholarships and the giving of other forms of financial help, to assist student members to qualify for call to the Bar and to assist them and newly called barristers to attain and maintain excellence in the conduct of their practices, including promoting the highest standards of professional ethics: in this way, the Inn contributes to achieving the Act's regulatory objectives by encouraging an independent, strong, diverse and effective legal profession (section 1(1)(f) of the Act) and by promoting and maintaining adherence to the professional principles (section 1(1)(h) and 1(3) of the Act); and

    c. through its own educational and collegiate activities, and through its membership of the Council of the Inns of Court (COIC) and involvement in the Inns of Court College of Advocacy (ICCA), to provide leadership, guidance and coordination in relation to the pursuit of excellence in advocacy: this further contributes to the Act's regulatory objectives by supporting (and realising) the constitutional principle of the rule of law, improving access to justice, protecting the interests of consumers, and encouraging the maintenance of an independent, strong and effective Bar in England and Wales (section 1(1)(b), (c), (d) and (f)).

3. In performing its principal functions as set out above, the Inn works with both the Bar Standards Board and the Bar Council. The consequences of any changes to the Internal Governance Rules (IGR) that result in a different relationship between the regulatory and representative bodies, or increase the costs of internal governance, potentially affect the Inn and its members.

4. This response is submitted on behalf of the Inn by its Regulatory Panel. Membership of the Panel comprises: Professor Stephen Mayson (Chairman), His Honour Crawford Lindsay QC (a retired judge), Sir Matthew Nicklin (a justice of the High Court), Timothy Lyons QC (a barrister in private practice, and member of the Inn's Bar Representation Committee), and Anne Sharp (Under Treasurer of the Inn). For the purposes of this consultation response, the Panel was further assisted by Mark Ockelton (Vice President of the Upper Tribunal, Immigration and Asylum Chamber), and Dr John Carrier (former Dean of Graduate Studies at LSE, and former lay member and chair of the Education Committee of the Bar Standards Board).

CONSULTATION RESPONSE

5. We welcome the Legal Services Board's supplementary consultation, and its willingness to reconsider the drafting of the internal governance rules to reflect more closely the language of the Legal Services Act 2007 in relation to 'prejudice' rather than 'influence'.

6. We recognise the narrow and specific scope of the supplementary consultation, and its restriction to sections 28 and 30 of the Act. We also note that the two consultation questions posed in the supplementary consultation paper deal only with the consequential amendments to Rules 4, 8 and 10 and to the Guidance.

7. We further note that there is no question on whether the proposed substantive amendment to Rule 1 to frame the overarching duty by reference to prejudice rather than influence is in fact the best way of meeting the objectives of the Board's revised draft. We do not believe that the revised drafting of Rule 1 is the best way of meeting those objectives, and we therefore first comment on the substantive amendment before addressing the consequential questions posed in the supplementary consultation.

THE SUBSTANTIVE AMENDMENT

8. We agree entirely with the Board's wish to revise the IGRs to reflect more closely the language of the 2007 Act in relation to the statutory duties imposed on both the Board and approved regulators by sections 28 and 30. Indeed, such an outcome was advocated by us in our responses to both the first and second consultations, and we are grateful that the Board has now agreed that this is a better approach.

9. However, we are not persuaded that the Board's revised formulation of Rule 1 on pages 4-5 of the supplementary consultation paper represents the most consistent or best drafting for the purposes of 'more closely reflecting the language of the Act' (cf. paragraph 8 of the supplementary consultation paper). While we accept the suggested redrafting of Rule 1(1), we do not believe that Rule 1(2) is entirely consistent with the language or intention of the Act.

10. Rule 1(2)a. as proposed refers to a need for the separation of regulatory and representative functions. Although the heading to sections 29 and 30 refers to such separation, the language of sections 29(2) and 30(1) for achieving separation is expressed in terms of (a) no *prejudice* in the exercise of regulatory functions, and (b) decisions relating to regulatory functions being taken *independently* (so far as reasonably practicable). There is thus no statutory requirement for the separation of functions. The Board's proposed re-drafting therefore changes the language of the Act and introduces a requirement into the IGRs that is not contained within the statute.

11. Further, the proposed Rule 1(2)b. adopts a similar elision. Its language requires an approved regulator to maintain independence of *functions* where the Act refers in sections 29(2) and 30(1) to maintaining the independence of *decision-taking*. The Act does not therefore presume that independence of decision-taking must be achieved through independence or separation of functions.

12. It is accordingly difficult to derive from the language of the Act the basis for the Board's preferred expression of approved regulators' duties as proposed in Rule 1, even with the change from influence to prejudice. The Act does not expressly require the separation of functions as proposed by the draft Rule 1(2). In addition, section 28 expressly places on the approved regulators the obligation in making their regulatory arrangements to have regard to the better regulation principles and other best regulatory practice.

13. In our view, the Act entrusts to the approved regulators the responsibility to make the appropriate arrangements (which may or may not in their judgement lead to functional separation) to ensure that prejudice does not take place, and that independence of decision-taking is maintained. Through the suggested re-wording of the statutory requirements, the language of Rule 1 seeks to substitute through the IGRs the Board's own judgement of the regulatory arrangements that must be adopted by an approved regulator. It is not clear to us that the language of the 2007 Act in fact supports such a view.

14. For these reasons, we repeat the substance of our suggestion from the response to the second consultation that Rule 1(2), recognising the re-drafting of Rule 1(1) proposed by the Board, should be drafted along the lines of:

> "In particular, an approved regulator must have arrangements in place that:
>
> (a) are consistent with section 28 of the Act; and
> (b) ensure that decisions relating to the exercise of regulatory functions are so far as reasonably practicable taken independently from decisions relating to the exercise of its representative functions."

QUESTION 1: CONSEQUENTIAL AMENDMENTS TO THE IGRs

15. With the IGRs now recognising the right of an approved regulator with representative functions to seek to influence the outcomes of regulatory decisions, short of prejudice to the exercise of regulatory functions and to independent decision-making, it is not clear to us that the sub-rules proposed in paragraph 13 of the supplementary consultation paper are needed. As formulated, the proposed sub-rule is in our view simply a restatement of the overarching duty in Rule 1.

16. Unfortunately, in addition to being unnecessary, the restatement also adopts different language from that in the Act and in Rule 1. It seeks to substitute the notion of "independent *judgement*" in an imperative IGR requirement ("must not") for a conditional statutory requirement expressed in terms of "so far as reasonably practicable" for achieving the independence of regulatory *decisions* from representative interests.

17. Our reading of section 30(1) of the Act is that, while the IGRs must set out the Board's requirements to be met by the approved regulators, subsection (1)(b) expressly limits the Board's scope in relation to those IGRs that apply to decision-taking to ensuring independence "so far as reasonably practicable". We do not believe that section 30 allows the Board to remove, through the IGRs, any opportunity for an approved regulator to form its own considered view of what is reasonably practicable, given its regulatory responsibilities, relative size, available resources and assessment of cost-effectiveness.

18. We recognise that the Board might legitimately take the view that an approved regulator has not achieved as great a degree of independence in its regulatory arrangements as the Board might believe is reasonably practicable. However, such a conclusion must in our view be reached on the facts of the particular arrangements put in place by a particular approved regulator, and not pre-empted by a requirement in the IGRs that seeks to achieve independence without reference to an approved regulator's assessment of practicability.

19. Even accepting the Board's view as expressed in paragraph 12 of the supplementary consultation paper that "clear separation of the residual role from the approved regulator's representative functions would help address the cause of many previous disputes", we are not persuaded that there is sufficient basis in the 2007 Act for the Board's revised draft as set out in paragraphs 9 and 13 of the consultation paper.

QUESTION 2: CONSEQUENTIAL AMENDMENTS TO THE GUIDANCE

20. In relation to the Guidance on Rule 1, we repeat our comments above in paragraphs 10-14 above about the substitution of a requirement for 'separation' in the IGRs that is not part of the language of the Act. If Rule 1 itself should not require separation, then the Guidance should also be amended to remove references to it.

21. We note that the opening italicised sentence for the Guidance on Rule 4 maintains the expression "inappropriate influence". In light of the proposed changes to Rule 1, and the consequential amendments to the IGRs, we suggest that such phrasing is itself inappropriate.

22. For the reasons set out in paragraphs 15-19 above, we do not believe that the proposed sub-rules for Rules 4, 8 and 10 are appropriate, given the language of the Act. Nevertheless, we would accept that the suggested amendments to the Guidance notes on those Rules are in themselves appropriate as part of the explanatory and support function of the notes. We believe that these views are more appropriately expressed as explanatory guidance than in the substance of the IGRs.

SUMMARY

As a general response, and for the reasons set out in paragraphs 8-14 above, we find it difficult to derive from the language of the Act the basis for the Board's preferred expression of approved regulators' duties as proposed in the re-drafted Rule 1, even with the change from influence to prejudice. Accordingly, we invite the Board to consider yet again the drafting of Rule 1 and how best to achieve its stated aims.

Question 1: Do you agree that the amendment to Rules 4, 8 and 10 as set out in [the Supplementary Consultation] document should be adopted ? Please provide your reasons.

We are not persuaded that there is sufficient basis in the 2007 Act for the proposed draft of the new sub-rule as set out in paragraph 13, for the reasons set out in paragraphs 15-19 above.

Question 2: Does the proposed guidance on Rules 4, 8 and 10 provide sufficient detail to help you to interpret and comply with the proposed revised versions of Rules 4, 8 and 10? Please provide specific comments on any areas of the guidance for Rules 4, 8 and 10 where further information would improve clarity.

Given our view on the substance of Rule 1, we consequently suggest that the guidance on Rule 1 should be amended accordingly. We do not believe that the proposed sub-rules for Rules 4, 8 and 10 are appropriate, given the language of the Act. Nevertheless, we would accept that the suggested amendments to the Guidance notes on those Rules are in themselves appropriate as part of the explanatory and support function of the notes. We believe that these views are more appropriately expressed as explanatory guidance than in the substance of the IGRs.

The Honourable Society of Lincoln's Inn, Lincoln's Inn, London WC2A 3TL

ICAEW
REPRESENTATION 65/19

PROPOSED INTERNAL GOVERNANCE RULES

Issued 12 June 2019

ICAEW welcomes the opportunity to comment on the Proposed Internal Governance Rules (IGRs) issued by the Legal Services Board (LSB) in October 2018.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 152,000 chartered accountant members in over 160 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

This response dated 17 January 2019 reflects the views of ICAEW as a regulator. ICAEW Professional Standards is the regulatory arm of ICAEW. Over the past 25 years, ICAEW has undertaken responsibilities as a regulator under statute in the areas of audit, insolvency, investment business and most recently Legal Services. In discharging our regulatory duties we are subject to oversight by the FRC's Conduct Committee, the Irish Auditing and Accounting Supervisory Authority (IAASA), the Insolvency Service, the FCA and the Legal Services Board.

Amongst ICAEW's regulatory responsibilities;

- It is the largest Recognised Supervisory Body (RSB) and Recognised Qualifying Body (RQB) for statutory audit in the UK, registering approximately 2,800 firms and 7,500 responsible individuals under the Companies Act 2006.
- It is the largest Prescribed Accountancy Body (PAB) and Recognised Accountancy Body (RAB) for statutory audit in Ireland, registering approximately 2,800 firms and 7,500 responsible individuals under the Republic of Ireland's Companies Act 2014.
- It is the largest single insolvency regulator in the UK licensing some 800 of the UK's 1,700 insolvency practitioners as a Recognised Professional Body (RPB).
- It is a Designated Professional Body (DPB) under the Financial Services and Markets Act 2000 (and previously a Recognised Professional Body under the Financial Services Act 1986) currently licensing approximately 2,200 firms to undertake exempt regulated activities under that Act.
- [It is a Supervisory Body recognised by OPBAS for the purposes of the Money Laundering Regulations 2007 dealing with approximately 13,000 member firms.]
- It is designated an Approved Regulator and Licensing Authority for probate under the Legal Services Act 2007 (the Act) currently accrediting approximately 300 firms to undertake this reserved legal activity.

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INTRODUCTION

General approach

1. ICAEW welcomes the LSB's initiative to improve the existing Internal Governance Rules (IGR) and its willingness to consult on amendments to the proposed new rules following its review of the responses received to its last consultation.

2. Whilst ICAEW agrees with the amendments the LSB is proposing to make to the IGR as these were requested by ICAEW in its last consultation response; ICAEW, as explained below, is disappointed that the other changes requested by ICAEW have not been made. ICAEW therefore remains concerned about the overall approach taken by the LSB which has resulted in the production of prescriptive rules; even more prescriptive guidance; and lack of definitions of important terms.

Proposed rules

3. ICAEW is pleased to see that the revised rules now more accurately acknowledge and reflect an Approved Regulator's statutory role which requires it to supervise and monitor the regulatory body to which it has delegated its statutory responsibilities. However ICAEW still believes that the level of prescription will make compliance for Approved Regulators unnecessarily difficult in certain areas. ICAEW is of the opinion that a re-formulation of some of the rules and guidance into principles with the onus on the regulators to demonstrate that they comply would have been a better way forward in ensuring satisfactory compliance.

The need for additional clarity

4. ICAEW is also of the opinion that there is a need for clarity, not just in the IGR, but also in the LSB's designation rules. As the LSB is aware, the Lord Chancellor has recently refused to accept that the LSB's current IGR are the correct test for regulatory independence for designation applications but rather rules made under schedules 4 and 10 of the Act which do not exist. This is despite the fact that the LSB makes it clear in its Decision Notices that the IGR are the test it applies when deciding whether an applicant's internal governance arrangements are sufficiently independent. There is clearly therefore a need for further clarity in the LSB's rules on this issue.

5. Schedule 4 and 10 of the Act require the LSB to "make rules specifying how it will determine applications" and that these rules must ensure the applicant has exactly the same independent internal governance arrangements as section 30 of the Act requires of the IGR (the test of prejudice).

6. However, the current LSB designation rules made under schedules 4 and 10 of the Act simply state: *"These rules are to be read in conjunction with the 2007 Act, together with any other relevant provisions made by or by virtue of the 2007 Act, or any other enactment, rules, polices or guidance produced by the Board from time to time"* (Rule 6 (schedule 4 applications) and rule 5 (schedule 10 application). The rules made under schedule 4 and 10 therefore do not specifically deal with independence of an applicant's internal governance rules but rather rely on 'other' rules produced by the LSB. They are therefore too vague and ambiguous. They should specifically state what rules are applied to ascertain independence of internal governance arrangements in designation applications i.e. the IGR.

7. Therefore, we believe that the introduction to the Rules should make clear that the IGR apply in respect of;

   - ongoing obligations by AR's in the conduct of their governance under section 30 of the act
   - any application to be designated as an authorised regulator under schedule 4 of the act
   - any application to be designated a licensing authority under schedule 10 of the act

8. This is particularly important as there is no provision in the Act to appeal a decision to refuse a designation application. The only option available to an applicant to challenge such a decision is judicial review which does not judge the merits of such a decision.

9. To be more explicit in the rules would make applications more certain (or at least more difficult for the Lord Chancellor to refuse on independence grounds).

10. A second observation we have is through the text of the original IGRs and in the latest draft amendments, the phrase “is and is seen to be (independent)” is used a number of times. It was noted in the judgment of the appeal to the permission hearing in ICAEW v Lord Chancellor that perception is not part of section 30 requirements. It therefore should be used in context and not as a sole determinant.

11. In the executive summary it is suggested that “”Consumers and the public must have confidence in legal services if regulation is, and is seen to be independent.” We consider this s strange comment not least because regulatory independence is not first and foremost in the minds of the consumer when acquiring legal services and secondly we query as noted above the regulatory obligation around perception.

Conclusion

12. In conclusion therefore, ICAEW believes that, in light of all of the regulatory objectives in the Act, it is important that ICAEW and other professional accountancy bodies remain part of the regulatory framework for legal services. This is because many of the firms regulated by us for probate are relatively small and many would give up this line of work rather than take on the additional compliance costs of dealing with two regulators if ICAEW were to withdraw from its regulatory role as a result of any difficulties in complying with the final version of the new rules. For the reasons set out in our last response to the LSB’s consultation on its proposed IGR, ICAEW does not believe that this will be the case.

13. However, whilst a change to the independence test in rules 1, 4, 8 and 10 clearly now acknowledges the role of the Approved Regulator as a supervisor of the regulatory body to which it has delegated its statutory regulatory responsibilities, it is disappointing that the rules and guidance remain so prescriptive and that important terms are not defined.

14. ICAEW would also urge the LSB to make it clear that the rules referred to in the designation rules relating to independence of regulatory arrangements are specifically the IGR to avoid confusion and add more transparency and certainty to the designation application process in the future.

RESPONSES TO SPECIFIC QUESTIONS

Q1: Do you agree that the amendment to Rules 4, 8 and 10 as set out in this document should be adopted into the new IGR? Please provide your reasons

15. ICAEW is pleased to see that the LSB is consulting on a change to rule 1 that we requested in our response to the LSB’s last consultation on its proposed new IGRs. We pointed out in our response that the wording of rule 1 did not accurately reflect the requirements of section 30 of the Act and the intent of Parliament as it included a test of ‘influence’ rather than ‘prejudice’.

16. We therefore agree with the LSB’s proposed amendment to rule 1 ie, the replacement of the word ‘influence’ with the word ‘prejudiced’ and the removal of the requirement for an Approved Regulator to separate its regulatory functions from representative ‘interests’ as well as representative functions. We believe the amended rule 1 now reflects the intention of Parliament and the requirements of section 30 of the Act.

17. With regard to the proposed changes to rules 4, 8 and 10, as these are necessary to ensure consistency with rule 1, we also agree with these changes and are pleased to see that not only, again, has the word ‘influence’ been replaced with ‘prejudice’ but the LSB has removed the requirement that an Approved Regulator’s views can only be taken into account when given in response to a regulatory body’s consultation.

18. We believe these rules now more properly acknowledge and reflect an Approved Regulator’s statutory role which requires it to supervise and monitor the regulatory body to which it has

delegated its statutory responsibilities. They will also enable a regulatory body to access technical expertise and know-how provided by the Approved Regulator which ensures quality decision-making.

19. ICAEW is however disappointed at the decision by the LSB not to amend the rules and guidance to make them more outcomes focused. This seems to run directly contrary to the outcome of the LSB's initial consultation on changes to the IGR and the expressed intent from the LSB to ensure that the new Rules would be principles-based and outcomes focused.

20. The clear focus of the proposed IGR still appears to be on the 'inputs' to the governance arrangements of the legal services regulators and on prescribed ways of ensuring the independence of their governance arrangements. ICAEW is of the opinion that the IGR should, instead, define key principles which would allow the regulators to adjust their existing arrangements in whichever way works most practically and efficiently for them in order to be able to demonstrate to the LSB that it complies fully with that principle. There is a risk that the LSB Board will be swamped with a series of reasonable applications under the saving provisions of rule 16 and a consequent dilution of intent in the other rules.

21. ICAEW is also disappointed to see that the LSB has failed to adopt ICAEW's recommendation that it provides clarity by defining important terms in the rules such as 'regulatory body' and 'involved in a material way'.

Q2: Does the proposed revised guidance on Rules 4, 8 and 10 at Annex A provide sufficient detail to help you to interpret and comply with the proposed revised versions of Rules 4, 8 and 10? Please provide specific comments on any areas of the proposed guidance for Rules, 4, 8 and 10 where further information would improve clarity

Guidance on Rule

22. As outlined in our last consultation response, the guidance on Rule 4 is unclear with regard to the definition of a Regulatory Body. The wording of the guidance under the sub-hearing Governance & Structure states [emphasis added]:

"Determining its own governance and structure, essentially requires that the regulatory body has control over its constitution including:

- *Its hierarchy*
- ***Its decision-making processes***
- *The make-up of its board9s0 and committee(s)*
- *Election of members*
- ***The division of power between those bodies and its executive***
- *Its conduct rules, and*
- *Terms of reference for its bodies*

23. It is unclear where the control lies. For example who decides on the division of power between the regulatory board and the executive and on the processes for decision-making? ICAEW is of the opinion that the guidance needs to be much clearer on these issues.

Guidance on Rule 8

24. ICAEW repeats its concern about the lack of definition of a regulatory body and would further add that the guidance on this rule needs to make clear that appointments and terminations should not just be made independently from the Approved Regulator with a residual role but should also be made independently from the executive of the regulatory body for the reasons outlined for rule 4 above.

IPReg

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3 June 2019

Mr Neil Buckley
Chief Executive
Legal Services Board
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Dear Neil

Re: Supplementary consultation on IGRs

Thank you for the opportunity to respond to the LSB's supplementary consultation on the new IGRs. The IPReg Board considered this matter at its meeting on 23 May and it:

1. Welcomes the proposal to replace "influence" with "prejudice" as this more closely reflects the drafting of the Legal Services Act (LSA) and recognises that it can be legitimate for ARs to seek to influence some decisions that regulatory bodies make;

2. Supports removal from the guidance on Rule 1 (The Overarching Duty) of the suggestion that periodic reviews of the separation arrangements should be conducted at least every two years. We consider that including in guidance an expectation that these reviews should be so frequent (even in the absence of any problems with them) would have introduced an unnecessary burden on IPReg;

3. Supports the LSB's retention in the guidance on Rule 4 (Regulatory Autonomy) of the requirement that ARs must remove from/amend their constitutions so that the election of members of the regulatory board or recruitment to senior positions is under the sole control of the regulatory body and that the AR will have no ongoing role in these matters. To that end, we suggest that the LSB slightly changes the drafting of the guidance to Rule 4 from "election of members" to "election and/or recruitment of members";[1]

4. Suggests that the LSB should review the drafting of Rule 8 (The Regulatory Board: Appointments and Terminations) and related guidance to make it clear (and consistent with Rule 4 (Regulatory Autonomy)) that the AR cannot be involved with recruitment to regulatory boards and must not seek to influence the recruitment panel. The current drafting seems to suggest that it would be legitimate for the AR in its representative capacity to seek to influence the appointment/termination process. Our view is that in order to ensure confidence in the independence of the recruitment process, the only legitimate role for an AR would be to suggest candidates for a Board position to whoever is running the recruitment process;[2]

Continued over/.....

[1] See consultation document page 13 "Governance and Structure": 4th bullet

[2] However, we continue to support the principle that the regulatory body can request feedback from ARs on the regulatory Chair's performance if the regulatory body considers it appropriate to do so.

...../2

5. Would like to reiterate the points made in our response to the November 2018 consultation about:

    a. The importance of using the LSA's terminology and definitions so as to avoid (for example) having different definitions of "regulatory arrangements" in the LSA and the IGRs; and

    b. The need for the LSB to provide sufficient clarity about what type of information should be provided to the AR by the regulatory body under Rule 3 (Provision of assurance to AR). This point remains a key one for us, as there is currently insufficient clarity in the draft IGRs and associated guidance about how the formal relationship between the ARs and IPReg will be expected to develop. The Board considers that removing ambiguity about the ARs' future role is crucial to ensuring that the IGRs achieve the outcomes we seek.

Please let me know if you would like to discuss any of these points.

Yours sincerely

Fran Gillon
Chief Executive

Law Society of England and Wales response to the LSB consultation on Proposed Internal Governance Rules – Supplementary consultation on amendments to proposed Rules 4, 8 and 10.

June 2019

Introduction

1. The Law Society of England and Wales ("the Society") is the professional body for the solicitors' profession in England and Wales, with over 170,000 registered legal practitioners. The Society remains unequivocally committed to its role as an Approved Regulator under the Legal Services Act 2007 ("the Act") and to ensuring that it continues to comply with the Act. It is the Act which sets the context for the relationship between the Law Society and the SRA, determining that regulatory bodies like the SRA sit within the governance structure of approved regulators like the Law Society, subject to the independence rules in section 30.

2. The Legal Services Board (LSB) has its own obligations as set out in Section 3 of the Act to act in a way that is compatible with the regulatory objectives, and to have regard to the better regulation principles.

3. The Society is pleased that the Legal Services Board (LSB) has listened to key points made (in response to the November 2018 consultation. We were concerned that the Internal Governance Rules (IGR) should not depart from the words and intention of the 2007 legislation and thereby preclude legitimate activities by professional bodies. We therefore welcome the change of wording from 'influence' to 'prejudice' in Rule 1, and the changes to Rules 4, 8 and 10 that arise as a consequence of this change to Rule 1 (subject to our comments below).

Our original concerns

4. In our response to the LSB's November 2018 consultation on Proposed Internal Governance Rules, the Society expressed concerns that rule 1(1) of the proposed IGR was inconsistent with section 30 of the Act. The wording which was being proposed in that consultation was as follows:

> *"Each approved regulator has an overarching duty to ensure that decisions relating to its regulatory functions are not influenced by any representative functions or interests it may have."*

5. We maintained that the concept of "influence" went a great deal further than the first limb of section 30(1) of the Act which is focussed on "prejudice", i.e. the exercise of an undue or negative influence. Furthermore, we said that even if it was aimed at the second limb of section 30(1) – which requires that regulatory decisions are taken independently from representative decisions – it went further and wider than what was required, necessary or could be justified.

6. We argued that the effect of the above would be to place limitations upon the Society, preventing it from carrying out the approved regulator role as intended by the Legal Services Act.

7. We raised a further significant concern that the intention for the proposed changes to the IGR to achieve clarity would not be achieved by the changes that were being proposed.

8. Insofar as this is a discrete single-issue consultation, the Society agrees with the changes to the wording suggested in the proposed rules, subject to our comments below.

Lack of relevant definitions

9. Whether or not the proposed changes to the IGR will achieve clarity continues to be a concern, and we suggest that the new rules should contain definitions of 'prejudice' and 'undue influence'.

10. 'Prejudice' is defined in the current IGR, and that definition states that prejudice will only be found to have arisen where influence has been exerted which is undue, other than in due proportion to the circumstances and that there must be, or be likely to be, a material effect on the discharge of a regulatory function or functions. There must also be a risk to the compromise or constraint of independence or effectiveness.

11. The relevant definitions from the current IGR are set out below for ease of reference.

    'Prejudice' the result of undue influence, whether wilful or inadvertent, causing or likely to cause the compromise or constraint of independence or effectiveness

    '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

12. These definitions are not perfect as they leave open the question of how to assess whether the mischief complained of is 'otherwise than in due proportion', and provide no guidance as to what effect would be 'material'. However, they make it clear that not all influence which is perceived negatively by a regulatory body will amount to prejudice. There must be a real risk of a negative effect on a regulatory function.

13. It is unclear why definitions for these terms have been removed in the new IGR and, even though they are not perfect, we request they be included. Stripping out important definitions from the glossary brings with it a risk that there will be uncertainty and confusion as a result. If the LSB's intention is now to widen the circumstances under the IGR in which prejudice might be seen to arise, then its rationale for this must be set out for consultation. If the term remains undefined, this will lead to a lack of clarity, and the very real risk for representative bodies that any influencing action taken by them may be deemed by the LSB or regulatory body to cross the line. Without an objective standard to refer to, in our view this is likely to increase, rather than decrease, the number of independence-related disputes between approved regulators and regulatory bodies (in contrast to the LSB's stated aim in developing these IGRs of providing clarity and decreasing the incidence of such disputes).

Focus on behaviour rather than outcomes

14. We would also question the new wording that approved regulators must not 'seek to prejudice' the independent judgement of the regulatory body in Rules 4(3)(b), 8(2)(b) and 10(2)(b). This seems to focus on the intention behind the behaviour rather than outcomes, which is inconsistent with the LSB's stated intention in para 2 to develop new IGR which are 'principled and outcome focused'. The current IGR do not use this 'seek to' formulation, and in our view the current IGR are aimed more at minimising the risk of prejudice by ensuring structural independence of decision-making, rather than looking at the motivation behind certain behaviours. While this

change may be inadvertent, it is nevertheless one on which we seek clarification.

15. The fact that there is no definition of what kind of behaviour amounts to prejudice, and that there is a risk that enforcement could be initiated if there is the merest perception that the representative body has 'sought' to act improperly, even if prejudice has not occurred, are both, in our view, elements of concern within the proposed rules. We would question who is to determine if a representative body has merely 'sought to prejudice' the regulatory body, and what criteria would be used to make this determination? Might it, for example, be sufficient for the regulatory body to complain that this has taken place?

Recommended changes

16. Without prejudice to the points made above, we believe the following should be attended to in the proposed rules and glossary:

Rule	Change recommended
Rule 4	Rule 4 (3) b. the 'seek to prejudice' part of this rule should be deleted.
Rule 8	Rule 8 (2) b. the 'seek to prejudice' part of this rule should be deleted.
Rule 10	Rule 10(2) b. the 'seek to prejudice' part of this rule should be deleted.
Glossary	The existing definitions of Prejudice and Undue Influence from the current IGR should be included in the Glossary.

Solicitors Regulation Authority

SRA Consultation Response

Supplementary consultation on proposed Internal Governance Rules

Legal Services Board

12 June 2019

Supplementary consultation on proposed Internal Governance Rules: Response of the Solicitors Regulation Authority (SRA)

Introduction

1. The Solicitors Regulation Authority ("SRA") is the regulator of solicitors and law firms in England and Wales, protecting consumers and supporting the rule of law and the administration of justice. The SRA does this by overseeing all education and training requirements necessary to practise as a solicitor, licensing individuals and firms to practise, setting the standards of the profession and regulating and enforcing compliance against these standards. Further information is available at www.sra.org.uk.

2. We responded to the Legal Services Board (LSB)'s earlier consultations on its proposals for reforming its framework for regulatory independence published in November 2017 and November 2018. Our comments on this targeted consultation, which proposes amendments to the draft Internal Governance Rules (IGRs) consulted on in November 2018, should be read in conjunction with those earlier responses.

Summary

3. The consultation focuses on the overarching duty at current Rule 1. This prohibits approved regulators' (ARs') representative functions and interests from *influencing* regulatory decision-making.

4. The proposal is to replace this with an obligation to ensure that such decisions are not *prejudiced*. The consultation also proposes consequential amendments to rules 4 (Regulatory Autonomy), 8 (Appointments and Terminations) and 10 (Regulatory Body Budget), and the supplementary guidance to the rules.

5. We agree that the current phrasing is too wide and that it is reasonable that the representative functions should be able to try to influence issues such as regulatory policy just as third parties can. We also believe that trying to constrain lobbying activity to formal consultation does not reflect the wide range of lobbying activities that are open to third parties and should therefore be revised.

6. We think the IGRs should instead refer to 'improper influence'. This keeps the focus on the 'how' of influencing activity and makes it clear that representative functions can legitimately lobby on behalf of their constituency so long as they do not use the governance and related arrangements to do so.

7. Therefore, in summary, we do not agree with the proposed amendment to Rule 1. Moving to the proposed model risks prohibiting only improper attempts to influence decisions where there is proof of an adverse prejudicial outcome. That would mean that the regulator would have to show that the improper influence – perhaps exerted

though governance, budgetary or staff or non-executive meetings, or other aspects of shared arrangements that third parties would not enjoy - did indeed prejudice the outcome. It may be that no prejudice has been suffered, or that this is complex, subjective or contentious – however there is inherent mischief in trying to exert improper influence and that can be readily demonstrated, should it ever occur.

8. Instead we suggest that any influence should be proper, i.e. open, transparent and arm's length. That would support public and professional confidence in both transparent governance and genuine good faith between the parties.

9. In our view, it would also be in the interests of the representative functions of the ARs which will want to be able to openly demonstrate their effectiveness to their constituency in just the same way as any third-party interest can do.

10. In addition to our concerns about Rule 1, we also consider that the consequential changes to rules 4, 8 and 10 are drafted too widely, albeit as above, we think the idea that lobbying activity should be constrained to formal consultation is too narrow. We would suggest instead the following alternative wording which the LSB may wish to consider:

Rule 1

Each approved regulator has an overarching duty to ensure that it does not seek to exert improper influence over decisions relating to the exercise of its regulatory functions as a result of any representative functions or interests it may have.

Rules 4, 8 and 10:

The approved regulator with a residual role:

a. may only seek to influence these determinations in a way that is open, transparent and arm's length…

Discussion

11. As we set out above, this targeted consultation seeks to propose amendments to the draft IGRs consulted on in November 2018. These replace the concept of *influence* with *prejudice* in the overarching duty at Rule 1 (and make consequential amendments to subsequent rules and guidance). Rule 1 currently prohibits ARs' representative functions and interests from *influencing* regulatory decision-making. The amendment would comprise an obligation to ensure that such decisions are not *prejudiced*.

12. The proposals are in response to concerns expressed by stakeholders that the previous wording prevented the legitimate exercise of representative functions by an AR, and that ARs would be left in a worse position than third party stakeholders in terms of their ability to influence decisions of the regulatory body.

13. We recognise the importance of the role of effective representation, and indeed highlighted in our response to the November 2018 consultation the need for the representative arm of the AR to be free to carry out lobbying and other roles on

behalf of its members, without being constrained by concerns about crossing boundaries established for the AR within the IGRs.

14. However, we do not believe the proposed changes provide sufficient safeguard against interference with regulatory independence. Rather than focus on prejudice, with the focus on showing that an outcome had indeed been prejudiced, we suggest simply changing the language to 'improper influence'.

15. Nor do we agree with the suggestion that these are necessary for the rules to remain within the scope of section 30 of the Legal Services Act (LSA).

16. Section 30(1) of the LSA requires the LSB to make rules with the aim of 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.

17. This permits the LSB to do more than repeat the wording at (a) above. It allows it to create a legal framework and to design requirements that it considers will both prevent prejudice and facilitate independent regulatory decision-making.

18. In our view, making it clear that ARs must not exercise improper influence to further their representative interests would fall squarely within those aims. We believe that prohibiting improper attempts to influence decisions will provide greater protection for regulatory independence than the narrow concept of prejudice can achieve. That is in part because the focus on prejudice shifts the consideration to the regulatory outcome, rather than the AR's actions or motivations. The regulator would have to show that the improper influence – perhaps exerted though governance, budgetary or staff or non-executive meetings, or other aspects of shared arrangements that third parties would not enjoy - did indeed prejudice the outcome.

19. The key point is that AR representative bodies have a relationship with the AR's regulatory arm within the same entity. The relationship is not the same, and is not seen as the same, as with a third-party stakeholder that is completely separate and structurally independent. As the consultation itself highlights, the AR's role in relation to delegation, governance and assurance, provides communication channels, pressures and influences that are unique. That means the representative body has to be particularly careful about how it seeks to influence – the channel and method matters, not simply the outcome.

20. Public and professional confidence in both regulator and representative body requires real clarity on the roles, responsibilities and interests between the roles of the two parts of the AR. It is also important that the profession is clear on the roles of each part of the organisation and the standing of, for example, any communication. Therefore, we believe that the effect of the IGRs should be to prohibit attempts to improperly influence regulatory decision-making in a way that goes beyond open and arm's length lobbying.

21. We do however agree that sub-rules 4 and 10 should not narrow any AR lobbying to formal consultation. Many third parties properly seek to influence on key issues

and indeed their views, if they have foundation, may ultimately lead to formal consultation and change.

Conclusion

22. We do not agree with the proposed amendment to Rule 1 and believe that the wording should capture the concept of improper influence, as described above.

23. Further we do not agree that the changes to Rules 4, 8 and 10 should be adopted in the new IGRs. In particular, we believe the suggested wording, that an AR "may only seek to influence these determinations in the exercise of its representative functions" is wide and ambiguous and would not effectively restrict any attempts to exercise improper influence.

24. We would suggest instead the following alternative wording for the LSB to consider:

Rule 1

Each approved regulator has an overarching duty to ensure that it does not seek to exert improper influence over decisions relating to the exercise of its regulatory functions as a result of any representative functions or interests it may have.

Rules 4, 8 and 10:

The approved regulator with a residual role:

a. *may only seek to influence these determinations in a way that is open, transparent and arm's length…*

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