From the Chief Executive

Chris Kenny
Chief Executive
Legal Services Board
7th Floor, Victoria House
Southampton Row
London WC1B 4AD
By email: chris.kenny@legalservicesboard.org.uk

12 November 2013

Dear Chris

SRA response to the Legal Services Board consultation paper on lay chairs for front line regulators

This is the SRA's response to the LSB's consultation paper on lay chairs for front line regulators. It has been approved by the SRA Board, following a full discussion at its recent meeting. We have commented on the arguments for and against a requirement for lay chairs, but as we explain below we consider that the more important issue is ensuring the independence and robustness of the process for appointing, and reappointing, the chair and members of regulatory boards.

We share the LSB's objective that regulation should be independent and effective. In the SRA's view it is the overall effectiveness of the arrangements for independence - not only the background of Board chairs - which needs to be considered in addressing the issues raised in the consultation paper.

The current arrangements - which flow from the requirements set out by the LSB in its Internal Governance Rules under the Legal Services Act 2007 - provide for the operational independence of the SRA (and other approved regulators) but not for full, structural, independence. The SRA remains a part of the body which provides professional and representative services for solicitors - the Law Society. The ultimate governing body of the Law Society is its Council of solicitors. So the arrangements which govern the SRA must ensure not only independence from those it regulates, but also ensure independence from the professional body. That is the context in which we make our suggestions.

We have concerns about the analysis in the consultation document. We do not think it would be profitable to do a line-by-line critique of the document, but we can summarise our reservations by saying that the document relies upon an assumption that wherever the regulators have not gone as far or as fast as the LSB might have wished, a significant

cause of that is that the regulators have been over-influenced by close ties with the profession being regulated. That ignores the possibility that the regulators have concluded, after careful consideration, that the changes which they have made and the pace with which they have made them are in the interest of consumers and the wider public interest. While we consider that the absence of structural separation from the Law Society has inhibited progress in some areas, the SRA's programme of radical reform has not been inhibited by its Board's professional membership.

But we do think that there are weaknesses in the current LSB Internal Governance Rules arrangements which could result in that danger. What follows is our analysis of the danger, and a suggested remedy.

Given the strength of the professional voice, regulators do run a risk of being dominated by professional interests, with the voice of other stakeholders being drowned out. The safeguard against this is, as your consultation document identifies, a robustly independent board with a wide range of experience - the criterion of independence applying as much to the professional members as to the lay ones. In addition, in the case of the SRA and the other regulators with constitutional ties to professional bodies, there is the need to have regard to the strength of the professional body's position and the risk of it seeking to influence or control the decisions of the regulator by virtue of the fact that, structurally, the regulatory body is a part of it.

The regulatory boards (including the SRA) already have lay majorities. This helps to address the perception issue of professional capture, and helps to ensure a wide view of the public and consumer interests. This is bolstered by the fact that it has already been agreed that the position of SRA Board chair will be open to either a legal professional or a lay person when the next chair is appointed.

The issue raised by the LSB is whether it is necessary to go further than this, and require the chair to be a lay person. The SRA Board has considered this proposition in detail, and has concluded that there is a range of arguments for and against the proposition; and some further issues concerning the process for the appointment of the chair (whether legal or lay) which need to be addressed.

The principal argument in favour of requiring a lay chair is that it would strengthen public confidence in the independence of the SRA (and other regulators) and be a clear and public statement that the SRA is a public interest regulator which does not regulate in the narrow interests of the profession. It is for that reason that some regulators of other professions have concluded that it is necessary to have a lay chair in the public interest. The importance of this public perception - particularly when lay chairs of professional regulators are becoming increasingly the norm - should not be underestimated. Additionally, because the SRA is not structurally independent from the professional body, the need for, and arguments in favour of, a lay chair are significantly stronger. This is because the SRA has not one, but two, risks to its independence: the professional capture issue raised by the LSB, and the risk arising from the influence that could be directly applied to the SRA by the professional body due to the absence of full structural independence.

The primary argument against a requirement that the chair must be lay is that it cuts across the principle of securing the best person for the job. It is unarguable that a professional person ***may*** have all of the required attributes, including the ability to ensure the independence of the organisation and its regulatory decisions. It can be argued that to exclude such a person from consideration for the role runs counter to the public interest. It is now far more common for individuals to undertake a broad range of roles within their career and, given this, it is arguably inappropriate to exclude an individual who might be the best candidate for the role simply because they had, say, begun their career as a solicitor many years previously but subsequently gone on to have a successful and relevant career in other fields. Furthermore, a prohibition of the type proposed could be seen to send a signal (whether or not intended) that a member of the regulated profession cannot be trusted to act independently in the public interest - this might be damaging to efforts to seek the profession's participation in and support for the regulatory objectives.

A strong lay chair might strengthen the public perception of independence, but there is also an argument that a strong professional chair helps to champion and drive through reform within the regulated constituency - as has been the case with the SRA.

Finally, there is another aspect relating to the perception of independence that needs to be considered. The export of legal services by SRA regulated firms is dependent upon international acceptance of the robust independence of those firms, including independence from Government. There is a risk that an intervention by the LSB to prohibit the appointment of a professional chair of the board which regulates those firms could be used by competing jurisdictions to damage the credibility of English and Welsh firms, and thus the continued economic success of English and Welsh firms in the international market.

The SRA Board discussed all these arguments, and did not reach a settled position on the matter. Our view is that focusing on the background of the chair is the wrong approach and carries considerable risks in the light of what we consider to be more significant deficiencies in the current Internal Governance Rules.

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

This gives rise to the obvious risk that a chair may be appointed because of his or her perceived willingness to advance the interests of the professional body and the profession.

The SRA suggests that the robustness and independence of the regulatory boards would be better served by provisions which placed the onus on the regulatory organisations themselves to design the competencies and appointments process in consultation with the approved regulators, coupled with a requirement that the arrangements be subject to confirmation from the LSB that they conformed with the Internal Governance Rules. This would enable some flexibility to reflect the size and circumstances of the different regulators. This provision could be supplemented with tighter requirements in the Internal Governance Rules for the composition of appointments panels - for example, a requirement for an independent chair and a lay majority on the panel, including people with broad regulatory and consumer experience. Finally, the Rules should require that both the process, and the decisions on appointments and reappointments, should be delegated to an independent appointments panel.

We would be happy to discuss these proposals with you further.

Yours sincerely

ANTONY TOWNSEND
Chief Executive, SRA