

A REPORT FOR THE CHARTERED INSTITUTE OF LEGAL EXECUTIVES (CILEX)

Good Governance for the Future

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Introduction

This report to the CILEx Council reviews the governance of the organisation, covering both the overall group structure and its various constituent parts.

Although some CILEx bodies are already subject to, and comply with, external governance scrutiny and requirements, the structures and practices governing relations between and within the various parts of the organisation have grown up organically and the time has come to assess whether these arrangements are still fit for purpose.

Why now?

There are various drivers for this review:

- There is evidence of growing strain in the existing governance model which contains potential conflicts of interest and risks for the Council.
- The standards of good governance practice and behaviour across public/regulatory, corporate, NFP sectors are constantly being updated. Many other professional body organisations both within and outside the legal sector are currently undertaking their own governance reviews and CILEx should aim to keep pace with these developments.
- The organisation is currently without a Group Chief Executive, and specifying the current requirement for that role and the type of person who would be required will depend heavily on whether and how the structure of the CILEx group changes as a result of a governance assessment.
- The government has announced its intention to consult on the complete separation of the Approved Regulators mentioned in the Legal Services Act from their regulatory arms.¹ This has potentially far reaching consequences for the overall shape of the CILEx Group, although the extent of the changes that might be required is still unclear.
- The CILEx leadership needs to prepare for the next phase of the organisation's strategic development, following on from the 2014-17 business plan.

The scope of this report

This report considers the challenges for CILEX governance against a background of broad governance trends and specific legal sector pressures. It is divided into six sections:

- Part one provides some background on good governance practice in order to provide a basis for the subsequent assessment of current arrangements in the CILEx Group. It also briefly considers the specific context for CILEx governance as an organisation operating in the legal sector, which can be prone to shifts in requirements and regulation.
- Part two addresses the governance structure of the parent body of the CILEx Group, set against good practice for such bodies and comparing precedents set by similar professional bodies and Royal Charter organisations. However, any firm conclusions on the most appropriate match from

¹ A better deal: boosting competition to bring down bills for families and firms, HM Treasury November 2015

amongst the various generic approaches surveyed cannot be reached until the nature of the CILEx Group and its constituent parts is more fully explored.

- Part three of the report looks at governance arrangements, which determine how governance structures operate in practice and the machinery in place to help them fulfil their tasks.
- Part four explores the CILEx group, including relationships and arrangements between and within each component.
- Part five draws out the main issues which need to be addressed from the previous discussion and sets out a selection of options.
- Part six makes recommendations for possible changes to current governance structures and practices, and for the adoption of a particular model for the CILEx Group as a whole.

Part 1: What is Good Governance?

INTRODUCTION

There is no standard definition of good governance. However, the Australian Good Governance Guide made a useful attempt by suggesting that “Good governance is about the processes for making and implementing decisions. It’s not about making ‘correct’ decisions, but about the best possible process for making those decisions”.²

Unpicking this further, we can identify various different themes in the good governance debate, covering:

- ***The effectiveness*** of the individuals and bodies responsible for an organisation’s governance and how they are empowered to ensure that the organisation meets its purpose. This means, for example, ensuring that the size and composition of decision-making bodies is appropriate for their function.
- It also concerns ***the accountability*** to those for whom the organisation exists. This implies, inter alia, appropriate checks and balances in the governance system, proper disclosure policies, the avoidance of conflicts of interest and the independence of methods for nominating and remunerating players in the governance system. Overall, it is intended to promote disinterested decision-making in the best interests of the organisation.

The reason we talk about ‘good governance’ and not ‘best governance’ is that its application cannot be formulaic but requires some judgment calls and the application of principles to the circumstances in which individual organisations find themselves. There are also slightly different governance considerations for different types of bodies, depending on whether these are run in the public interest, for shareholders or for some charitable purpose. The key elements and sources for good governance standards relevant to CILEx are summarised in table 1. This shows that regardless of the type of organisation, good governance standards have many common features. What this table does not show, however, is the challenge of governance in an organisation which combines a range of different organisations each with their own requirements.

² <http://www.goodgovernance.org.au/>

Table 1: Good governance practice

	Corporate governance standards ³	Standards for Public bodies and appointments ⁴	Charity Commission	Professional Association ⁵
<p>Effectiveness</p> <p>i) In purpose</p> <p>ii) In decision-making</p>	<p><u>Responsibilities:</u> Reviewing and guiding corporate strategy, annual budgets and business plans; monitoring implementation and corporate performance.</p> <p><u>Composition:</u> The board needs relevant skills to review and challenge management performance. Also needs adequate size and appropriate levels of independence.</p> <p><u>Functioning:</u> Committees of the board should have well defined mandate, composition and working procedures. Boards should assign non-executive board members where there is a potential for conflict of interest</p>	<p><u>Objectivity:</u> Holders of public office must act and take decisions impartially, fairly and on merit, using the best evidence and without discrimination or bias.</p>	<p><u>Responsibilities:</u> Trustees have overall control of a charity and are responsible for making sure it is doing what it was set up to do.</p> <p><u>Composition:</u> Trustees should be appointed following the procedures in the charity's governing document. Recruitment processes should be transparent. Governing documents may state how long trustee appointments should last, and whether trustees can be reappointed after their term ends.</p> <p><u>Functioning:</u> Good practice is to appoint trustees with range of skill sets (e.g. fund raising etc.)</p>	<p><u>Responsibilities:</u> The association's governing body should be responsible for its strategic plan.</p> <p><u>Composition:</u> Identification of skills needed as basis for appointment/election to governance bodies.</p> <p><u>Functioning:</u> Members should be offered leadership training to prepare them for the governance positions they want to hold.</p>
<p>Accountability</p> <ul style="list-style-type: none"> - In legal and regulatory requirements - Holding management to account on behalf of organisation - Of the Board individually and collectively - Transparency and disclosure 	<p><u>Responsibilities:</u> Board and management responsibilities should be clarified and made public.</p> <p>Organizations should recognize duty to non-shareholder stakeholders,</p> <p>Boards should monitor the effectiveness of the company's governance practices and making changes as needed.</p> <p>Board hold responsibility for the integrity of the corporation's accounting and financial reporting systems.</p> <p>Boards should ensure that appropriate systems of control are in place, in particular, for risk management.</p>	<p><u>Integrity:</u> Holders of public office must avoid placing themselves under any obligation to people or organisations that might try inappropriately to influence them in their work. They should not act or take decisions in order to gain financial or other material benefits for themselves, their family, or their friends, acting solely in the public interest. They must declare and resolve any interests and relationships.</p> <p><u>Openness:</u> Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing.</p>	<p>Trustees have a legal responsibility to act in the best interests of their charity and deal with conflicts of interest</p> <p>Trustees have a legal responsibility to manage their charity's resources responsibly</p> <p>Trustees have a legal responsibility to implement appropriate financial controls and manage risks</p> <p>Trustees must act with reasonable care and skill</p>	<p>Standing committees should be appointed to perform functions that require ongoing (every-year or all-year-long) expertise.</p>

³ Principles of Corporate Governance, OECD, 2004

⁴ The Seven Principles of Public Life, Committee on Standards in Public Life, 1995

⁵ Practice note on association strategic governance, The Association Forum of Chicagoland, 2011. The Association is an association of professional associations in the USA.

GOOD GOVERNANCE IN THE LEGAL SECTOR

Beyond generic good governance standards that might apply to CILEx bodies individually or to the CILEx Group as a whole, any assessment of CILEx structures must also take into account the specific requirements of the legal sector. These apply by virtue of the Legal Services Act 2007 (LSA) which states in s.30 (2) (b) that:

The exercise of powers granted under the act should not be “prejudiced by the approved regulator’s representative functions and is, so far as reasonably practicable, independent from the exercise of those functions”.

These ‘independence’ requirements are further elaborated on by the Legal Services Board (LSB), which has determined that approved regulators have a duty:

*“to actively place the public interest higher than sectional interests of particular consumer or professional interests”.*⁶

Further to the LSA, the LSB has set down more detail contained in its Internal Governance Rules. These can be summarised in three key principles:

a) Independence of control

- The exercise of regulatory functions should not be prejudiced by any representative functions or interests.
- The regulatory functions must be governed by a board in which the Chair is a lay, independent person and that appointment arrangements ensure that there is a lay, independent majority of Board members.
- Appointments to bodies carrying out regulatory functions should be based on open, merit based selection using public appointments principles. There should be no sectional interest representation and the regulator must be responsible for designing and implementing the appointments process
- No person appointed to and serving on a regulatory board may be responsible for any representative function, and if they have served in such a position in the recent past, a sufficient gap in time must have elapsed.

Box 1: What is ‘Regulation’?

The LSA (s.21) defines the scope of “regulatory arrangements” to cover:

- (a) authorising persons to carry on reserved legal activities,
- (b) authorising persons to provide immigration advice or services,
- (c) practice rules,
- (d) conduct rules,
- (e) disciplinary rules and arrangements
- (f) qualification regulations, including any rules or regulations relating to the education and training of regulated persons or any other requirements which must be met by, or in respect of them.
- (g) indemnity arrangements,
- (h) compensation arrangements,
- (i) any other rules or regulations or arrangements, which apply to, or in relation to regulated persons, other than for representational or promotional purposes.
- (j) licensing rules for ABS (if applicable)

⁶ “The regulatory objectives. Legal Services Act 2007”, Legal Services Board

b) Independence of action

- Responsibility for performing all regulatory functions should be delegated to a body (whether or not a separate legal entity/separate legal entities) without any representative functions;
- The regulatory body should have an unfettered ability to communicate externally and to notify the LSB if it considers that its independence or effectiveness is being prejudiced
- Adequate resources should be made available for regulatory functions
- The regulatory body should have control over its own strategy and resources.

c) Accountability

- Oversight arrangements of the approved regulator over Board should be transparent and proportionate.
- Remuneration, appraisal, reappointment and discipline should be independent of the approved regulator where this is also a representative body.

These requirements have been in place since 2009 (as amended in 2014) and in themselves impose additional constraints on CILEX governance over and above more general corporate governance standards.

However, this state of affairs is subject to change. On 30 November 2015, HMT published a document entitled “A Better Deal: Boosting competition to bring down bills for families and firms”. This document stated that:

“The government will launch a consultation by spring 2016 on removing barriers to entry for alternative business models in legal services, and on making legal service regulators independent from their representative bodies.”

Although the planned consultation has been delayed due to the prolonged period of purdah created by local elections and the European referendum, its publication is now believed to be imminent. Its exact shape and the options it will propose for the future are unknown but may well be influenced by recent interventions from the Competition and Markets Authority (CMA) and the LSB.

The CMA produced an interim report in July 2016⁷ which suggested that there was a case for a more systematic review of legal services regulation leading to a very different model of regulation with fewer regulators in the sector. It also concluded that full independence of regulators from those they regulate is an important principle that should be properly applied to legal services.

These ideas were further picked up by the LSB in September 2016⁸, in a paper which recommended the creation of a single regulator for the entire sector and a shift in the model of regulation to focus on activity rather than title.

⁷ “Legal Services Market Study – Interim Report”, Competition and Markets Authority, July 2016

⁸ “A vision for legislative reform of the regulatory framework for legal services in England and Wales” 12 September 2016

How is this all relevant to CILEx?

There are a number of reasons why all of this is of importance to CILEx:

- CILEx is a Royal Charter Body registered at Companies House with various wholly owned subsidiaries. Charter Body status imposes certain public interest responsibilities and registration with Companies House implies good corporate practice. It is therefore incumbent on its directors to ensure that the organisation's governance is fit for purpose.
- Above and beyond these general good corporate governance obligations, the changing environment for legal regulation, has implications for CILEx's overarching charter body. Although it is still very early days and we do not know what the Government's consultation will suggest. The fact that the current arrangements are compliant may not be sufficient to prevent the need for further change, if total separation is required by legislation.
- Various component parts of the CILEx group have functions governed by other external standards (e.g. OFQUAL, Charities Commission etc.), which have particular good governance considerations. This governance review is an opportune moment to consider how these different component parts of the group operate together and whether there are conflicts between the different obligations imposed upon them.

This report explores the application of the good governance standards set out above to the CILEx governing body and to the various elements of the governance structure. It assesses current CILEx governance practice against these standards and against practice in other professional organisations. Three issues are looked at in particular:

- i. The governance structure and how it needs to be designed to reflect the purpose of the organisation;
- ii. The governance arrangements which underpin this structure;
- iii. The model by which all of the different elements and layers of governance structure are integrated together.

Following this, a number of options are considered and then, finally, the report makes recommendations on changes or clarifications that CILEx might make to its governance arrangements to prepare for the next stage of the organisation's evolution.

Part 2: The CILEx Governing Body

INTRODUCTION

A review of CILEx governance should naturally start at the top with the parent body of the CILEx Group. However, it is not easy to isolate the governance of a parent body from the wider group structure, since governance form is best dictated by the functions, or purpose of the organisation (“form follows function”).⁹ CILEx’s objectives are set down in its Royal Charter. These emphasise the organisation’s public interest roles relating to regulation, education and training and in maintaining public confidence in the profession. It is noteworthy that the word ‘represent’ does not feature in the Charter.

The functions that CILEx performs in order to achieve its objects require it to have a range of different bodies under its control or associated with it. The relation between these bodies and the specific considerations relating to each of them are considered in the next section of this report. Here we focus primarily on the overarching **governance structure** of the organisation, i.e. what form should the apex decision-making body take in order to help a professional body achieve its purpose? This is a more complex question in professional organisations compared to other types of organisation because they usually combine a representational (or ‘membership’) function alongside other roles. Professional body governance structures therefore place a particular emphasis on managing the relationships between members and decision-making bodies.

Box 2: Royal Charter Bodies

Royal Charter bodies are:

- Incorporated as legal entities
- Must have a solid record of achievement
- Must be financially sound
- Must represent a unique field of activity
- Should have at least 75% of its corporate members qualified to first degree level standard
- Should act in the public interest

(Source: Privy Council)

GOOD PRACTICE IN STRUCTURING PROFESSIONAL BODY GOVERNANCE

Table 1 in Part 1 of this report summarised the key features of good governance in various types of organisations, including professional organisations. Applying these principles in professional bodies is a challenge because of the fact they have often grown up organically over time and their roles have since evolved. Many have, for example, set up subsidiary bodies under their exclusive control which are constituted as charities or companies, with the separate governance requirements these structures entail. Not surprisingly therefore, professional bodies have tended to evolve through different phases in which they have used different governance structures, according to what was, at the time, most appropriate for their size, complexity and functions.

There have been broadly, three phases identifiable in the governance of professional bodies so far and these can be characterised as:

- The representative approach
- The ‘cupped hands’ approach

⁹ Originating in schools of American modernist architecture this concept is now widely applied in organisational theory.

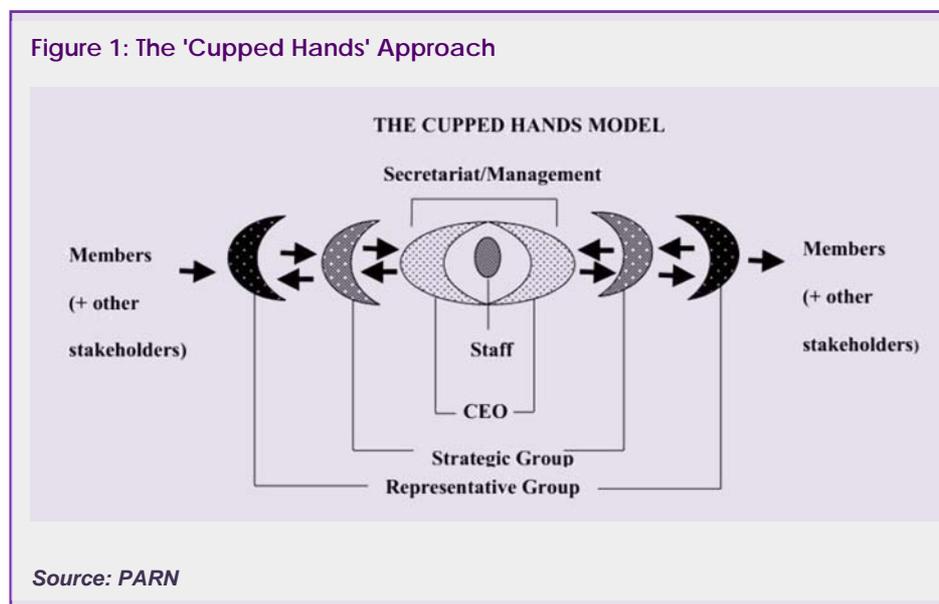
- The 'corporate' approach

The Representative Approach

The representative approach is a relatively simple structure used by many representative organisations. It involves a single tier of governance in the form of a council elected from the wider membership. The leaders of the council may either be selected from within the council pool or directly elected by the membership. It is usually a structure that is entirely, or predominantly, volunteer led and run. This was how most organisations in the professional services sector, such as the Law Society, started out. The approach is still used today, for example, in newer bodies such as the Society of Licensed Conveyancers¹⁰ or smaller professional organisations such as the Chartered Institute of Patent Attorneys.¹¹

The 'Cupped Hands' Approach

The 'cupped hands' structure represents a further stage in the evolution of professional organisations.¹² This approach recognises that larger and more complex professional bodies need a smaller governing group ('the strategic group'), often referred to as the executive board, to improve the timeliness and focus of decision-making and to hold to account the growing number of permanent staff needed to carry out the organisation's activity. Usually the executive board in this structure is largely, if not entirely, elected from amongst the members of the council. The council formally remains the lead body in governance terms, but day to day decision making responsibility is delegated to the board. The role of the wider council ('the representative group') is now focused on drawing in views from the profession and representing the profession to the wider world.



This approach is used in varying forms by the Law Societies of England and Wales, Scotland and Northern Ireland, all of whom have created delegated Boards or equivalent strategic governance bodies to complement their larger councils. The two examples below show how it can be applied in different ways. In the case of the Royal Institute of Chartered Surveyors (RICS), for example, the

¹⁰ See <http://www.conveyancers.org.uk/>, not to be confused with the Council of Licensed Conveyancers

¹¹ <http://www.cipa.org.uk/>

¹² A concept conceived by the Professional Associations Research Network. For more details, see <http://www.parnglobal.com>

Council has delegated nearly all of its decision-making functions, reserving only very limited powers. In the case of the Law Society of England and Wales, on the other hand, the council remains the main policymaking body with more limited executive functions delegated to the main board.

Box 3: Cupped Hands I: The Law Society of England and Wales

Acquiring its Royal Charter in 1825, the Law Society of England and Wales was established to improve the reputation of the solicitor’s profession by setting standards and ensuring good practice.

Today the Law Society has an elected 100 - person Council, which meets up to seven times a year. It is responsible both for the strategic decisions of the Society, including the annual business plan and budget, and any changes to policy and rules. There are four boards which advise the Council on representative matters and carry out delegated functions for the Council. There are also two boards charged with the oversight of the SRA, and shared support services of the Law Society and Solicitors Regulation Authority.

Box 4: Cupped Hands II: The Royal Institute of Chartered Surveyors

The Royal Institute of Chartered Surveyors (RICS) which began in London in 1792 as the Surveyors Club with 20 members, is now an international professional and standards setting institute for surveyors, with 118,000 members worldwide.

RICS formally has an elected Council at the apex of its governance structure but this now only meets three times a year and has delegated most of its functions either to the management board, an independent regulatory board or a number of separate commercial companies. The 10-person management board is responsible for developing and implementing RICS' business plan to deliver the strategic goals set by the 60-person council.

The Corporate Approach

The ‘corporate’ approach is, to some extent, still emerging within the professional services sector and may be considered a further iteration from ‘cupped hands’ structures, representing more centralisation and professionalization of a professional body organisation. The need for such an approach to governance has grown up as a result of the addition of new roles for such organisations, which may be created through legislation (e.g. statutory regulatory functions), through commercial opportunity or necessity (the creation of additional income streams to supplement membership dues). The expansion of the functions of a professional organisation in order to serve its overarching purpose, inevitably necessitate a change in governance. Changes are needed to reflect different accountabilities (e.g. for commercial versus charitable business) and different skill sets. The key characteristics of the corporate structure are the replacement of elected councils at the apex of the organisation by supervisory boards with overall responsibility for strategy and decision making. Members of the supervisory board are more likely to be appointed, rather than elected, in order to ensure that certain skill sets are available to the board, although some of the appointed members may be drawn from the council.

In this structure the wider council then becomes a mainly advisory body, although it may retain some key reserved powers as, for example, the shareholders of a company would do. This approach is used by the Institution of Structural Engineers (ISE), for example. The form of governance adopted by RICS

contains elements of this approach, but probably falls more clearly into the ‘cupped hands’ structure because of the retention of the Governing Council in the formal role of designated Royal Charter body, as well as the explicit role of the RICS Council in communicating externally.

Box 5: The Institution of Structural Engineers (ISE)

The Institution of Structural Engineers is a 27,000 strong representative and standards setting organisation with members in 105 countries. ISE has made its 12-person board the governing body of the organisation, with the 90-person council acting as an advisory body which meets three times a year.

The ISE has also established a number of separate companies and charitable organisations to carry out different commercial activities, all with separate boards containing members who do not otherwise sit on council. The institution’s general counsel sits on all of the organisation’s commercial boards.

Box 6: The Association of Chartered Certified Accountants (ACCA)

ACCA is a Royal Charter body with over 180,000 members worldwide. It sets standards for one of the recognised accountancy qualifications and acts as the professional body for its members. It is governed by a 36-person council and an executive board led by the CEO. The Council acts purely as strategic body and day to day decisions are left to the CEO and a panel of non-executive advisors. Council has a number of standing committees dealing with remuneration, governance and audit etc. and a series of temporary taskforces. There is a separate independent regulatory board.

Table 2 sets out in more detail some of the key features of these different structures and summarises their advantages and disadvantages.

In addition to the above case studies contained in this part of the report, we have also looked at a wide range of governance practice in Bar Associations and Law Societies around the world, as well as in the other UK legal professional bodies. We found there to be widespread dissatisfaction with governance arrangements for the legal profession in many parts of the world. Reviews have been instigated in a number of major jurisdictions, including Australia and Canada.

The sort of reforms that are being widely considered by law societies at home and abroad include:

- The need for smaller, centralised decision-making bodies to reflect more complex operations;
- The need for a much greater degree of delegation from elected council to an executive body, or a board which can make decisions quickly, involve a wider range of experience and skills and avoid conflicts of interest.
- The need for the board to act for a wider range of stakeholders not just member interests (e.g. public interest).
- The need to reflect changing attitudes to the democratically elected model of representation, due to falling interest by members in standing for election or in voting; coupled with the growth in

alternative methods of engagement and identification of member interest (e.g. using technology and research methods).

At this stage we can draw the following conclusions:

- Good practice in choosing the right apex governance structure for a professional body is not fixed and depends on what the organisation is trying to achieve and for whom it is trying to achieve it.
- As professional bodies become more complex they need to move to different forms of governance approaches in order to remain effective and to meet competing accountability requirements.
- Few, if any, are really satisfied with their governance arrangements. It is almost always a work in progress.
- This implies that there is a real opportunity for CILEx to break new ground and be known as an organisation which has led the way in its governance reform.

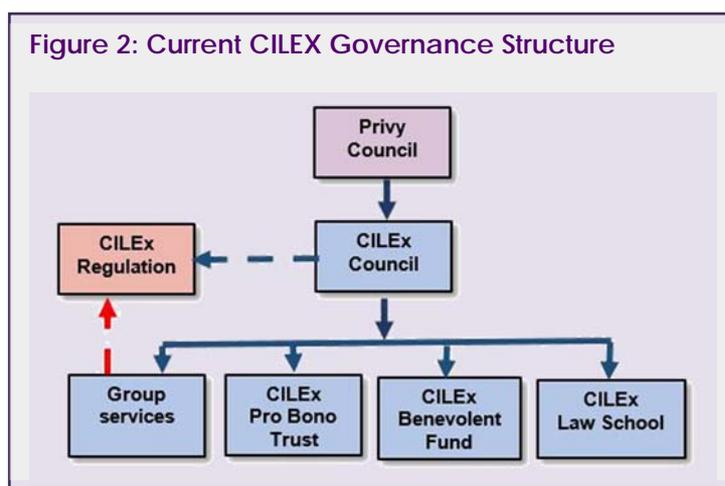
Table 2: Types of Governance Structures Used by Professional Bodies

	Representative Approach	“Cupped hands” Approach ¹³	“Corporate” Approach
Key Features	<ul style="list-style-type: none"> • Council acts as main decision maker. • Elected Council • Allocation of seats on Council according to demographics/special interests/ geography • Functions, strategy • Activity mainly driven by volunteers with limited permanent professional support. 	<ul style="list-style-type: none"> • Board is decision maker - powers delegated from Council. Has main strategic planning function; defines and adopts risk management policies and processes; sets organisational goals and monitors performance of staff • Board usually wholly or predominantly elected from among Council; Board holds CEO and staff to account • Council acts as a check and balance on Board. Can alter the aims and objectives of the organisation and constrain the power of the Board (e.g. a vote of no confidence). Communicates with and to members and feeds into strategic planning. • Elected Council – designation of seats designed to maximise its representativeness of the profession • Activity combines staff and volunteer engagement 	<ul style="list-style-type: none"> • Board has main strategic planning function; defines and adopts risk management policies and processes; sets organisational goals & monitors staff performance • Board appointed and members recruited to cover skills required for organisation’s functions, both from within and outside the profession • Board holds CEO and staff to account • Council has ‘stewardship’ role on behalf of profession – as in shareholder AGM. In practice may be mostly advisory but required to approve strategic direction. • Council may be drawn from pre-approved pool of candidates • Activity driven by staff but draws on volunteers for professional expertise
Advantages	<ul style="list-style-type: none"> • Reflects roots as ‘friendly societies’ run by volunteers • Allows for member participation • Profession feels ‘in control’ 	<ul style="list-style-type: none"> • Combines need for more streamlined decision-making with need to draw in views from the membership 	<ul style="list-style-type: none"> • Allows for timely decision-making • Requires definition of roles of Council and CEO • Encourages clarity of purpose through focus on KPIs and setting of objectives
Disadvantages	<ul style="list-style-type: none"> • No clear role for CEO/professional staff • Accountability through elections can be difficult to achieve unless actively contested, mandates regularly renewed and participation rates high. • Representational role of Council harder as organisation grows and becomes more diverse • Elected Council may lack specific skills required to run new aspects of the organisation (e.g. commercial operations) • Cycle of Council meetings cumbersome and requires delegation 	<ul style="list-style-type: none"> • Council may see its role as ‘the opposition’ to the board rather than as contributors to its thinking and disseminators of its decisions. • Requires resources to support Council member communications with the membership • Doesn’t easily allow for the specific governance requirements of very different functions (e.g. regulatory, commercial or charitable) • When body becomes more complex, elected Council not best vehicle for overarching governance of different subsidiary organisations 	<ul style="list-style-type: none"> • Council may not appreciate distinction between setting direction and getting involved in decision-making • Election of Council limits its capacity to act as a strategic level body - danger of ‘group think’ arising within a single professional group • Risk of disconnect with wider membership

¹³ Professional Associations Research Network (PARN) – www.parnglobal.com

CURRENT CILEX GOVERNANCE STRUCTURE

CILEx, like many other UK professional bodies, has evolved from a voluntary association for legal executives, into an organisation with regulatory powers and ultimately to the status of Royal Charter body with regulatory powers now ring-fenced from the rest of the professional body following the provisions of the Legal Services Act. As a result, CILEx could be characterised in governance terms as a public interest professional body organisation with varied and complex functions.



The Charter states that the management of the Chartered Institute is vested in the Council but permits the Council to delegate any function other than its regulatory functions, which are governed by special provisions. This implies that CILEx could base its governance arrangements on a variant of the ‘cupped hands’ model. At present, however, the CILEx governance structure more closely resembles the simple representative approach, given the existence of single formal tier of governance in its current arrangements (see Figure 2), which

oversees both the core operations of the professional body, performs a number of key roles (see Part 3 for further detail) and acts as the parent body for various subsidiaries. Although much business is delegated on a day-to-day basis to a number of standing committees, this is not the same as formal vesting of powers in another level of governance.

ASSESSMENT OF THE CURRENT CILEX GOVERNANCE STRUCTURE

For CILEx, determining whether and how to change its high level governance approach will therefore depend on the answers to the following questions:

- i. *What is the purpose of the organisation?* – Purpose will determine the functions that the organisation needs to fulfil and this in turn will point to the most appropriate governance structure. For example, as a Royal Charter body, public interest considerations need to be present in the CILEx governance structure. Similarly, a mix of different functions, requiring different subsidiary entities, may also point to a board that is appointed, not elected, in order to ensure the skillsets required are at the organisation’s disposal. On the other hand, as the organisation has a role in promoting the profession, incorporating the voice of CILEx members in its work will be important (although the word ‘representation’ is not used in the Royal Charter).
- ii. *In whose interests does it act?* – If, as the Charter requires, this is to be in the public interest, this is increasingly seen as implying the need to involve external non-executive directors, or lay participants, in decision-making structures.

- iii. *Who decides what needs to be done and how it will be done?* – The definition of the apex governing body in a Royal Charter need not prevent that governing body from delegating most of its powers. This is the case, for example, in the RICS charter.
- iv. *Who implements these decisions?* – In a more complex body, the role of permanent staff tends to increase over time, supplanting volunteer involvement. The challenge for a professional body is to maintain the voice and expertise of the profession whilst allowing the organisation to run effectively. It also requires clear definition of roles. Where the lines between volunteers and staff in implementing the organisation’s objectives are blurred, this can lead to tension. The Law Society of England and Wales has, for example, periodically suffered from the perception in some quarters of its council that its officer team/main board is too close to (or has been ‘captured by’) the chief executive.
- v. *Who holds the implementers to account?* – Again, if the lines between officers and CEO are not clearly drawn then issues can arise. This reinforces the need for appropriate control committees (e.g. remuneration, nomination) to be put in place.
- vi. *What checks and balances are there on the decision makers?* – Good governance requires that no power is entirely unfettered but equally that controls do not stymie all decision-making.

Table 3 assesses the current CILEx structure against some of the good governance practice indicators that have been reviewed in this section of the report.

Table 3: Benchmarking the CILEx Governance Structure

Good Governance Questions	Good Practice for a public interest body with complex functions	Current CILEX governance structure	Assessment
What is the organisation’s purpose?	Whatever governance units it requires (but not too many) in order to allow the organisation to fulfil its purpose	Separate Law School, regulatory arm, and charitable organisations; other functions governed by Council	Current arrangement of governance units in relation to functions is unbalanced, leading to operational tensions
Who decides?	A body able to act in the public interest – independent of sectional interest	The Council	The Council is currently too large and insufficiently independent to be considered an effective public interest decision maker. A smaller Board with greater lay representation, defined terms of reference and job descriptions would be more appropriate to meet this requirement.
Who implements?	Professional staff	Professional staff, council and officer team	Most of CILEx’s work is undertaken by professional staff, with committees mostly made up of council members for advice and input. The President also has a number of ex-officio functions. These need to be reviewed to ensure they do not blur lines. Roles and responsibilities of professional staff and volunteers need to be more clearly outlined and delineated to avoid conflicts and uncertainty.
Checks and balances	There are sufficient checks and balances present in governance arrangements	Checks and balances largely exist through external controls imposed on subsidiaries and the AGM.	The current situation needs to be reviewed and a system of robust checks and balances introduced into the governance structure. This is especially the case if the delegation of powers by the CILEx council is to be increased

CONCLUSION

Overall, our assessment is that CILEx's governance structure is currently inadequate for the task of overseeing the functions that the organisations has accumulated over time.

It does not appropriately reflect its status as a Royal Charter body, which implies a public interest role, nor does it reflect good practice for the balancing of different, and sometimes competing, professional interest functions, through appropriate checks and balances. Recommendations on what might be a more appropriate governance structure for the main CILEx body in future are contingent, however, on considerations of what happens within the CILEx Group as a whole, which is considered later in this report.

Part 3: Governance Arrangements

INTRODUCTION

Before moving on to issues relating to the wider CILEx Group, it is first important to touch on the **governance arrangements** that should be put in place to ensure the apex decision-making body's effectiveness and accountability.

The question of governance arrangements covers issues such as: the size and composition of governing bodies; the term of office of the chair and members of those bodies; the selection processes and terms of reference used to complete the membership of those bodies; remuneration policies etc. Table 4 sets out the arrangements used by some of the bodies looked at in the previous discussion on governance structures. This allows us to draw some conclusions about the most common good practices adopted in the professional sector, which are set out in Box 7.

Box 7: Summary of good practice: Governance Arrangements

- Size: Where boards exist they tend to be between 10-15 people in size
- Selection: The boards of professional associations are increasingly appointed, in whole or part, by a transparent, public appointments type process, which require job descriptions and terms of reference. A standing nomination committees may exist.
- Composition: The composition of governing boards varies but there is a general tendency to include members from outside the profession, to a greater or lesser extent.
- Duration: Term limits on board members tend to be either 2 or (maximum) 3 terms of three years.
- Remuneration: Board remuneration is not standard, but where it exists it tends to be on a fixed fee basis calculated on an assumed number of days plus expenses. Board chairs are normally paid slightly more than members.
- Board policies: Good boards have in place a suite of good governance policies (e.g. conflicts of interest, registers of interests etc.), as well as performance management.

Table 4: Governance Arrangements in Professional Body Boards

Organisation and status	Board responsibilities	Board size and composition	Board term of office	Selection and JDs for Board Members	Board remuneration	Other policies/notes
Law Society	Council determines major issues of policy and appoints members of boards and main committees. Management Board is responsible for some operational decision-making but operates within very limited parameters laid down by council.	Board = 10 members Includes officeholders, Council members and CEO Council = 100 members still takes most major decisions	3-year term	Board members elected from Council	Officer team remunerated, small honorarium for council members and expenses. Main Board remunerated.	(NB. Arm's length regulatory arm in form of SRA) The Law Society has been trying for over a decade to reform its governance structure post Legal Service Act and has to date been unable to agree on a way forward.
RICS – Royal Institute of Chartered Surveyors	Board responsible for day-to-day performance and delivery of the business plan; Council responsible for overall strategy;	Board =10 persons; 7 drawn from profession, 3 lay members	3-year term (subject to a review after 1 year), with a cap at 8 years	All Board positions are advertised and subject to interview and public appointments process. All positions have JDs and TORs advertised	Attendance fees and expenses	(NB. Arm's length regulatory board). Presidency team elected by Council do not sit on board. Play mainly external facing role
RIBA – Royal Institute of British Architects	Council determines major issues of policy and appoints members of boards and main committees Board = assumes fiduciary responsibility and executes its business plan, as well as having oversight of RIBA's main committees and commercial arm (RIBA Enterprises)	Council = 60; elected from membership body Board = 13; appointed	Council = President – 2 years; Council member – 3 years; no more than 6 consecutive years	All Board positions are advertised and subject to interview and public appointments process.	Expenses only	
The Institute of Structural Engineers	Council provides high-level guidance to board and is responsible for stakeholder relations Board develops policy; acts as trustee; manages internal processes	Council = 40; elected Board = 12; elected from council	3 years	Elected from Council	All unpaid except chief executive	Day-to-day operations are conducted by directorates, led by the Chief Executive

CILEX GOVERNING BODY ARRANGEMENTS

The CILEx Council, which acts as the organisation’s main decision-making body, consists of up to 23 members (19 fellows elected as Constituency members, and up to four co-opted, appointed fellows). The Council appoints a Chief Executive, who together with the officer team (the President, Vice-President and Deputy Vice-President) and staff is responsible for the implementation of the strategic and policy decisions made by the Council. The officers are elected by the council from within their number to serve as a presidency team.

Council members serve renewable terms of 3 years up to a maximum of 12 years. There are various standing committees of Council (education, governance, finance and remuneration and membership) for which tenure is limited to 2x3 years for Council members and 2x2 years for lay members.

ASSESSMENT OF CILEX GOVERNING BODY ARRANGEMENTS

How does CILEx match up against the practices adopted in comparable, more complex professional organisations?

Table 5: CILEX Governance Arrangements Compared to Good Practice

	Good Practice ¹⁴	CILEX practice	Assessment
Size	10-15	23	Too large to act as a board of directors (as implied by Royal Charter)
Selection	Transparent, public appointments type process. Specific roles	Election from council. No specific job roles.	Move to smaller Board-type structure would require modifications in selection processes and clarification of terms of reference.
Composition	Mixed to include independent representation from outside the profession	Only CILEx fellows	Too restricted to fulfil public interest Charter role. Membership should involve lay members and in public interest bodies lay membership should be in the majority.
Duration	Average 6-8 years	12 years	Good practice would require that there should be a limit on overall time that can be served on governing body
Remuneration	Fixed fee plus expenses	Payment is made to the employers of all Council and Standing Committee members	No fixed practice on remuneration. Usually board level remuneration is modest and linked to time commitment
Independent control committees	Nomination, remuneration and audit committees	Standing committees include finance and remuneration and governance. Nominations working party also exists	CILEx standing committees concerned with governance, nominations and finance should be independent which implies that a majority should be lay members .
Performance assessment	Board members assessed annually	Not applicable	CILEx board should introduce annual appraisals to fall into line with good practice.

¹⁴ This is drawn from a combination of the standards set out in Table 1 and the practices adopted by comparable organisations.

CONCLUSION

The current governance arrangements used in the peak CILEx governing body (though not in its more recent subsidiary organisations) are old fashioned, and fall short of what is today considered standard good practice for corporate governance or governance in public interest entities. In particular, issues such as size, selection, composition, tenure, remuneration, control and performance assessment all need to be considered actively in any future governance design.

Part 4: The Governance Model for the CILEx Group

INTRODUCTION

In this part of the report we review the governance model used for the CILEX Group, including the challenges and constraints facing its individual constituent parts and how it fits together as a whole. As explored in the previous section, any recommendations on how the organisation might adapt its governance model and arrangements can only sensibly be made after considering any issues that arise in the Group's governance.

THE CILEX GROUP

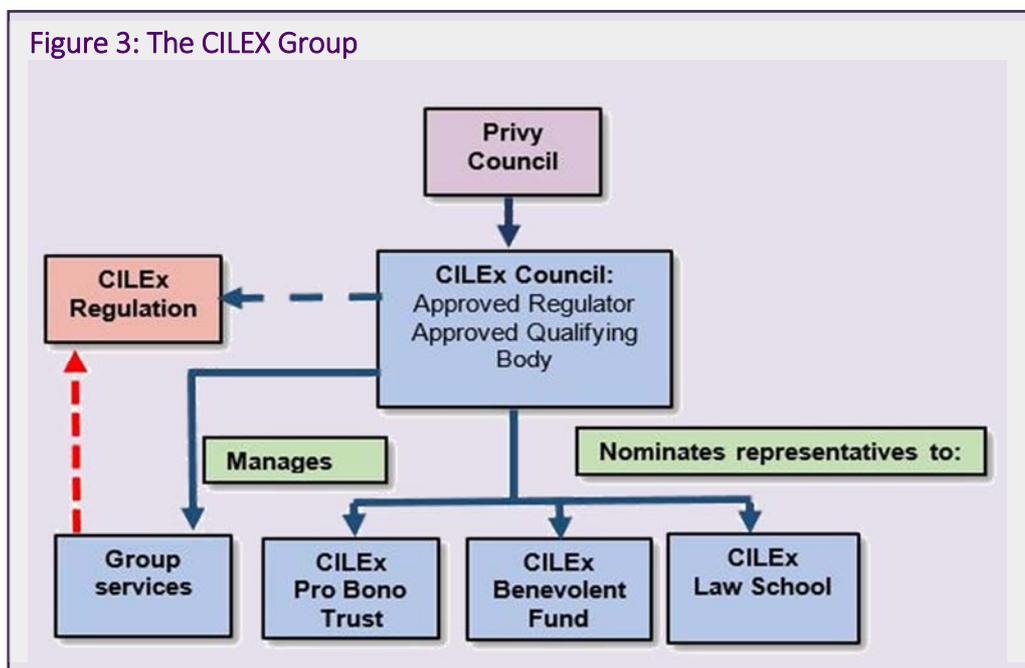
The CILEx Group includes the following:

- **CILEx** - which acts as a professional body and performs other roles required, including those conferred by virtue of the Royal Charter and Bye Laws. In addition to its professional body role, the council of CILEx:
 - Acts as the approved regulator under s.20 of the Legal Services Act with powers delegated to CILEx Regulation
 - Provides services to CILEx Regulation under a service level agreement from its group services department (HR/IT etc.)
 - Acts as the governing body of the Awarding Organisation of qualifications on behalf of OFQUAL, Qualifications Wales and CCEA. In accordance with the regulations of these qualification bodies, the power to act as the Awarding Organisation must be vested in apex decision-making organ. CILEx Regulation also has oversight of the quality assurance arrangements of the Awarding Organisation – to assure that the qualifications on which it relies meets its minimum requirements. This oversight is conducted in the first instance through the Quality Assurance and Compliance Committee which is an independently chaired committee comprising CILEx Council representation and CILEx Regulation as well as independent members.
- **CILEx Law School (CLS)** – which is a separate, wholly owned subsidiary of CILEx. Although it has a separate managing director and Board. The Board of the Law School comprises 2 members of the management team of CLS, together with up to 7 non executives (4 CILEx council nominees, the CILEx CEO and 2 independent non-executives).
- **The CILEx Benevolent Fund**, which is a registered charity. Benevolent Fund Trustees are appointed by CILEx in accordance with the Trust Deed. No more than 3 trustees can be nominated by the CILEx council and no more than 2 of these can be ex-officio. At present there are 5 trustees of the Fund, 3 of whom are nominees (none acting ex-officio) and 2 lay appointments.
- **The CILEx Pro Bono Trust**, which is also a registered charity. The Pro Bono Trust must have between 3 and 8 trustees, one of which should be a lay appointment. These are appointments made by the

Council drawn from the CILEx membership. Trustees are appointed for 3 years and may serve no more than 2 consecutive terms.

- **CILEx Regulation** – which is a ring-fenced independent regulator overseen by the Legal Services Board. This is established as an entirely separate limited company with a maximum of 7 directors, the majority of whom must be lay appointments. The other directors are CILEx Fellows not on Council and the Chief Executive of CILEx Regulation. CILEx Regulation falls within the CILEx Group by virtue of the ultimate statutory responsibility that has been vested in CILEx. The relationship between CILEx and CILEx Regulation is governed by an internal Protocol and Service Level Agreement made in accordance with the Internal Governance Rules of the LSB. These arrangements govern budgeting for regulatory activities, resource provision, appointments, communications and accountability. CILEx Regulation staff are formally employees of CILEx but are accountable only to the Board of CILEx Regulation.

The interrelationships between these various component parts of the CILEx Group are modelled in Figure 3.



ISSUES IN CILEX GROUP GOVERNANCE

Figure 3 illustrates that the organic growth of CILEx functions has led to a number of governance issues which need to be tackled alongside any general modernisation of the apex body’s governance as recommended in the previous section. These issues arise, in particular, in relation to:

A. The CILEx Law School (CLS):

i) *OFQUAL conflict*

The Council exercises qualification awarding powers granted under the General Conditions of Recognition (GCR)¹⁵. This means that the Council is empowered to recognise other providers of CILEx qualifications, in addition to the CLS. However, given the direct role that CILEx plays in

¹⁵ Known as the Standard Conditions of Recognition (SCR) in Wales

the management of CLS through its representation on the CLS board, there would appear to be a risk of conflict which is currently not managed; since the way in which the Council may choose to exercise its powers as an Awarding Organisation could affect the competitive environment of the CLS. This suggests an urgent need to separate more cleanly the decision making of CILEx as an Awarding Organisation from the CLS.

The Awarding Organisation Conditions of Recognition note that:

“A4.1 For the purposes of this condition, a conflict of interest exists in relation to an awarding organisation where –

(a) its interests in any activity undertaken by it, on its behalf, or by a member of its Group have the potential to lead it to act contrary to its interests in the development, delivery and award of qualifications in accordance with its Conditions of Recognition,

(b) a person who is connected to the development, delivery or award of qualifications by the awarding organisation has interests in any other activity which have the potential to lead that person to act contrary to his or her interests in that development, delivery or award in accordance with the awarding organisation’s Conditions of Recognition, or

(c) an informed and reasonable observer would conclude that either of these situations was the case.”¹⁶

Direct discussions with the relevant department of OFQUAL have helped to shed some light on the nature of the conflict concerns of the qualifications regulator. These concerns are twofold:

- First, the integrity of qualifications could be undermined if the same governance structures are involved in the delivery of training and assessments and in moderating the results of those assessments. This is a potential risk in the current CILEx Group model, given the overlapping membership of CLS board and the Council, which takes the OFQUAL decisions.
- Second, there could be competitive conflicts if the relationship between the awarding organisation side of CILEx was perceived to be too close to CLS and took decisions which favoured it, or appeared to do so. The risks of such a perception increase as CILEx now accredits a wider range of providers offering a wider range of courses.

It is also a priority for OFQUAL that Awarding Organisation decisions are taken at the top of the bodies it accredits. This can help to protect against the kind of conflicts set out above and is more likely to ensure that proper risk management is put in place, in accordance with standard, modern Board practice. However, OFQUAL have also told us that they are not prescriptive on structures and are more interested to see that the model of governance that is adopted in any organisation it accredits, has effectively identified risks and put in place systems to manage those risks.

ii) The status of CLS

There is also a wider question of how the CILEx Group should view CLS, as this will determine its status within the Group in the longer term. CLS is an important commercial operation for CILEx and its ability to generate revenue may be of even greater importance in the longer

¹⁶ General Conditions of Recognition, OFQUAL, June 2016

term, if there is an absolute separation between legal regulators and their parent professional bodies. However, there is a feeling within the CLS executive that the absolute prioritisation of surplus generation for the Group could potentially undermine future investment in the Group's training arm.

B. CILEx Regulation

Although the LSB has given the IGRs adopted between CILEx and CILEx Regulation a clean bill of health, the CILEx Group remains vulnerable in the event of any significant change in the way in which the legal sector is regulated. Although CILEx Regulation is independent of CILEx, there are still points of interconnectedness, in particular because:

- the CILEx Group remains the approved regulator;
- the CILEx Group is responsible for accrediting providers who meet the standards required for entry into the profession (NB. see the definition of regulation set out in Box 1 on page 8);
- the right to administer oaths is a practice right that arises from the title of Chartered Legal Executive and this title is conferred by CILEx;
- CILEx provides shared services to CILEx Regulation, which inter alia means that CILEx Regulation staff are employees of CILEx.

The extent to which any or all of these issues is a problem in future will depend on the extent to which the model for legal regulation is changed. Although at this stage it is impossible to make any concrete predictions on possible outcome or timetable of any review, indications from Government departments suggest that the most robust assumption on which to plan in future is for total separation of regulatory and professional body functions

- In this scenario the delegated regulators would stay in a similar form as today, but regulatory powers would be removed from the current approved regulators and be vested entirely in their now entirely separate regulatory arms, through an amendment to the Legal Services Act 2007. This would remove the assumption that services could, or would, necessarily be shared between the regulatory and professional services arms; it would remove any link between authorisation to practice and CILEx qualifications and it would require a change in the objects of the CILEx Charter to remove references to regulation.

C. CILEx Benevolent Fund

There are no major current governance issues for the CILEx Group in relation to the Benevolent Fund. Trustee appointments are made by Council and may include ex officio appointments. In future it is recommended that all appointments are made following an independent nominations committee process.

D. CILEx Pro Bono Trust

There are no significant current governance issues for the CILEx Group in relation to the Pro Bono Trust, other than the agreed decision by the trustees to apply for Chartered Incorporated Organisation status. Appointments are made by the Council from the wider CILEx membership and beneficiaries of the Charity are members of the public. However, the appointments process used by the Council for the pro bono trust could perhaps in future be subject to a more independent nominations committee.

Table 6 summarises the issues that exist in relation to the Group.

Table 6: Dealing with CILEx Group issues

Issue	How
Address CLS governance	Make CLS Board more independent of the Council with appointments subject to independent nominations process.
OFQUAL role/CLS conflict of interest	OFQUAL’s position is that potential or actual conflicts of interest, whether educational (i.e. those who set exams should not moderate assessments), or competitive (ie. that relations between an organisation’s training and accreditation arm should not give rise to suspicions of favouritism) are recognised and addressed. Any new Group structure must ensure that any potential conflicts in the CILEx model are identified and managed.
Greater separation in regulation: This will have potential consequences for the following parts of the Group structure: Shared services, the status of CILEx Regulation employees.	Will need to be addressed in choice of governance model. Full requirements will not be known for some time. Best option will be to choose a model which enshrines regulatory separation, thus reinforcing arguments against more radical change.
Benevolent Fund nominations	Subject benevolent fund nominations to a process overseen by a more independent nominations committee
Pro bono trust nominations	Subject pro bono trust nominations to a process overseen by a more independent nominations committee

In addition to the above, there is the future role of the CILEx CEO to consider. Box 8 sets out the broad role and accountability of CEO positions in main professional comparator bodies. This suggests that if there is to be a CILEX CEO, he/she should be responsible for the Group (however this is to be drawn) and should formally be accountable to the Royal Charter body. Any decision on the role and job description for this post will, however, depend heavily on the eventual shape of the CILEx Group model. One important point to note is that all of the Group CEO roles outlined below involve significant operational control across the operations of the Group and therefore a fairly high level of integration of these operations.

Box 8: The Role of Group CEO

The Association of Chartered Certified Accountants - The Chief Executive is appointed by the Council of the Association, whose role it is to effectively deliver the strategy envisioned by the Council. The Chief Executive is responsible for the activities of the Group and is supported by a team of four executive directors and a large group of non-executive advisers.

Royal Institute of Chartered Surveyors - The Chief Executive is responsible for the RICS Group and is accountable to the Management Board for delivering the expected performance results defined by its annual operating plan. The CEO also supports the Governing Council in defining its strategic priorities and goals.

Royal Institute of British Architects - The Chief Executive, or principal executive officer, is appointed by the Council of the Royal Institute. S/he is responsible to the Council and manages the establishment and conduct of the executive business of the Institute.

Institution of Structural Engineers - The Board appoints the Chief Executive, who implements all decisions made by the Board and Council. The Chief Executive and team of four supporting directors is tasked with the day-to-day operations of the Institution.

Part 5: Options

INTRODUCTION

This section of the governance report pulls together the preceding analysis to suggest options which would seek to address the current governance shortcomings both of the CILEx Council and of the CILEx Group against the backdrop of uncertainty about future governance changes that might be necessitated by further moves to separate legal regulatory functions from representation.

The following are the key issues that need to be dealt with:

- The adoption of a governing structure which reflects best practice for Royal Charter bodies and professional and commercial entities more generally. This suggests the replacement of a larger, elected council with a smaller, appointed board.
- Improve governance arrangements (size, composition, selection and performance management) of the apex body within the CILEx Group and its component parts.
- The adoption of a model which:
 - Removes regulation from the Group
 - Introduces a cleaner separation between the Law School and CILEx's Awarding Organisation powers
 - Enables CILEx Awarding Organisation decisions to be taken at the appropriate level of governance within the Group, respecting the need for the organisation's decision-making to be independent
 - Creates a clear governance structure reflecting the role of the other functions which exist within the Group (i.e. professional membership functions and group services)
- The decision about what role, if any, a new Group CEO might fulfil.

OPTIONS

We have identified three distinct potential alternatives for CILEx's future governance model. These are:

- i) A Board-led Model: In this scenario a board is designated as the parent CILEx Royal Charter organisation. The Council no longer has a formal role in the governance structure but becomes a purely advisory body. The board would be appointed by a transparent public appointments process. As the board would still need to reflect the public interest nature of the organisation's Royal Charter, for it to contain some independent lay members as well as CILEx Fellows. This model could potentially work under a range of different approaches to the separation of regulation and representation. Here it is assumed that CILEx Regulation becomes an entirely separate entity and the SLA for shared services is no longer required.
- ii) A Split Model: In this model, CILEx introduces a clearer separation of its representative functions from regulatory arm than currently. In this model, the parent body of the Royal Charter becomes a purely neutral, public interest body sitting between two

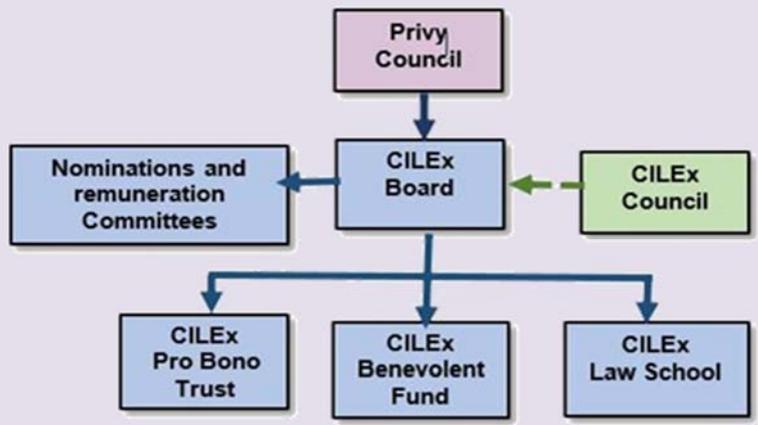
independent arms CILEx Regulation and a CILEx Representation. The main board would be entirely appointed through a public appointments process drawn in combination from the CILEx membership and lay appointments. The main CILEx Board would oversee CILEx education and shared services and would make decisions as an Awarding Body for OFQUAL. A new, separate representation board, would parallel the structure of the regulation board (e.g. in its independence from the CILEx parent board whilst remaining part of the CILEx Group). This representation board would be made up of elected Council members who would oversee CILEx professional representative functions and would act as the parent body for the Law School and the various existing charitable subsidiaries. CILEx Representation would have an SLA with Group Services which paralleled that of CILEx Regulation. The representation board would replace the current Council but have a smaller membership.

- iii) A Subsidiary Model: In this model, the CILEx charter body is a board which acts in essence as a holding company for a number of independent subsidiaries, all of which operate within the parameters of the CILEx strategy. The board oversees the finance and governance of the group as a whole but leaves a wide range of operational independence to its subsidiaries which are all able to act commercially.

Option 1: A Board Led Model

Characteristics: In this scenario, regulation has been divested. A smaller board would be designated as the parent CILEx Royal Charter organisation and would be majority appointed, with lay representation, in accordance with good practice. The council would no longer have a formal role in the governance structure but would become a purely advisory body. It could, however continue to supply some the candidates for the board. As is also the widespread practice in well run governance models, the board would establish independent committees to deal with issues such as remuneration, finance and audit, and nominations. The CLS board would contain independent appointments made by the board nominations committee, allowing it to be run as an independent subsidiary, responsible to the parent body but with operational independence. Awarding Organisation decisions would be made by the CILEx Board. The President would be elected by the Council and would act as the main external representative of CILEx and sit ex-officio on, but not chair, the board.

Option 1: A Board Led Model



Pros: This is a simple structure. An appointed board structure is easier to justify as public interest led than an elected council. It also fits with a world in which regulation has been separated from professional representational matters.

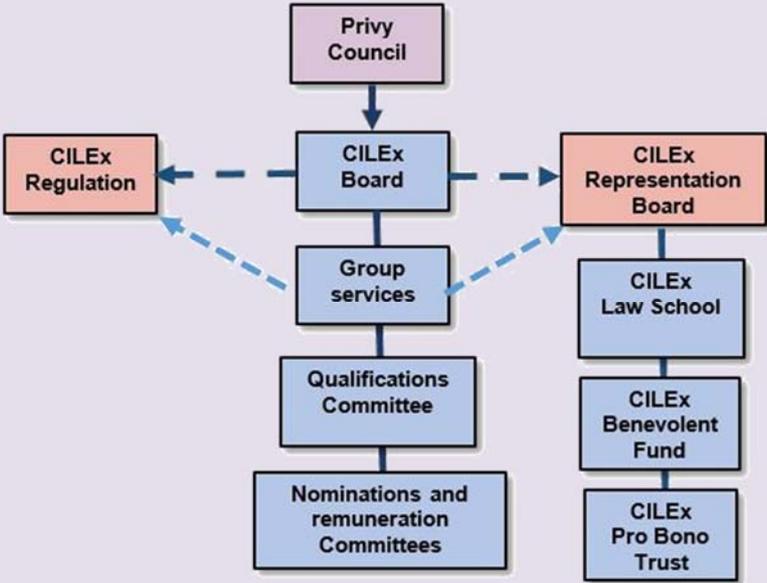
Cons: Although as a Charter body, representation of the interests of the CILEx membership is not a core function, the risk of this model is that members may feel that they are removed from the core of the organisation. It is also questionable whether it makes sense to retain a council of the size that CILEx currently has. Generally, in this sort of model, a small board sits alongside a much larger council. This model also does not necessarily deal satisfactorily with potential conflicts of interest between the Awarding Organisation function of CILEx and the CILEx Law School. It also leaves the governance relationships of other areas of the CILEx group unclear.

Precedents: Institution of Structural Engineers (the Board as Charter body with purely advisory council)

Option 2: A Split Model

Characteristics: This is a model which assumes that, in a transitional period, regulation and professional representational matters are more clearly separated, allowing for an eventual total divorce. This separation is achieved by interposing a separate purely public interest professional body in between the membership functions and the regulatory functions. The model assumes that there is some longer term utility in a division between the public interest and member based functions of CILEx. The public interest side of the organisation would be responsible for qualifications and group services provided to others, as well as overall group strategy and finance, whilst the member led side of the organisation would be responsible for training and providing services to members. A new smaller Representation Board would replace council. Both the representation and regulation boards would sit at arms-length from the CILEx Board which would be made up of a lay majority with independent CILEx fellows not otherwise on the Representation Board.

Option 2: A Split Model



Pros: This model reflects the public interest nature of CILEx as a Charter body. It would allow for total separation by the simple hiving off of CILEx Regulation, leaving public interest functions under the board and more member type functions and the Law School under the purview of the separate Representation arm of the organisation.

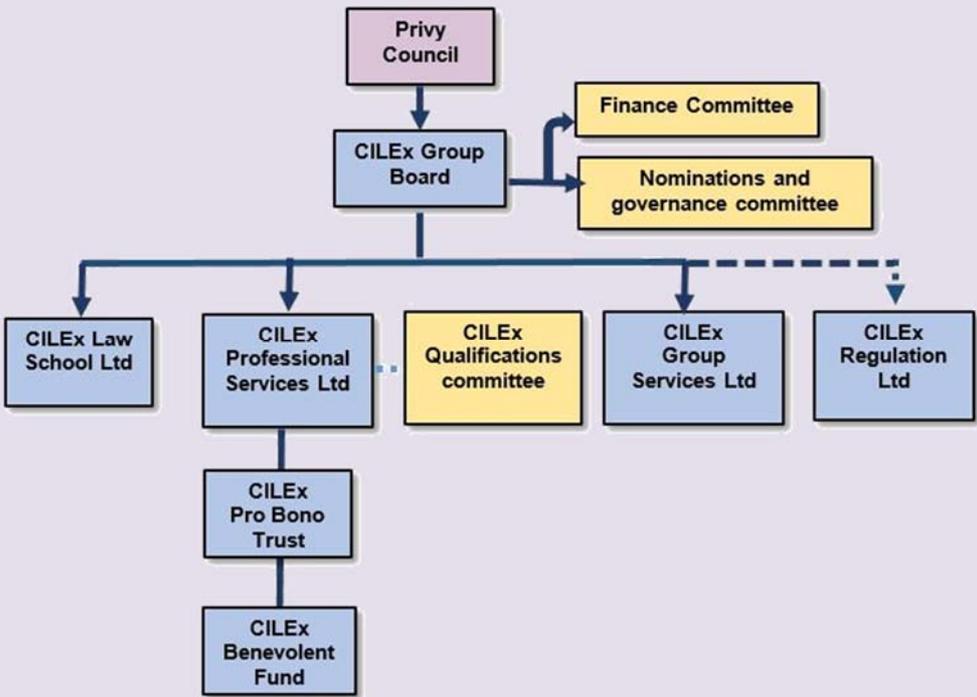
Cons: This results in a three way split of the current organisation and leaves the Council/Representation arm semi-detached from the Charter body. Although it achieves a separation of the Awarding Organisation function and the Law School training function, it does not satisfactorily resolve the long term role of CLS.

Precedents: The Law Society – which created a Business Oversight Board to act as a neutral arbiter between the SRA and Law Society. Although this does not work well and the moderating structures between the SRA and Law Society are under constant review. These shortcomings are due as much to personalities as to design.

Option 3: A Subsidiary Model

Characteristics: This model replaces Council with a Group Board rather than adding an additional structure to the top layer of governance as in the previous two options. It then deals with the issues that arise within the CILEx Group by more clearly separating and delegating functions to a number of independent subsidiaries. CILEx’s member body functions, including its role as the awarding organisation would be incorporated into a separate independent subsidiary whose decision-making is clearly separated from any influence related to the Law School. All of the first tier entities under the Group Board, with the exception of CILEx Regulation, which can eventually disappear from this model without undermining it, could be empowered to operate commercially. Overall, the Group Board would be smaller than the current council and made up of chairs of the subsidiary companies plus a number of other independent appointees.

Option 3: A Subsidiary Model



Pros: This model deals most effectively with issues that arise within the CILEx Group, whilst also ensuring that the apex of the governance structure is streamlined.

Cons: It requires the creation of a number of new entities and ensuring their integration and ongoing commitment to a single CILEx strategy will be a challenge.

Precedents: There are no exact precedents for this model. It bears some strong resemblance to the models adopted by ACCA and RICS in terms of the way in which key functions are managed through separate commercial entities. The apex of the structure is different to both of these other examples and reflects the unique requirements of the CILEx situation: RICS retains both a Board and an advisory Council, the latter to reflect its international membership base; ACCA has a purely executive board supplemented by a supervisory council.

Part 6: Recommendations

INTRODUCTION

The above options set out three possible models for the future structuring of the CILEx Group, all of which represent a marked improvement on the current situation. We are however, recommending the adoption of Option 3 as a starting point for further discussion because:

- It offers maximum flexibility in relation to the future position of CILEx Regulation. By creating a separate Group Services company, CILEx can begin to make existing arrangements more transparent in preparation for total separation. However, by making the parent body in the form of the Group Board a more independent Board, CILEx is reinforcing the argument for the retention of CILEx Regulation within the overall CILEx Group, should that be a feasible option for the future.
- It is a model that would deal most effectively with any tensions or competing conflicts between the functions or duties of the different parts of the organisation.
- It puts the representative, member side of CILEx on an equally organised footing to the education and training functions of the organisation, thus preparing it to be able to cope better with the demands of a changing membership.
- It retains the voice and inputs of CILEx members in all parts of the governance structure, with the proviso that no individual can be in two structures at the same level (i.e. subsidiary chairs will be on the Group Board but members cannot serve on more than one subsidiary board).

This top level recommendation then leads to the following more detailed recommendations

Recommendations

The following eleven recommendations emerge from the analysis contained in this report and cover governance structure, arrangements and the model for the CILEx Group.

Recommendation 1: We recommend that CILEx adopts option 3, as set out in part 4 of this report, as suggested above, as the starting point for developing the CILEx model in future. This means that a Group Board replaces the Council as the Institute's Charter body and provides the overarching governance of the Group. All of the major functions of the Institute are then incorporated as independent subsidiaries, the reasons for this are explained in more detail below. The Group Board has responsibility for setting the strategy for the Group as well as operational and financial targets. It holds to account the subsidiaries of the Group through their chairs.

Recommendation 2: The CILEx Group Board would consist in this model of 7 members. The chairs of each of the subsidiary boards would sit on the main Group Board, in addition to 4 additional appointed members. The Chair should ideally be an appointed lay person. These conditions allow the Board to function as a truly public interest organisation, as required by Royal Charter but this also allows the President, who would chair the Professional Services board, to remain unquestionably the most senior fellow in the governance structure.

Recommendation 3: Members of the Group Board and subsidiary boards should be subject to limits of 2 x 3 year terms. Independent members of the main board and appointed members of all subsidiary boards should be recruited by an independent appointments process overseen by a nominations committee, on basis of desired and defined competencies and job descriptions. These appointed

positions would include both CILEx Fellows and lay individuals and the balance between these would depend on the function of the relevant subsidiary board.

Recommendation 4: All board members (of the Group and its subsidiaries) should be subject to annual performance management as is the norm and remunerated in accordance with good board practice. There should be no assumption that the remuneration for all boards would be the same. Performance management would allow CILEx, as an organisation, to identify what additional training or support board members would need in order to perform their governance roles.

Recommendation 5: The Group Board should establish a number of independently chaired, standing committees for nominations, finance and remuneration matters. These standing committees would provide support for all appointments across the Group.

Recommendation 6: The main professional body functions of CILEx would now be ringfenced within a corporate entity which sat in governance terms below the Group Board. This structure would allow CILEx to maintain the different functions that it currently undertakes, which would not be the case without this ring fencing. From the external perspective, CILEx as a representative membership body would not have changed; there would still be a Council, although this might now be more properly called 'the Professional Services Board'. This Board should have a smaller membership than currently and an appropriate number would be around 11-15 in size. The chair of the Professional Services Board would be the President who would retain the ambassadorial function for the Institute and carry out all ceremonial and representative functions. This Board would retain oversight of the Institute's charitable bodies, which are closely linked to its membership activities. Although this Board would have fewer responsibilities in relation to other parts of the Group compared to the current Council, new tasks will present themselves once regulatory separation takes place. In this new world, the Professional Services Board will need to lead on developing and delivering an attractive membership offer.

Recommendation 7: The Law School should become a more independent subsidiary with non-executive directors who are all appointed through an independent process. CLS would be accountable to the Group through the Chair of its Board, who would sit on the Group Board. The size of the CLS Board should remain as at present with non-executive members who can reflect both education and training specialist knowledge as well as knowledge of the CILEx profession. The operational independence of CLS would allow it to run more separately than at present, contracting services from Group Services as required, but it would be guided by the overarching strategy and financial targets of the Group.

Recommendation 8: The CILEx education services department would run the CILEx Qualifications committee and would be responsible for managing potential conflicts and risks, as identified by OFQUAL. These operations would be more isolated from CLS in governance terms than at present. The Professional Membership Board would take Awarding Organisation decisions on the recommendation of the CILEx Qualifications committee and, as a separate subsidiary within the Group, this would satisfy the OFQUAL requirement for awarding organisation decisions to be taken at the top level of the governance structure.

Recommendation 9: CILEx Pro Bono Trust and Benevolent Fund structures remain as now. Any required appointments made through the nominations committee and ratified by the Professional Services Board.

Recommendation 10: There are a number of options in relation to the future treatment of CILEx Group Services:

- **Option 1:** CILEx Group Services, chaired by a qualified lay individual (probably an accountant or tax specialist) is also incorporated as a subsidiary under the CILEx Group, allowing it to contract with CILEx Regulation and potentially to develop the capability to provide shared services to other similar bodies (e.g. other smaller regulators). It would also adopt more transparent transfer pricing to enable the Group Board to have a better understanding of the usage of such services within the group and the true financial position of all the subsidiaries. In these circumstances, a Group Services Board would be a small board of between 3-5 people who should include a mix of independent non-executives with relevant experience in finance, tax or HR and CILEx Fellows.
- **Option 2:** CILEx Group Services could instead sit as an operational department under the Group Board. This would enable Group Services to provide support to the Group Board and the argument could be made that it is sufficiently arms-length from the other operational units of the CILEx Group, despite not being legally incorporated as a separate body.

The advantages of option 2 are that it offers a solution to the problem of how to support the Group Board (see recommendation 10 below) and simplifies the number of independent governance units that the CILEx Group needs. On the other hand, it creates a potential imbalance in the governance since the proposed model anticipates each subsidiary chair sitting on the Group Board as directors of the CILEx Group, alongside 3 external directors. If CILEx Group Services is no longer a separate company with a chair represented on the Group Board, then there is a risk that the external directors would outnumber those directors of the Group Board representing CILEx subsidiaries. Option 1 also has the advantage that a corporate structure around Group Services would make it easier for this part of the organisation to sell its services outside the Group.

On balance, option 1 is recommended as the starting point for discussion as it offers most flexibility.

Recommendation 11: Support the Group Board effectively. CILEx has hitherto had a CEO to support Council and manage the organisation. In the new governance model envisaged, the apex Board in the governance model is relatively small and although it has significant strategic and fiduciary duties, it has little direct operational responsibility. In these circumstances, it is worth asking what kind of Group CEO does CILEx need, if indeed it needs one at all? The following are the options that might be considered:

- **Option 1:** Appoint a Group CEO. The advantages of this approach is that it is familiar and there would be one individual who would be the permanent face of the CILEx executive to the rest of the world. They would act as the guardian of the Charter body and be responsible for the overall strategic direction and financial health of the Group. The downside is that the job, as envisaged, lacks significant operational control and creating this post would risk undermining the independence of the various subsidiaries.
- **Option 2:** Create a company secretary role. This individual would act as the executive for the Group, ensuring that the Charter company was fulfilling its obligations, managing reporting requirements etc. The advantage of this is that the role would clearly have no remit to get involved in the operations of the Group subsidiaries. On the other hand, whilst a company secretary would be well placed to ensure Group compliance, providing the required strategic leadership to the Group might be more difficult.
- **Option 3:** Replacing the Group CEO with a lay chair. This option would require a more powerful chair of the Group board who would play a more hands on role in the organisation, meeting with subsidiary boards and executives on a regular basis to ensure that the strategic direction of the Group is maintained and to provide any mediation required between different parts of the Group. This has the advantage of allowing for the creation of strong strategic leadership within the Group but without the risk of undermining the necessary independence of the various subsidiaries.

- Option 4: Use Group Services support. In this option, group services would not be established as a separate company but would instead sit immediately under the Group Board and provide support to it as well as to the rest of the Group. This would be possible because Group Services would, by definition, be serving each part of the organisation on an equal footing. The downsides of this approach were explored above.

There is no perfect answer to this question but it seems unlikely to be a replacement Group CEO. It is nonetheless important that the Group Board is properly served and supported in the strategic tasks for which it would have responsibility. The risks of not doing so in the subsidiary model are that the CILEx Group fragments. On balance therefore, Option 3 above is the best likely solution and therefore recommended.

TRANSITIONAL ARRANGEMENTS

Once CILEx has decided on the final shape of the governance structure, model and arrangements it wishes to adopt, there will need to be a period of transition to allow the organisation to transform. The detail of this will most sensibly await a decision on the ultimate goal but it is likely that:

- The governance changes need to be turned into a project which is effectively project managed in order to deal with all of the complexities involved. This should impose parameters around the project in terms of timing and costs.
- The starting point for change will be amendment of the Institute's Charter in ways that allow for maximum flexibility in future. This usually means removing detail that is not immediately necessary and allowing for flexibility in terms of future objects. It will also mean the removal of regulation as an object, in order to prepare for the likely separation of regulation and representational activities in the legal sector.

Conclusions

The governance project outlined for CILEx in this report is a far reaching one. But it is also an exciting one which would not only position the Institute to manage the expected challenges of the legal sector in coming years, but to break new ground in professional body governance.

It represents an opportunity for the CILEx Council to show real leadership by taking decisions that other professional bodies in the sector have wanted to undertake but found difficult to do for political reasons. The case for making the sort of changes proposed however, is very strong. They would enable the organisation to provide better services to members, they would encourage a wider range of CILEx members to participate in governance of the organisation, since the roles would be more specific and corporate in nature, and therefore easier for individuals to 'sell' to their employers as skills enhancing. The adoption of modern, good corporate style governance by CILEx therefore also creates the prospect of creating a wide cadre of CILEx members who have highly portable experience from serving on CILEx boards.

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