

Legal Services Board (LSB) – Consultation on proposed revised regulatory performance assessment process

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

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1. Introduction

- 1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.
- 1.2. CILEx is the Approved Regulator under the Legal Service Act 2007. These regulatory powers are delegated to the independent regulator CILEx Regulation Ltd.
- 1.3. CILEx welcomes initiatives to improve regulatory processes in order to give greater transparency, clarity and confidence to consumers, whilst enabling the regulators to retain the flexibility to undertake focused and proportionate regulation of their particular regulated community. The proposals in this consultation broadly achieve those outcomes.

2. Substantive points

- 2.1. CILEx regards the identification of minimum standards required to be achieved as a positive development as well as the intention not to generally prescribe how regulators should meet those standards. However, LSB will have to guard against any temptation to prescribe, derived from the need to be able to properly compare what might legitimately be varied approaches by different regulators to the same areas of regulation.
- 2.2. There remains a useful role for the relationship the independent regulators have with their (Applicable) Approved Regulators in the maintenance of regulatory standards. CILEx would in no way wish to compromise regulatory independence and, as now, both parties have to guard against any undue influence and ensure the Internal Governance Rules (IGRs) are adhered to. However, it is often the ARs, as membership bodies, who have a unique perspective on issues of practice affecting the regulated community which could be very useful to the regulators and support the requirement under RA3.
- 2.3. CILEx welcomes too the intention of a proportionate approach proposed by the LSB: that there should not be too much that is prescribed as requirements for regulators to meet, that they do not intend to replicate or replace the accountability regulators have to their governing Boards and Councils and that mostly only data that is already being collected will be required as part of the dataset.

3. Responses to specific questions

Question 1 - Please could you set out any other minimum standards required of a regulator which are not covered by the proposed regulatory performance standards?

- 3.1. CILEx believes that the minimum standards set out in the consultation are broadly the right ones and cover all the appropriate areas. The clarity in relation to how the CMA-related outcomes relate to the standards is also welcome. There could be a need for consideration of some changes of emphasis within the detail of the outcomes of those standards, however. For example, as stated at 2.2 above, the ARs, as membership bodies, are very well placed to assist the regulators achieve some of the regulatory standards: understanding of the practical environment the regulated community are practising in and access to that community could be facilitated by many ARs. This could support the achievement of outcome RA3 and also in relation to outcomes A2¹ and A3².
- 3.2. Similarly, ARs have access to datasets about that community which could inform regulators' understanding, assist them in the gathering of relevant evidence, enabling regulatory approaches to be proportionate and based on the reality of practice and more accurate assessment of the regulatory risks that may be inherent in that practice. This in turn could assist in supporting the confidence of consumers: regulation does not happen in a vacuum and consumers need to be confident that regulators not only have processes in place to ensure good practice by the regulated community but also that they truly understand that community. ARs can help provide some of that perspective; the extent to which the regulators use that information of course remains for the regulator. This could also be addressed in a change of emphasis within Outcome GL4 and the need to engage with and learn from stakeholders.
- 3.3. CILEx welcomes the inclusion of the specific reference for the need for regulators to assess risk in relation to maintaining a robust-evidence base, RA2. Again, sharing intelligence on risk with the AR could also be beneficial particularly given (though depending on the nature of the relationship between specific ARs and regulators), that the AR could be material to supporting the solution to mitigate any risks identified by the regulator. Similarly, in relation to outcome RA4, there are also benefits to information-sharing with the ARs who

¹ Assurance around education providers producing qualifications that meet the standards and competences specified by the regulators.

² Ensuring an effective and proportionate CPD policy is in place.

may themselves and for their own purposes be collecting much of the data that would be material to the evidence that the regulators themselves need to collect.

- 3.4. This also links to Outcome RA5: having a proper risk identification process is rightly identified as an example of evidence of achieving this outcome but this is also in the context of the need to effectively assess the impact of regulatory arrangements. Arguably, this outcome would benefit from greater emphasis and detail; this is particularly in relation to making changes to regulatory arrangements where there should be a greater requirement to adequately impact assess those changes. Without that, regulators are under no real level of accountability and it is the only way to properly test regulatory changes which may look sound and logical but may contain within them unforeseen practical consequences.

Question 2 - Please could you set out any items that should not be included within the regulatory performance standards? Please identify why they should not be included

- 3.5 CILEx questions why the civil standard of proof is prescribed as the minimum performance standard in relation to enforcement. Whilst it is acknowledged that there are regulators who apply this standard and advocate its use elsewhere in the sector, there are those operating in the sector who have resisted that direction³ and there is some logic that regulators should be permitted to make their own judgements on the level of proof required, relating to their expert view of and proximity to their regulated community.

Question 4 - Are there any items listed in the revised dataset that should not be included?

- 3.6 CILEx welcomes the undertaking that the LSB is not proposing to replace regulators' boards and committees in relation to holding their executives to account but, CILEx questions the inclusion of 'Number of planned business activities not completed within agreed timetable' under 'Governance and Leadership – Business Planning'. This borders on accountability for operational activity which is very much the domain of regulators' governing bodies.

- 3.7 Also, the LSB will have to guard against any tendency towards the use of informal information requests⁴. Whilst CILEx welcomes the indication that it will mostly only be data that is already being collected which will be required

³ Such as the Solicitors' Disciplinary Tribunal

⁴ Consultation paper, para 30

as part of the dataset, informal information requests could end up being the means of 'plugging the gaps' where other specific information is required. It would therefore be useful to understand the extent to which the dataset requirement was mapped against the existing data that regulators currently collect.

- 3.8 Similarly, it is positive that the LSB recognises that there are differences between the language and processes used across the regulators⁵, but caution will have to be taken that the work with regulators to 'tailor the dataset' does not become burdensome.

Question 7 - Are there any other evidence-gathering approaches we should be using, or any evidence-gathering approaches listed which we should not use?

- 3.9 CILEx suggests that Third Party Feedback might usefully be given greater prominence in this process. As referred to above, there are certain stakeholders who are uniquely placed to give insightful perspectives on regulatory performance and, indeed, to be able to support regulators in achieving the outcomes that meet those standards. Demonstrating where regulators have specifically addressed observations from third parties could be a useful indication of their practical effectiveness and go some way in bolstering consumer confidence.

Question 8 - Will a move to a risk-based process, with the ongoing monitoring proposed, provide sufficient evidence through which we can gain assurance about the regulators' performance?

- 3.10 CILEx believes that the process as broadly set out is capable of providing sufficient evidence to provide the LSB with assurance about regulators' performance. CILEx would welcome though greater detail about what is required of regulators in relation to the capture, analysis and management of risks identified. As above, CILEx also suggests that there is a greater role for stakeholder feedback' to feature in this process rather than simply at the stage of a possible review⁶.

⁵ Consultation Annex C, para 3

⁶ Consultation Annex B, para 31

Question 10 - Please provide your views as to whether the revised grading scale supports accurate measurement of the regulators' performance against the standards?

Question 11 - Please provide your views as to whether the approach to reporting on the regulators' performance enables the reader to understand how a regulator is performing against the minimum standards?

3.11 CILEx agrees that the proposed grading structure is an improvement. It provides a welcome recognition of where regulators are working towards attaining the requisite standards and towards improving their performance. The examples of evidence in the standards document is also useful and can perhaps be built upon further. It is also positive that good practice among regulators will be recognised and shared. Readers should be able to understand how regulators are performing from this approach. However, there may be benefit in offering more detail to qualify and inform the grading in terms of how the accompanying findings will be presented and to what level of detail.

4. Conclusions

4.1. CILEx broadly welcomes the LSB's proposals in relation to the regulatory performance assessment process which represent a positive improvement on present arrangements. However, the useful relationship with and role of ARs (as membership bodies), within the limits of the IGRs, should not be forgotten, both in terms of a third-party feedback and stakeholder engagement perspective (which should have greater prominence in the process) but also from the perspective of their unique position to give insights about the regulated community, give access to datasets useful to regulators and to support regulators in the maintenance and development of their performance.

4.2. CILEx also welcomes the intention of the LSB not to prescribe how regulators should approach meeting these standards. Care will have to be taken that this is not compromised by a desire to standardise approaches between regulators to ensure comparability or that this does not stray into regulators' operational 'business, which is better the domain of their governing Boards and Councils.

4.3. CILEx sees the emphasis on a risk-based approach and the use of risk identification processes as positive; but this needs to extend to a requirement to properly impact assess regulatory arrangements and particularly regulatory changes if they are to remain proportionate and effective and thus also instil consumer confidence.

- 4.4. Finally, the obvious connection with the changes to this process and how they should dove-tail with any changes following the upcoming reform of the IGRs needs to be considered carefully and CILEx would welcome further opportunity to discuss both.

For further details

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require any
further
information,
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