

# Regulatory performance assessment

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The process

June 2017

## About the LSB

### Our purpose

The LSB oversees the regulation of legal services in England and Wales. We are independent of both government and the profession. We hold to account the regulators for the different branches of the legal profession and the Office for Legal Complaints (OLC).

We have a very simple goal – to reform and modernise the legal services marketplace across England and Wales. Our vision is a legal services market characterised by:

- Consumers who are well informed and able to choose from a range of services that are of appropriate quality and represent value for money.
- Vibrant, diverse and professional legal service providers, who compete and innovate to offer services that collectively support wider public interest objectives including the rule of law and access to justice for all.
- Prompt and effective redress for consumers when things go wrong.
- A regulatory framework that commands the confidence of consumers, the public and all those who have an interest in legal services.

### Our regulatory responsibilities

We have statutory responsibilities in relation to:

- **approval and recognition** – we consider a range of applications from both existing and those seeking to become an approved regulator (including applications to become a licensing authority, changes to regulatory arrangements and extension of scope)
- **monitoring and investigation** – we monitor regulators' compliance with regulatory requirements; oversee aspects of the performance of the OLC; and perform some specific duties in relation to the Solicitors' Disciplinary Tribunal. We also examine the wider market place to identify trends, gaps in regulation, competition issues and how both our own rules and those of regulators are working in practice
- **enforcement and disciplinary activities** – we ensure that regulators and licensing authorities perform their duties in a way that meets the regulatory objectives and, where necessary, exercise the powers at our disposal to ensure that this happens.
- **regulation, education and training** – we have a duty to assist in the maintenance and development of standards of regulation by approved regulators and in the education and training of persons carrying out reserved legal activities

- **scope of regulation** – we have powers to make recommendations to the Lord Chancellor on the designation of new activities as reserved and the removal of existing designations.

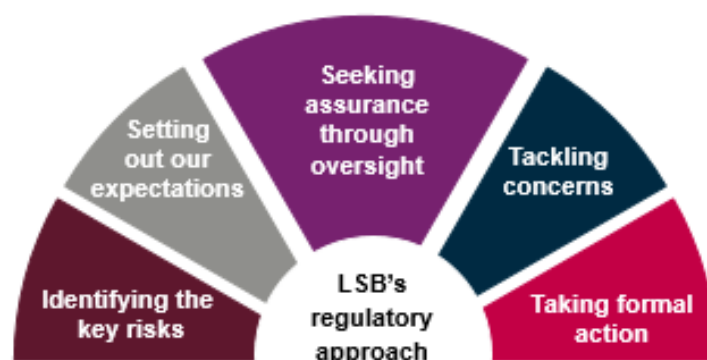
In carrying out this work, we promote regulatory objectives as set out in the Legal Services Act 2007 (the Act). We share these objectives with the regulators and the OLC. We must also have regard to the better regulation principles, enshrined within the Act, and ensure that in all our activities, we are transparent, accountable, proportionate, and consistent and targeted only at cases in which action is needed.

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## Our regulatory approach

1. We are evidence-based and use evidence to determine which of our regulatory tools to use to address the regulatory problems that we identify. Our tools include:
  - advocacy and communications
  - publishing research findings, best practice recommendations and guidance
  - making statutory decisions (for example about proposed new rules and regulations, practising fees, or applications from regulators to regulate new areas)
  - assessing regulatory performance (in general and in relation to specific thematic issues)
  - agreeing action plans and monitoring performance against them
  - using formal enforcement powers
  - exercising other statutory powers - such as recommending legislative changes.
2. Across all our work, timely and effective progress on issues requires collaboration and cooperation with others including regulatory bodies, professions, and government and consumer bodies. It involves good relationship management, influencing and advocacy, as well as proportionate and targeted use of our powers. We will only take formal enforcement action in response to the most serious or sustained failings.
3. Our approach to meeting our responsibilities can be broadly characterised by the diagram below. The five activities are connected and there is feedback between different activities as necessary.



4. Our assessment of the regulators' performance is core to our role as an oversight regulator. How we assess the regulators' performance is in line with our regulatory approach as demonstrated below:

- *Identifying the key risks* – our regulatory performance standards focus on the key risks to an effective regulator’s performance and our process allows us to target our resources on addressing areas of performance which are most in need of improvement or where we have insufficient assurance.
- *Setting out our expectations* – the regulatory performance standards outline the minimum outcomes we expect regulators to achieve through their performance.
- *Seeking assurance through oversight* – our assessments of the regulators’ performance are the main way in which we deliver our oversight and obtain assurance. They provide us with an ongoing assessment of the regulators’ performance against the regulatory performance standards.
- *Tackling concerns* – where our completed regulatory performance assessments do not provide assurance we will consider appropriate activities in order to manage risks to the delivery of effective regulation.
- *Taking formal action* – it will be open to us to take formal action to tackle concerns about a regulator’s performance.

## Overview of the regulatory performance assessment process

### Standards

- 5 function-based standards

These cover the core regulatory functions carried out by the regulators, and the regulator's ability to carry out its functions well.

- 4-6 outcomes per standard

These are the minimum outcomes we expect the regulators to achieve against each standard.

- Supported by evidence

Set out examples of the types of evidence we will consider in assessing the regulators' performance against a standard/outcome. This is an illustrative prompt

### Evidence

- Performance management dataset

This reflects the core performance areas for the regulators.

- Third-party feedback

Stakeholder feedback is gathered to gain meaningful insight into the regulators' performance, from those affected by it.

- Informal information requests

Occasionally we will request information from the regulators in order to assure ourselves of their performance.

- Review and analysis of other available information

### Assessment

- Ongoing monitoring

We monitor the regulators' performance against the evidence gathered to identify whether we can be assured, or whether there are specific areas which warrant closer attention.

- Internal annual assessments

We carry out an internal annual assessment against the evidence gathered to determine whether any regulatory action is required such as a performance assessment.

- Benchmark assessments

We undertake 'benchmark' assessments where we have not reviewed a regulator at all, or only a small aspect of its performance.

### Grading

Performance will be graded against the following scale:

- Met

The regulator meets the minimum standard of regulatory performance

- Not met - 1

The regulator does not meet the minimum standard of regulatory performance. There are areas of concern, which, in agreement with us, the regulator is working to address.

- Not met - 2

## How we review the performance of the regulator

### The regulatory performance standards

#### Standards

- *5 function-based standards*
- *4-6 outcomes per standard*
- *Supported by evidence*

6. We assess the regulators' performance against five function-based standards. These are:
  - Regulatory approach
  - Authorisation
  - Supervision
  - Enforcement
  - Governance and leadership.
7. The first four standards cover the core regulatory functions carried out by the regulators. The fifth standard, governance and leadership, allows us to review the regulator's ability to carry out its functions well. Under each standard are between four to six outcomes we expect the regulators to achieve.
8. The standards form the basis of our regulatory performance assessments. The standards and related outcomes describe the minimum standard of performance we consider all regulators must meet in order to perform the basic role of a regulator.
9. The standards are outcomes-focused. We do not generally prescribe how the regulators will demonstrate they meet the standards. We recognise this will vary across the regulators and that performance against some outcomes may need to be assessed within the context of a specific regulator. However, there are some instances where we have described what we consider equates to minimum performance, for example, the use of the civil standard of proof in the enforcement process in relation to Outcome E3 (enforcement). These have been identified through our previous policy and research work.
10. In order to develop a shared understanding of the process we will use. We have set out against each outcome examples of the types of evidence that could be provided by the regulators, or used by us, to assess the regulators' performance. This is an illustrative list, it is not exhaustive. We will refine it over time.



## Evidence-Gathering

### Evidence

- *Performance management dataset*
- *Third-party feedback*
- *Informal information requests*
- *Review and analysis of other available information*

11. Our approach to the assessment of the regulator's performance is evidence-based. We will gather evidence through the streams identified in the above text box.

12. We will gather evidence to:

- assure ourselves that the regulators are meeting the standards
- identify where we may need to ask more detailed questions to seek assurance about a regulator's performance
- carry out a review to determine whether a regulator has met the standard or outcome being reviewed
- where appropriate, identify good practice that can be shared.

13. All the evidence we collect will be reviewed, analysed and balanced to provide us with a well-rounded picture of the regulators' performance.

### *Performance management dataset*

14. A performance management dataset (the dataset) will be collected from the regulators. Datasets will be collected from the regulators at different intervals ensuring the data we receive is representative of current performance. These intervals will be agreed with each regulator individually. Where possible we will liaise with individual regulators and amend datasets to reflect items the regulator already collects and reports upon (publicly or not). Regulators will also have the opportunity to provide written commentary against the dataset.

### *Third-party feedback*

15. As part of our ongoing monitoring, we will routinely gather stakeholder feedback about the regulators' performance. This feedback will be received through different streams of our work or through our meetings with stakeholder organisations. The manner through which we receive specific feedback will vary depending on the circumstances, for example, whether we are gathering evidence to determine the scope of a review or whether we are already conducting a review.

16. Methods we will use to collect feedback may include, but are not limited to:

- targeted invites to provide feedback for reviews
- receiving formal feedback through our ongoing relationships with organisations
- if appropriate, providing an open invitation for stakeholders to provide feedback through our website.

17. We will not take account of hearsay evidence. Feedback will need to be supported by evidence. The feedback received is just one of the evidence sources we will use to assure ourselves about the regulators' performance, it will be balanced with other evidence collected.

#### *Informal information requests*

18. We will attempt to gather as much information as we can ourselves. However, we recognise this is not always possible and we will sometimes make information requests from the regulators. All efforts will be made to ensure our requests are proportionate and targeted. The form and frequency of our information requests will vary. They will also take account of the information we have already collected through our ongoing monitoring and other aspects of our work.

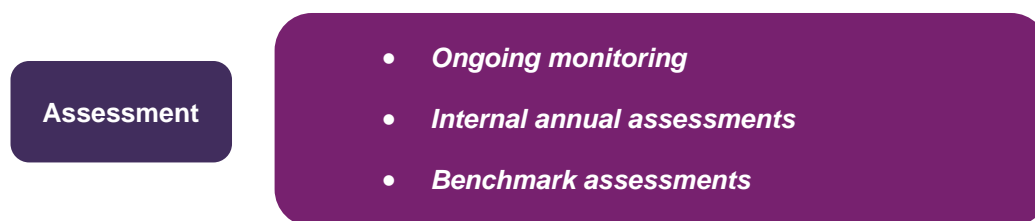
19. We will initially request the dataset and any additional information informally from the regulator. However, we reserve the right to use our formal powers under s55 of the Act to require the regulators to provide the information if necessary.

#### *Review and analysis of available information*

20. We will also review and analyse available information such as:

- documentation publicly available on the regulators' websites, for example, annual reports, Board papers and consultation documents
- information or concerns raised with us about a regulator
- the outcomes of our work or meetings with the regulators and other interested parties.

## The assessment process



21. The process we use to assess regulatory performance is risk-based. This enables us to tailor the resources we devote to oversight according to the risks presented by each regulator. It is a three-part process which involves: ongoing monitoring of the regulators' performance, an internal annual assessment of the outcome of our ongoing monitoring and benchmark assessments. A diagram of the risk-based process can be found at Appendix 1.

### *Ongoing monitoring*

22. The first stage of the process is that all regulators are subject to ongoing monitoring of their performance using information and evidence we gather ourselves alongside the dataset provided by the regulators. We use this information to form an understanding of how the regulators are meeting or not meeting the standards. This allows us to promptly identify specific areas of concern which warrant closer attention, or identify areas where we lack assurance. It also allows us to identify thematic issues which have emerged for all or some of the regulators, and which need to be addressed.

### *Internal annual assessment*

23. The second part of the process involves an internal annual assessment of the information we have gathered to determine whether any action is required. This will form part of our business planning process. Our ongoing monitoring and internal annual assessments will allow us to identify whether we need to:

- assure ourselves that the regulators are meeting the standards
- ask more detailed questions to seek assurance about a regulator's performance
- carry out a review to determine whether a regulator has met the standard or outcome being reviewed
- share good practice, where appropriate.

### *Benchmark assessments*

24. The third part of the process only occurs where we have not reviewed a regulator at all, or only a small aspect of its performance. In these circumstances, we will no later than three years after the transitional arrangements conclude, undertake a 'benchmark' assessment. Sufficient notice will be given to the regulators in relation to such reviews.

### *Decision to undertake a review*

25. Our ongoing monitoring, or our internal annual assessment, may identify that we do not have sufficient assurance about an area of a regulator's performance, or may identify an area as one of concern. Where this occurs, we will consider whether an information request or review is necessary, and if so, the scope of those activities.

26. Factors that would lead us to consider whether an information request or review is necessary include:

- a decline in performance as evidenced by change(s) in the dataset and/or other evidence such as stakeholder feedback, media reports etc.
- despite our best efforts, limited information gathered which means we cannot be assured
- recurrence of a single performance issue or a number of smaller performance issues which indicate a pattern of concern
- follow up activity from a previous poor regulatory performance assessment
- significant changes in regulatory approach
- change in regulatory scope by the regulator
- a major change in the size of the regulated community
- significant legislative changes which have a direct impact upon the legislated community
- a major failing within the regulated community.

27. In deciding whether to ask for further information or carry out a review, we would also consider prioritisation criteria, which include:

- the likely benefit of action (direct and indirect) to consumers, the regulated community and the wider public
- the impact of the underperformance or risk of underperformance on consumers, the regulated community and the wider public
- the ultimate scale and scope of the underperformance
- the resources required to review and address the breach in full.

28. Both the list of risk factors and prioritisation criteria are non-exhaustive and it remains at our discretion to consider other factors and criteria.

29. Once our senior leadership team has made its decision about what action to take, we would write to the regulator with the outcome of our assessment and explain the next steps.

### *What is an information request likely to involve?*

30. Information requests will be focused and tailored, and will only seek information necessary to provide assurance about performance. If the information request is unable to provide assurance or raises concerns, we reserve the right to consider whether a review of a regulator's performance is necessary.

### *What is a review likely to involve?*

31. Reviews are likely to include the tasks listed below. This list is not exhaustive and we will undertake any tasks considered necessary to assess accurately whether a standard or outcome has been met:

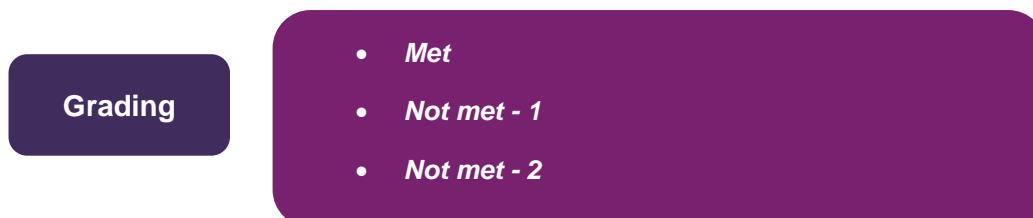
- a review of the available evidence and the dataset the regulator has provided.
- an initial meeting between the LSB and the regulator's senior management to discuss the purpose of review, any particular areas that will be focused on, the proposed timescales, and the LSB's expectations of the regulator during the review.
- a targeted information request developed by the LSB, which also provides an opportunity for the regulator to provide additional detail on their performance if they wish. This may also include a request for a regulator to complete a self-assessment.
- stakeholder feedback including targeted invites to key stakeholders to submit written feedback on the performance of the regulator; a general invitation to provide feedback both on the LSB's and the regulator's websites; and, where considered appropriate, offers of meetings to selected organisations. The regulator will also have an opportunity to comment on any stakeholder views obtained.
- a further meeting with the regulator to discuss any outstanding questions we may have.

32. The information generated will be collated and analysed, and will form the basis of a report providing an assessment of performance. The report will highlight areas where a regulator's performance has met or has not met the standard(s). Reports will not routinely include all of the data or evidence gathered on which our assessment is based.

33. Reports are subject to quality assurance and consistency checks through our internal governance mechanisms. We will share the draft performance assessment report with the regulator prior to publication for their comments on factual accuracy. We will consider any comments made by the regulator about our draft report prior to the Board being asked to approve the report, and prior to publication of the final report on our website. In circumstances where regulators adamantly disagree with our gradings, we will offer the option of publishing their comments alongside the final report.

34. We may also from time to time publish a thematic report which highlights the general learning and good practice we have identified across our regulatory performance work.

## Gradings



35. The grading scale measures whether a regulator has or has not met a particular standard or outcome at the time of the performance assessment. It also enables us to tailor our response where a regulator has not met a standard so that we use the most appropriate regulatory approach. Examples of the action we could take include the development of an action plan or an agreed re-review within a certain timeframe. Use of the grading scale will be flexible and can be used to score overall standards or individual outcomes.

36. The grading scale is as follows:

<b>Met</b>		The regulator meets the minimum standard of regulatory performance.
<b>Not met</b>	1	The regulator does not meet the minimum standard of regulatory performance. There are areas of concern which, in agreement with us, the regulator is working to address.
	2	The regulator does not meet the minimum standard of regulatory performance. After fully considering all circumstances we will decide on an appropriate course of action.

37. We have taken steps to reduce the risk of subjectivity in the gradings we award. This includes providing within the standards document examples of evidence we will consider, and describing what we consider equates to minimum performance as identified in our policy and research work. Gradings will also be subject to internal consistency checks to further mitigate this risk.

38. Where we identify good practice within a regulator's performance, we will acknowledge this and, where appropriate, share it amongst the regulators.

## Tackling concerns

### *Addressing underperformance*

39. Following a review, where we have identified underperformance or have been unable to assure ourselves about the regulator's performance we will take steps to manage the risks posed to effective regulation. These actions are guided by our regulatory approach.

### *Investigation*

40. If we have serious concerns about the performance of a regulator, at any stage of our ongoing monitoring or formal review process, we will refer the matter to the Head of Regulatory Reviews and Investigations to enable us to consider whether it is necessary to consider an investigation.

## Other considerations

### *Access to information implications*

41. We are committed to operating transparently and to meeting all reasonable requests for information about our activities, including the regulatory performance assessments.

42. In accordance with s167 of the Act, we will treat all information obtained during the course of the performance assessments as confidential. However, such information may be disclosed in circumstances set out in s168 the Act, which include but are not limited to:

- disclosure for the purposes of enabling or assisting the Board to exercise its functions (whether as an approved regulator, a licensing authority or otherwise); and/or
- disclosure in accordance with any requirements of the Act or any other enactment or other rule of law. This will include any disclosure in response to a request for information under the Freedom of Information Act 2000. Any such requests will be considered on their own merits and, where necessary, in accordance with legal advice.

### *Continuous improvement of the regulatory performance assessment process*

43. Following each regulatory performance assessment, we will ask the regulators for their views on the performance assessment process, the standards, and on the performance assessment reporting. We will consider these views as we ensure our approach remains fit for purpose. We will also conduct a review of the regulatory performance assessment work stream five years after the end of the transitional arrangements.

## Appendix 1 – Diagram of the risk-based assessment process

