

## Summary of feedback: Regulatory Performance Assessment Framework

June 2017

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### Background

1. Following the development of a preferred revised model for regulatory performance assessments, we met with each of the regulators and the Legal Services Consumer Panel (LSCP) to seek their views. The revised model included: the regulatory performance standards, the evidence-gathering methods, the assessment process, and the grading scale
2. The feedback received was largely positive and overall the preferred revised approach was considered to be more targeted and proportionate. All of the suggestions for improving the model have been carefully considered and a number of amendments have been made as a result. This document provides an anonymised summary of the feedback provided and, where required, our response to the feedback.

### Summary of feedback

#### *Regulatory performance standards*

3. The regulators were happy with the shift to function-based standards and commended the move as being useful, as it made our performance expectations clearer and more transparent. The five functions (regulatory approach, authorisation, supervision, enforcement, and governance and leadership) were viewed as both logical and reflective of the way in which their organisations work. In particular, the inclusion of authorisation was regarded as positive, as was the recasting of capacity and capability as governance and leadership. The structure of the standards was considered to be an improvement, particularly the reduced duplication of outcomes within the standards.
4. Some of the regulators suggested matters that they considered to be missing from the standards including 'removing barriers to access' and 'mechanisms for receiving client feedback'. We consider 'removing barriers to access' to be covered under 'RA5: the regulator understands the impact of its regulatory arrangements and guidance on consumers, the regulated community, the market and the regulatory objectives'. We consider 'mechanisms for receiving client feedback' to be captured in different ways through a number of the standards. For example, 'RA3: The regulator has a robust evidence base from a range of sources on (a) consumers' needs and use of legal services, (b) the regulated community, and (c) the market(s) regulated by it which inform its regulatory arrangements and approach', and 'GL4: The regulator learns from its own work, stakeholders, the legal sector and other sectors and uses that learning to improve its work.'

5. Similarly, it was noted that there is not a standalone diversity outcome. This was a conscious decision by the LSB. We consider diversity to be a matter which weaves through many of the standards as reflected in the suggested examples of evidence for several of the standards.
6. Several regulators expressed concerns about the outcomes of the regulatory approach function which related to consumers and their needs, with respect to the outcome that regulators have a robust evidence base from a range of sources on consumers' needs and use of legal services. It was noted that gathering such information has been difficult in the past, and the LSB must remain conscious of the need to use suitable substitutes for this information.
7. The LSB is mindful of the difficulties some of the regulators have advised us of in this area. However, we consider that work on understanding consumers' needs can be undertaken in a proportionate manner which fits the context in which the regulators work, and this is what we would want to see in their evidence. On this point, clarification was also sought on the definition of consumers. The LSB does not have a formal definition of consumers, however, we refer to the segments of legal services consumers provided in the 2011 Oxera Consulting Services report 'A framework to monitor the legal services sector'. This segmentation is set out at Appendix A.
8. The regulators asked if there would be a degree of flexibility in the LSB's consideration where the regulatory performance outcomes do not exactly match the regulator's operations. We will not be prescriptive about how outcomes are to be met. Our assessment will focus on whether outcomes are being achieved and the quality of the outcomes being delivered.
9. The regulators acknowledged it is appropriate that the LSB is mindful of the variance in resources each of them has. However, it was suggested that limited resources should not be a justification for regulators' not meeting the standards, as this has the potential to act as a disincentive to being adequately resourced to be an effective regulator. We consider this to be a valid point, and while we encourage regulators' efforts to reduce the cost of regulation, we do not expect this should come at the expense of quality of regulation.
10. While some thought the list of examples of evidence was a useful guide, others expressed concerns. Namely, where regulators' considered performance should be self-evident, they did not want to have to create additional documentation to demonstrate meeting a standard. We will not require regulators to create additional documentation, nor do we expect them to provide each piece of evidence on the list. The list serves as an illustrative prompt, is not exhaustive and will be refined over time. It is for the regulators to decide what evidence they provide to demonstrate they have met the standard.

*Evidence gathering streams and the performance management dataset*

11. The revised regulatory performance assessment process formalises the evidence-gathering streams utilised in previous exercises. The regulators considered that this was a sensible way to proceed.
12. Stakeholder engagement as an evidence stream was largely supported, and many regulators reported the feedback received through the last performance assessment exercise was useful. A small number of regulators raised concerns about the process being too broad, and parties not wholly relevant being invited to provide feedback. We

consider that these concerns will be adequately addressed through efforts to ensure engagement is more targeted and tailored in future.

13. The regulators found efforts made to refine and tailor the performance management dataset (the dataset) used in previous performance assessment exercises encouraging, and overall there was no great objection to its inclusion in the process (other than by one regulator). It is proposed that the use of the dataset would commence in 2018/2019 when the transitional process commences.
14. Clarification about the dataset was sought on the following points:
  - i) Whether Key Performance Indicators (KPIs) will be able to provide an accurate picture of performance. In response to this, the LSB would welcome commentary against the numerical data. It is also important to note the dataset is only one source of evidence we will rely on to develop our understanding of a regulator's performance.
  - ii) The reasoning for selecting median as the average to be reported. Median is considered to be a fairer measurement as it discounts outliers which can distort performance figures.
  - iii) Whether staff attrition is a good indicator of organisational health. As there is a significant body of research which supports the use of staff turnover as an indicator of organisational health, we consider its inclusion is justified.
  - iv) Whether regulators will be required to provide details for KPIs that occur outside legal services, or that apply to individuals not authorised to undertake reserved legal activities. We are only interested in these figures where they apply to legal services, or individuals or entities authorised to undertake reserved legal activities.
15. A small number of concerns were raised about items contained within the dataset not being relevant for a regulator's individual circumstances. The LSB will liaise with individual regulators in order to amend datasets, where appropriate, to ensure data collected provides a meaningful picture of performance allowing for our identification of emerging risks. We will also seek to reach agreement on the appropriate frequency of requests for datasets from regulators.
16. Some regulators raised that where information was publicly available, the LSB should be gathering this information itself. We encourage transparency on the part of the regulators and where information is published in a timely manner we will rely on it.
17. A concern was raised about an overlap between the dataset and the data reported to the regulator's board in their governing role. To be clear, we are requiring information in order for us to deliver our oversight function and assure ourselves about performance; we are not replacing the Boards or Councils of the regulators who are responsible for holding their executives to account.
18. A question was raised as to whether we would use our formal powers to collect this data. We will initially request the dataset and any additional information informally from the regulators. However, we reserve the right to use our formal powers under s55 of the Legal Services Act 2007 to require regulators to provide the information if necessary.

*Assessment process and transitional assessment option*

19. The risk-based process for regulatory performance assessments was largely considered to be an improvement, as it was noticeably more proportionate and would be targeted at areas of greatest need.
20. Several regulators advised it would be useful for the LSB to advise them of the focus of any assessments in advance so they can plan and allocate resources to the assessment. We will commit to providing regulators with sufficient notice of any assessments that are planned during a financial year. However, an inherent part of a risk-based process is responding to emerging issues, where such notice cannot be given. Further, we note that where we have not assessed a regulator at all or only a small aspect of its performance, we will undertake a 'benchmark' assessment to ensure that we have a proper and robust understanding of the regulator's performance. This benchmark assessment will take place no later than three years after the transitional arrangements conclude. Sufficient notice will be given to the regulators in relation to such assessments.
21. In addition to seeking views on the risk-based assessment process, we also sought preferences on three potential transitional assessment options to move from the current process to the new risk-based process.
22. Of the three transitional options proposed, option two was largely the one preferred by the regulators. This would see assessments of each regulator only where we have knowledge gaps or there is an area of concern. These would be undertaken over approximately 18 months. The regulators considered this approach was the most aligned with the risk-based process and it was also considered to be the most closely aligned with identifying and addressing underperformance, which is one of the central aims of the regulatory performance assessment exercise.
23. It was acknowledged by one regulator that option one (full assessments of the regulators over two to three years) would provide the most detailed baseline information about the regulators' current performance. However, others thought the timeframe for this option was too long, and several regulators suggested the information will have become out of date by the time all the assessments had been completed.
24. The regulators said that efforts should be made to ensure findings from the last regulatory performance exercise were used to inform this process. They considered the previous exercises to be very involved and resource intensive processes and advised they would not expect the learnings gained from it to be disregarded. We note that we have proposed option two as our preferred approach. In line with this, we will undertake a gap analysis on each regulator to identify areas for assessment. The gap analysis will be informed by the findings and results of the previous exercises, as well as the recent updates provided against the regulators' action plans.
25. The third option (function-based assessments against individual functions over two to three years) was identified by one regulator as offering the benefit of planning resources, as the schedule of assessments will be determined well in advance. However, other regulators considered this option did not truly address underperformance, nor did it provide the assurance necessary to confidently move to a risk-based process. Overall, the regulators also believed it to be the least proportionate of the proposed options.
26. One regulator raised that different transition processes could be employed based on the regulator's preference. However, we do not consider that this would be practical to

implement and therefore all regulators will be assessed using the same transitional option.

27. As fluctuations in performance are to be expected over time, it was suggested that it would be helpful to clarify what, within the evidence collected, might trigger an assessment. We have put together an illustrative list of triggers and this is documented within the regulatory performance assessment process document which we are consulting on.

#### *Grading scale*

28. The proposed grading scale was consistently viewed by the regulators as an improvement on the existing scale. The simplicity of the scale was regarded to be positive and it was considered to be both easy to understand and fit for purpose.
29. Our focus on minimum standards was considered a benefit and the regulators expressed their view that it should be for the LSB to determine and assess against minimum standards, and for regulators to decide whether they implement initiatives beyond this. A view was expressed that the grading scale could further reflect this by having only one level of 'met' to be awarded wherever the minimum standard is achieved. We agree with these comments and have amended the grading scale accordingly.
30. It was suggested that it would be helpful to have the language around minimum standards clarified, as this is considered to underpin how the process works in practice. Failure to do so may give rise to concerns that ratings are being awarded subjectively or influenced by personal opinion. The proposed standards are outcomes-focused and we do not generally prescribe how the regulators can demonstrate they meet the standards. This is because we recognise that performance against some outcomes may need to be assessed within the context of a specific regulator. However, there are some instances in the standards document 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.
31. Concern was also raised that a 'not met' grade may be awarded because the right evidence is not available. However, as highlighted under regulatory performance standards at paragraph 10, the process will not be concerned about having the 'right' evidence, but about assessing the range of evidence available that demonstrates performance.
32. It was noted by some that the grading scale did not have a mechanism for acknowledging good or best practice. This is deliberate. Our process will focus on whether the regulators meet the minimum standards necessary to perform as a regulator. However, we will continue to share good practice with the regulators through the commentary in individual reports and on occasion in overview reports.
33. It was queried as to whether the qualitative commentary accompanying the grading awarded could make the grading unclear. We will be mindful of this risk and make efforts internally to ensure it is mitigated. At a minimum, we anticipate comments to touch on the context of the regulator, justification for the grading awarded and, if appropriate, the extent of improvement required.

34. Another suggestion made was whether there should be an 'appeals process' through which regulators could challenge the grading provided if they think it does not accurately reflect their performance. We will share the regulator's draft regulatory performance assessment report with them, prior to publication, for their comments on factual accuracy. In circumstances where regulators adamantly disagree with our grading, we will offer the option of publishing their comments alongside the final report.
35. A concern was raised about whether the revised process would make it more difficult to sense improvement because the grading scale no longer measured regulator maturity. We note that improvements in performance will be covered in the report commentary.
36. A concern was raised that it was unclear as to what action the LSB would take if a regulator performed poorly. Where our completed regulatory performance assessment process does not provide assurance or has identified underperformance, we will take steps to manage the risk posed to effective regulation. We will consider the options open to us, working in line with our organisational regulatory approach which is available [here](#).

## Appendix A: Segmentation of the types of Legal Services Consumers

Level 1	Level 2	Level 3— other defining characteristics
Natural persons	Legal aid	Ethnicity
		ONS socio-economic group
		Income
	Not legal aid	Age
		Postcode
		Ethnicity
Legal persons (less sophisticated) <sup>1</sup> —SMEs, charities	Not legal aid	ONS socio-economic group
		Income
		Age
		Postcode
Legal persons (sophisticated) <sup>2</sup> —larger companies, savvy charities, government	Not legal aid	For-profit; not-for-profit government; not-for-profit non-government
		Number of employees
		Turnover
		For-profit; not-for-profit government; not-for-profit non-government
Government (sole purchaser) <sup>3</sup>	Not legal aid	Number of employees
		Turnover
		Local
		Central
		Quasi

Note: <sup>1</sup> Legal person purchasers without in-house legal teams. This includes charities, corporate firms and government bodies purchasing legal services also purchased by corporate firms. SMEs are defined by 2003/361/EC as having staff of up to 250 and either turnover not exceeding €50m or balance sheet not exceeding €43m. <sup>2</sup> Legal person purchasers with in-house legal teams. A suitable proxy in some cases can be size of legal consumer. <sup>3</sup> Closely related to the definition of public law, this includes issues such as the role of government bodies in child custody cases, in criminal prosecution, or in judicial review. For areas where the purchaser is a government body, but the issue is also encountered by other private organisations, the appropriate classification of customer type is legal persons (eg, the government purchasing legal advice in relation to employment contracts).

Source: Oxera.