



LEGAL SERVICES
BOARD

Regulatory performance assessment

Consultation on the proposed revised regulatory performance assessment process

This consultation will close on 25 September 2017

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Introduction

1. The Legal Services Board (LSB) is the independent body responsible for overseeing the regulation of lawyers in England and Wales. We are independent of both government and the profession. We are funded by the legal profession. We hold to account the eight regulators for the different branches of the legal profession and the Office for Legal Complaints.
2. The LSB's work to hold the legal services regulators to account for their performance is key to delivering public confidence in legal services and is a core statutory function. Through it, we drive improvements in the eight regulators' performance and challenge them to become more effective and efficient.
3. Through the processes we currently have in place, we have delivered two full assessments (2012/13 and 2015/16) of the regulators' performance. The process was also used to carry out an update exercise in 2014/15. The framework and approach were introduced in 2011 following a public consultation. This work has, so far, provided us with a 'snapshot' of the regulators' performance against a set of agreed standards and enabled us to follow up on areas for improvement through individual action plans.
4. In 2016/17, we examined the extent to which the existing framework operates in a risk-based, proportionate and targeted way and whether it is clearly linked to the regulatory objectives and better regulation principles. This piece of work was associated with the performance, evaluation and oversight stream of our 2015-2018 strategy.
5. Consideration of our own experience in using the process, and consultation with the regulators about their views and experience, identified opportunities for improvement to ensure the assessment framework remained fit for purpose.
6. In addressing these opportunities for improvement, and in developing our new framework, we undertook extensive environmental scanning of review processes across the United Kingdom (UK) and internationally. We also held conversations with UK regulators in other sectors about their approach to performance assessment.
7. The proposed framework builds on our previous 'regulatory standards' work and benefits from the learning we have gained from reviewing other processes and speaking with stakeholders and interested parties. It also takes account of the regulatory objectives, the better regulatory principles and best regulatory practice and is in line with government policy as set out in the Regulators' Code and the Cabinet Office's Regulatory Futures review. The Code says that regulation

should be risk-based and the review says regulation should be targeted and proportionate¹².

8. Initial pre-consultation on our revised assessment framework has been undertaken with the regulators and with the Legal Services Consumer Panel. Feedback provided during these meetings has been anonymised, summarised, and published on our website. The assessment framework has also been subject to review by internal auditors. The input received from this pre-consultation has been extremely valuable and resulted in a number of refinements being made.
9. We are now seeking broader views on the proposed regulatory performance assessment framework.

Our regulatory approach

10. We have recently published a document which sets out our regulatory approach. The proposed regulatory performance framework is consistent with our approach:
 - *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.

Revisions to the regulatory performance framework

11. In carrying out this review we were keen to build on our previous performance assessment framework and exercises. We wanted to propose changes only where they would add value to our oversight of the regulators’ performance; we see the proposed revised regulatory performance framework as an improved

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300126/14-705-regulators-code.pdf

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/582283/Regulatory_Futures_Review.pdf

iteration of our previous model rather than something which is brand new. We set out below how we consider we have achieved this:

Standards

- We have retained the regulatory performance standards (the standards) but have revised them to ensure they more accurately reflect the core functions of the regulators and the outcomes which we expect the regulators to achieve.
- To aid transparency around our approach to oversight, we have been explicit that we are seeking to measure the regulators' performance against the minimum standards of performance considered necessary for an effective regulator.
- To create a common understanding of how we will assess performance against the standards, we have provided examples of evidence we will consider in the standards document.

Evidence-gathering

- We have kept the evidence-gathering approaches we used in our previous performance assessment exercises. Our previous experience has allowed us to refine and develop a more structured approach to our evidence-gathering. This process has been evolutionary, and we anticipate that further refinements will be made in the future as necessary.

The process

- Our previous exercises enabled us to identify that undertaking full reviews of all of the regulators against all of the standards may not offer the most proportionate approach to oversight of regulatory performance.
- The proposed framework employs a risk-based assessment approach which focuses on identification and monitoring of risks to performance.
- To aid transparency and enable a shared understanding of our approach, we have developed a process document which sets out how we will assess the regulators' performance.

Grading scale

- The previous grading scale placed emphasis on the progress of the regulator in working towards the achievement of a standard. We consider that the regulators have sufficiently developed since the Act and our oversight should now focus on whether they meet the minimum expected standard of performance.

Overview of the regulatory performance assessment framework



Elements of the revised process

Regulatory performance standards

Standards

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

12. Our review identified opportunities for improvement within the regulatory performance standards including scope:
 - to clarify what standard of performance we are assessing the regulators against
 - for increased focus on key areas of regulatory risk
 - to remove duplication, ambiguity and inconsistency amongst the standards.
13. We propose that the regulators' performance be assessed against five function-based standards. These are:
 - Regulatory approach
 - Authorisation (which includes education and training)
 - Supervision (which includes education and training)
 - Enforcement
 - Governance and leadership.
14. The first four of the standards cover the core functions of a regulator. The fifth standard allows us to review the regulator's ability to carry out its functions well.
15. Under each of the standards there are between four to six outcomes that we expect the regulators to demonstrate they are achieving. These reflect the minimum standard of performance expected of a regulator.
16. 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 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.

New and emerging policy developments

17. There are some important new and emerging issues for which we have considered whether there may be a need to require specific outcomes within the standards. These are the CMA market study into legal services and Brexit.

18. In response to the Competition and Market Authority's (CMA) market study into legal services, we identified four high-level outcomes we would like the regulators to focus on. These outcomes are contained within the document which details the LSB's response to the CMA's legal services market study, available [here](#). Strong links exist between the monitoring of these outcomes and the regulatory performance assessment process. Following the initial monitoring period of the CMA related outcomes, consideration will be given to whether they should be more explicitly integrated within the regulatory performance standards. At present, they are captured under Outcome RA3 in the standards, which requires the regulators to consider new and emerging policy developments in developing its regulatory arrangements and approach.
19. We acknowledge 'Brexit' is currently underway, and is likely to have an ongoing impact on the legal sector, particularly around outcomes regarding education and training, and consumer protection. However, given the extent of the uncertainty surrounding Brexit, we do not propose to include specific reference to it within the standards at this time. As matters relating to Brexit become clearer we will reconsider our position.
20. The proposed regulatory performance standards are provided at Annex A.

Consultation questions

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

Evidence-gathering

Evidence

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

21. We propose that we formalise the four evidence-gathering methods used in previous performance assessment exercises as part of our revised framework. These are:
 - performance management dataset provided by the regulators
 - third-party feedback
 - informal information requests
 - review and analysis of available information.

22. 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.

Performance management dataset

23. A performance management dataset (dataset) will be collected from the regulators. We will use this dataset to monitor performance and it will be balanced with other evidence to identify trends in performance and to assure ourselves of the regulators' performance.
24. 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. We will liaise with individual regulators to amend datasets, where possible, to reflect items the regulator already collects and reports upon (publicly or not).
25. During pre-consultation we clarified that we are not expecting the creation of new information for the purposes of this dataset. We believe this will minimise the cost and time burden of providing the dataset. We also believe that through the collection of this data, we will reduce the number of requests we make of the regulators in other areas of our work. For example, policy and research work we undertake to inform our awareness of the sector and any developments within it.
26. Regulators will, if they wish, also have the opportunity to provide written commentary against the dataset. We recognise providing this commentary may lead to additional costs. It would be helpful if regulators could quantify this additional cost in their consultation responses.
27. During our initial pre-consultation with the regulators, 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 the information in order for us to deliver our oversight function and assure ourselves about performance; we are not replacing the Boards and Council of the regulators who are responsible for holding their executives to account.
28. A template of the dataset is provided at Annex C.

Third-party feedback

29. We will continue to gather third-party feedback to gain meaningful insight into the regulators' performance from those affected by it. During initial pre-consultation, we received feedback highlighting the value of this to the regulators during the previous performance assessment exercise. The manner through which we

receive feedback will vary depending on the circumstance. Further information on the possible methods is set out in the process document at Annex B.

Informal information requests

30. Whilst we will attempt to gather as much publicly available information as possible, we recognise it may still be necessary to request information from the regulators. All efforts will be made to ensure our requests adhere to the better regulation principles enshrined within the Legal Services Act (the Act). The form and frequency of any requests for information will vary, however all requests will take account of any information already collected through ongoing monitoring and other aspects of our work. Where possible, we will seek to provide the regulators with sufficient notice of any requests for information that may be 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.
31. 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 Act to require regulators to provide the information if necessary.

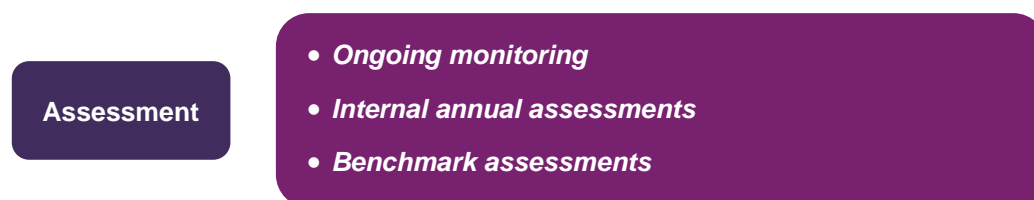
Review and analysis of available information

32. The fourth evidence-gathering method we propose using is reviewing and analysing available information such as:
 - documentation publicly available on the regulators' websites such as 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 or interested parties.
33. All the evidence we collect will be reviewed, analysed and balanced to provide us with a well-rounded picture of the regulators' performance.

Consultation questions

3. Other than the items already listed in the revised dataset, please could you list any items that we should be collecting? Please identify why we should be collecting them.
4. Are there any items listed in the revised dataset that should not be included?
5. Is it necessary for the information collected in the revised dataset to be put into the public domain? What is the LSB's role, if any, in encouraging this?
6. If you believe the collection of this dataset would have a disproportionate cost/time impact on the regulators, what would you estimate this to be?
7. Are there any other evidence-gathering approaches we should be using, or any evidence-gathering approaches listed which we should not use?

Assessment process



34. The review of the existing framework found there was opportunity for our approach to be more proportionate, and for there to be greater alignment with the Regulators' Code, which promotes risk-based regulation.
35. The revised model proposes we move to a risk-based assessment process. This will enable us to tailor the resources we devote to oversight according to the risks presented by each regulator, and to target our efforts to areas of greatest need. A diagram of the risk-based process can be found at Annex B within the process document.
36. We consider this approach to hold the following benefits for the regulators:
- the approach is more targeted and we anticipate this will reduce regulatory burden
 - it is more proportionate, as where we are assured about a regulator's performance, the regulator will not be subject to a performance assessment
 - where the current process is largely reactive, the proposed model is proactive in identifying risks and supporting the regulators to mitigate them
 - ongoing assessment will provide the regulators with feedback, that is both regular and current, about where they are performing well, and where they could improve.
37. We are proposing a three-part process:
- ongoing monitoring of the regulators' performance
 - an internal annual assessment of the outcome of our ongoing monitoring
 - benchmark assessments.

Ongoing monitoring

38. The first part of the process is our ongoing monitoring of the regulators' performance using information and evidence we gather ourselves alongside the dataset provided by the regulators. The ongoing monitoring proposed will provide us with evidence from which we can gain an understanding of whether the regulators are meeting or not meeting the standards. It will also allow us to promptly identify areas of concern which warrant closer attention, or areas where we consider we do not have sufficient information to be assured about a regulator's performance.

Internal annual assessment

39. The second part of the process will see us carry out an internal annual assessment of the information we have gathered to determine whether any action is required. It is proposed that this forms part of our business planning process. Our ongoing monitoring and internal annual assessments will allow us to identify whether we need to:

- take no further action
- seek further information about a regulator’s performance through a specific information request
- review a regulator’s performance against a particular standard or outcome
- review a regulator’s performance against all of the standards
- carry out a thematic review of one or more regulators’ performance against a particular standard or outcome.

Benchmark assessments

40. 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.

Consultation questions

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?
9. Do you have any comments on the proposed methods of assessment and review for the regulators?

Gradings and reporting

Grading

- *Met*
- *Not met - 1*
- *Not met - 2*

41. The grading scale used in previous performance assessment exercises measured regulators’ maturity against the regulatory standards. While suited to previous regulatory performance exercises this grading scale is not considered appropriate for measuring minimum standards of performance.

42. The proposed revised grading scale measures whether a regulator has, or has not, met the minimum performance expected against 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.
43. The grading scale is as follows:

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.
	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.

44. 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.
45. We propose that performance assessment reports will set out the way in which we have reviewed a regulator's performance, include the findings of the review and the grading awarded. We also propose that at appropriate intervals we publish thematic reports which detail learning gathered from the range of reviews undertaken.
46. Where we identify good practice within a regulator's performance, we will acknowledge this and, if appropriate, share it amongst the regulators.

Consultation questions

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

12. Where we identify good practice within a regulator's performance, how do you think we should share this with the other regulators?

Transparency of the performance assessment process

47. The review of the existing framework identified a need for increased transparency around our review processes. In response to this, we have developed a process document, which explains how we plan to undertake the regulatory performance assessments.

48. The document outlines:

- how the regulatory performance assessment process links with our overall regulatory approach
- our approach to gathering evidence
- our risk-based approach to monitoring and assessing the regulators' performance
- how and when we will address any concerns identified with the regulators' performance
- our approach to reporting on the regulators' performance.

The regulatory performance assessment process document is provided at Annex B.

Consultation question

13. If you consider that the regulatory performance assessment process document does not provide sufficient transparency about our approach to performance assessment, what could we do to make this more transparent?

Timetable and Implementation

49. We are proposing to commence implementation of the revised performance assessment framework in the 2018/19 financial year. In order for a risk-based assessment process to be effective, a transitional assessment of each regulator is required.

50. Transitional assessments will be performed over an approximately 18 month period. We will only review regulators against those standards and/or outcomes where we have concerns, or are unable to assure ourselves, about a regulator's performance. Items for review will be identified through gap analyses undertaken on the information and evidence we have on each of the regulators.

51. The schedule for when we will review specific regulators during the 18 month transition period has yet to be determined, this will be informed by results of the regulator's gap analysis and a number of other prioritisation factors.

52. Following a transitional assessment, assessment of the regulator's performance will move to the risk-based process described above.

Consultation questions

1. Please could you set out any other minimum standards required of a regulator which are not covered by the proposed regulatory performance standards?
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. Other than the items already listed in the revised data set, please could you list any other items that we should be collecting? Please identify why we should be collecting them.
4. Are there any items listed in the revised data set that should not be included in this?
5. Is it necessary for the information collected in the revised dataset to be put into the public domain? What is the LSB's role, if any, in encouraging this?
6. If you believe the collection of this dataset would have a disproportionate cost/time impact on the regulators, what would you estimate this to be?
7. Are there any other evidence-gathering approaches we should be using, or any evidence-gathering approaches listed which we should not use?
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?
9. Do you have any comments on the proposed methods of assessment and review for the regulators?
10. Please provide your views as to whether the revised grading scale supports accurate measurement of the regulators' performance against the standards?
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?
12. Where we identify good practice within a regulator's performance, how do you think we should share this with the other regulators?
13. If you consider that the regulatory performance assessment process document does not provide sufficient transparency about our approach to performance assessment, what could we do to make this more transparent?

How to respond

53. Responses should be submitted to the LSB by Monday 25 September 2017.
54. We would prefer to receive responses electronically (in MS Word or PDF format), but hard copy responses by post will be accepted.
55. Responses should be sent to:

- Email: consultations@legalservicesboard.org.uk
 - Post: Legal Services Board, One Kemble Street, London, WC2B 4AN.
56. We intend to publish all responses on our website unless a respondent explicitly requests that a response (or part of it) should be kept confidential. We will record the identity of the respondent and the fact that he/she has submitted a confidential response in our summary of responses.
57. Any complaints or queries about the process should be directed to the Consultation Co-ordinator, Jenny Prior, by one of the following means:
- Email: consultations@legalservicesboard.org.uk
 - Post: Jenny Prior, Consultation Co-ordinator, Legal Services Board, One Kemble Street, London, WC2B 4AN.

Annexes

- Annex A – Regulatory performance assessments: Regulatory performance standards
- Annex B – Regulatory performance assessments: The process
- Annex C – Regulatory performance assessments: Performance management dataset