

To:	Legal Services Board	
Date of Meeting:	23 November 2017	Item: Paper (17) 81

Title:	Revised regulatory performance assessment process	
Workstream(s):	Performance, evaluation and oversight	
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Status:	Unclassified	

Summary:
<p>The LSB's work to hold the legal services regulators to account for their performance is a core statutory function and is key to delivering public confidence in legal services. Through it, we drive improvements in the regulators' performance and challenge them to become more effective and efficient.</p> <p>In line with the 2016/17 Business Plan we reviewed and revised the framework we use for assessing the regulators' performance to ensure that it enables us to carry out our oversight role effectively and efficiently. In developing our proposed revised framework we have had regard to the regulatory objectives, the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed¹ (the "better regulatory principles") and other principles representing best regulatory practice². We also held pre-consultation discussions with colleagues, regulators, and the Consumer Panel. Benchmarking against other regulators' (both UK and international) performance frameworks was also undertaken.</p> <p>Following discussions at its May 2017 meeting, the Board subsequently approved the proposed process and framework for consultation. This has now been subject to a 14 week consultation. This paper reports the changes to the framework following consultation and the draft consultation response document for the Board to note.</p> <p>The regulatory performance standards, process and performance management dataset documents will be available at the Board meeting and can also be requested in advance.</p>

Recommendation(s):
The Board is invited to:

¹ Section 3(3)(a) of the Legal Services Act 2007

² Section 3(3)(b) of the Legal Services Act 2007

- (1) note the amendments that have been made to the framework
- (2) note the regulatory performance consultation response document
- (3) note that implementation of the revised framework will commence in the 2018/19 financial year following CEO sign off.
- (4) provide views on the proposed approach for keeping the Board informed about the regulatory performance workstream

Risks and mitigations	
Financial:	N/A
Legal:	<p>Whilst the work of the team has been informed by the approach of a regulator in health and care sector, the board must ensure that its approach to regulatory performance is appropriate to the legal services statutory framework and the sector specific context.</p>
Reputational:	<p>Our approach to regulatory performance assessments is core to our ability to assure ourselves about the regulators' performance and to address the risks to performance where we are unable to do so.</p> <p>Failure to appropriately consider and respond to the feedback received during the consultation may result in the LSB being perceived as an unresponsive regulator.</p> <p>Further, if we do not introduce an improved model in a timely fashion, it may hamper our ability to assure ourselves about the regulators' performance in a risk-based and proportionate manner.</p>
Resource:	The resources required to progress this work have been factored into the 2018/19 business plan.

Consultation	Yes	No	Who / why?
Board Members:	x		Discussion with board sponsors Dr Helen Phillips and Michael Smyth QC (Hon)
Consumer Panel:	x		Preliminary views of the Legal Services Consumer Panel (LSCP) members on the proposed framework were sought. The LSCP also submitted a formal response to the consultation.
Others:			We received 19 responses to the consultation which closed at 5 pm, Monday 25 September 2017. This included responses from regulators, professional associations, consumer groups and complaint bodies. A full list of respondents and a summary of the responses is provided in the draft consultation response document at Annex A.

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
Annex A	s.22. The document is intended for future publication.	

LEGAL SERVICES BOARD

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Revised regulatory performance assessment process

Executive Summary

Background

1. The core role of the LSB is to hold the legal services regulators to account. The main way we have achieved this is through our assessment of their performance against the regulatory standards framework.
2. After the last full regulatory standards assessment (published in May 2016³), we acknowledged that it would be an appropriate time to consider whether the framework operated in a risk-based, proportionate and targeted way. We also wanted to ensure that it was clearly linked to the regulatory objectives and the better regulatory principles, and that it enabled us to have confidence and assurance about the regulators' performance.
3. We carried out a review of our framework including comparing it with other similar schemes in the UK and internationally and considering best regulatory practice. We prepared a revised framework and between March and April 2017 we discussed it with each of the regulators and the Legal Services Consumer Panel. This pre-consultation engagement was strongly welcomed. A number of regulators elected not to provide a detailed response to the formal consultation as they felt their views had been captured through this process.⁴
4. The Board considered the revised framework at its May 2017 meeting and a public consultation was held between June and September 2017. A number of supplementary activities have also been undertaken prior to and during the consultation period.
5. In this paper we set out a summary of the supplementary activities which have been undertaken, the changes that have been made to the framework following the consultation, and a proposed approach for maintaining Board engagement with the regulators' performance.
6. We invite the Board to:

³ http://www.legalservicesboard.org.uk/Projects/developing_regulatory_standards/index.htm

⁴ An anonymised summary of the pre-consultation feedback is available on our website. http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/2017-200617/Reg_performance_consultation_-_Anonymised_summary_of_stakeholder_feedback.pdf

- note the amendments that have been made to the framework
- note the response document to the regulatory performance consultation
- note that implementation of the revised framework will commence in the 2018/19 financial year following CEO sign off.
- provide views on the proposed approach for keeping the Board informed about the regulatory performance workstream

Well-led: governance and leadership

7. Through our work to hold the legal service regulators to account we drive improvements in their performance and encourage them to be well-led organisations which strive to be more effective and efficient. Through our review, we refocused our ‘capability and capacity’ standard so it more closely reflected the requirements for a well-governed and well-led regulator.
8. We further built on this during our consultation period by learning from the Chair’s experience of the Care Quality Commission’s (CQC) approach to assessing whether hospital trusts are well led. It currently places considerable emphasis on assessing this in its inspections. We saw benefit in adopting a similar emphasis on the ‘well-led’ standard within our framework, as we consider this will enable us to greater encourage the legal services regulators to become modern, well-led organisations.
9. As a result of this, we have done the following:
 - We consider that in order to be a well-led organisation, elements of the governance and leadership standard should be reflected in the other standards which relate to the core regulatory functions carried out by the regulators. We have therefore reviewed the relevant sections to ensure that this is reflected in the standards of performance described under each of them.
 - Reflecting the direct equivalence of the standards, we have included the term ‘well-led’ in the title of our ‘governance and leadership’ standard, as we consider this more accurately describes the standard. This is discussed on page three of the consultation response document.
 - We will signal that if regulators meet the well-led: governance and leadership standard, this will be an important factor in determining the scope and scale of future reviews of other aspects of the regulatory performance standards.

- An additional outcome which focuses on effective communication and stakeholder engagement has been developed within the well-led: governance and leadership standard. It is discussed at paragraph 16 below.
- We have adopted a Key Lines of Enquiry (KLoE) approach to assess the regulators' performance against standards. We will use our KLoE when undertaking gap analyses of the regulators' performance. These analyses will inform the scope of the individual transitional reviews.

10. Other ideas which we are considering using to support our assessment of whether the regulators are well-governed and well-led are:

- The CQC will be issuing an annual mandatory information request return on their well-led standard. We will consider whether to adapt future information requests to focus on our well-led: governance and leadership standard, or to adopt a process where we request such information more regularly than for other standards.
- Whether there would be any benefit in undertaking a governance thematic review, the outcome of which could then be used as a key factor in determining future regulatory reviews.
- Relationship managers for the regulators (we are currently piloting a relationship management program with three of the regulators)
- Reports focused on findings that are important for consumers, and to maximise clarity providing detailed evidence in separate appendices
- Extracting regulator ratings from individual reports for display on the appropriate section of our website.

Post consultation changes to the revised framework

11. Respondents were generally supportive of the revised framework. It was considered to be a more proportionate and evidence-based approach, which reflected the diversity of the sector and the progress regulators have made since the Legal Services Act 2007 (the "Act") was introduced.

12. Our plans in relation to the evidence gathering streams and the assessment process remain unchanged. In light of some comments in response to the consultation and our further development of the framework, we have made some minor changes to the standards and the grading scale. Below is a summary of the amendments that we have made.

Regulatory performance standards

13. Performance will still be assessed against the five function-based standards proposed in the consultation. As referenced above the fifth standard 'Governance and leadership' has been re-titled 'Well-led: governance and leadership'.
14. Under each of the standards there are four to six outcomes that regulators are expected to demonstrate they are achieving. In the consultation these were described as the 'minimum' standards of performance. Following the consultation we have amended this to 'required' standards of performance. This is consistent with our draft strategic plan 2018-21 which includes that 'all regulators are assessed as meeting the required level of performance against all performance standards'.
15. Except for the following two outcomes, the individual outcomes remain unchanged:
16. As referenced above, an additional outcome within the Well-led: governance and leadership standard has been developed. It focuses on effective communication and stakeholder engagement. The new outcome is:

'WL: GL6: The regulator communicates with a diverse range of stakeholders, for example its regulated community, the approved regulator, its representative body(ies), students, consumers, government, etc. to:

- account for its plans, progress and performance
- ensure appropriate and accurate information is effectively taken into account in its work ⁵

17. Outcome E5 has been revised to reflect that all parties involved, and any others affected by an enforcement process, should be kept informed of progress, *unless it is not appropriate to do so*. We have also replaced the term 'complainant' in the outcome with the more relevant term 'provider of information'. The new outcome is:

E5: During the process, and at each key decision stage, the regulator keeps those involved and any others affected by the case (for example in cases of dual regulation, the regulator, the provider of information and those under investigation) informed of progress, unless it is not appropriate to do so.⁶

Gradings and reporting

18. In the consultation we proposed a three-level grading scale which measured whether a regulator has or has not met a particular standard or outcome. This

⁵ See page 8 of the consultation response document

⁶ See page 9 of the consultation response document

approach was welcomed. However, some respondents thought the distinction between the ratings ‘Not met - 1’ and ‘Not met - 2’ was not sufficiently clear (the third rating was ‘Met’).

19. We plan to keep the three-level scale but propose changing the ratings to the following:

Met	The regulator meets the required standard of regulatory performance.
Not met – action being taken	The regulator does not presently meet the required standard of regulatory performance and is working to address the areas of concern.
Not met – action required	The regulator does not meet the required standard of regulatory performance and is required to work with us to improve performance.

Performance management dataset discussions

20. Discussions have been held with all of the regulators to begin the process of tailoring the datasets and ensuring they are consistent with their specific circumstances (for example, taking account of differences in the language and processes used across the regulators).
21. Amended datasets and reporting intervals are being agreed with the regulators and reporting will begin by April 2018 at the latest. Datasets will be collected from regulators at different intervals, reflecting the differences in the scale of their activity. Comments from these discussions which have further informed the revised framework are included within the consultation response document.

Integration with other LSB work streams

22. As commented on in the Board discussion in May, the assessment of regulatory performance is central to our role as an oversight regulator and there are, therefore, strong linkages between it and other LSB work streams.
23. There are synergies between regulatory performance and the monitoring of the Competition and Markets Authority (CMA) action plans. There will be a standalone assessment of the regulators’ progress against their CMA action plan in autumn 2018. Following this the regulatory performance team will work with colleagues responsible for the CMA action plan workstream to determine whether there is scope for these pieces of work to be more closely interlinked going forward.
24. Where possible, monitoring and assessment of regulatory performance will inform, and be informed by, workstreams set out in our Business Plans. Our planned work on developing LSB oversight of standards of education and training, reviewing delivery of enforcement activities and assessing regulators’

responses to revised diversity guidance, as identified in our 2017/18 Business Plan, represent examples of where this will or has occurred.

Regulatory performance and Board working

25. Introduction of a revised framework and new risk-based approach, presents an opportunity to take a new approach to keeping the Board informed about our regulatory performance workstream.
26. In addition to the annual assessment information we plan on providing to the Board as a whole, we would be interested in piloting a more proactive approach where we update individual Board Leads more frequently on their allocated regulators. Board Leads would be kept informed of any areas of concern identified during our ongoing monitoring of their allocated regulators, as well as any further investigation we are conducting into those concerns.
27. This approach would give Board members greater opportunity to contribute to the regulatory performance work in relation to their allocated regulator. LSB staff would also benefit from any insight or support that Board members may be able to bring to the work.
28. We believe the approach described above maintains Board engagement with regulatory performance at an appropriate level. We would be interested in hearing the Board's thoughts on this proposed approach.

Next steps

29. Subject to CEO sign off, the attached response document will be published along with the standards, process and dataset documents. The gap analyses undertaken to inform the transitional reviews will begin in December 2017. Implementation of the revised framework would then commence in the 2018/19 financial year, with transitional reviews performed over an approximately 18 month period from April 2018.⁷

14.11.17

⁷ See paragraphs 65-68 of the response document for further information on the transitional reviews and implementation of the revised process and framework.