

Regulatory performance assessment

Summary of responses received and the LSB's response to them

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Introduction

1. In June 2017, the LSB opened a consultation on its revised framework for assessing the performance of the legal service regulators (the regulators). The consultation was open for 14 weeks and closed on 25 September 2017.
2. We also undertook a number of supplementary activities aimed at further refining and strengthening the framework. These activities included pre-consultation discussion of the revised framework with the regulators and Legal Services Consumer Panel (LSCP), as well as tailoring the proposed performance management datasets (the dataset) with the regulators.
3. We received 19 responses to the formal consultation from regulators, professional associations, consumer groups and complaint bodies. A full list of the individual respondents is included as an annex to this document and copies of the responses can be found on the LSB's website.¹ We are grateful to all of the organisations who took the time to respond.
4. This document provides a summary of responses received to the consultation and our response to those comments. The final regulatory performance assessment framework that will come into place in April 2018 is available on our website.²
5. 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.
6. 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 regulatory performance standards and the grading scale. A summary of these minor amendments is provided below.

Regulatory performance standards

7. Performance will still be assessed against the five function-based standards proposed in the consultation. However, through our review, we have refocused our 'capability and capacity' standard so that the requirements for a well-governed and well-led regulator are more closely reflected within the outcomes of performance under all of the standards.

¹ See LSB closed consultations

http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/index.htm

² Legal Services Board (2017). Regulatory performance assessments. The process. Available at:

[http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2017/Regulatory_Performance_Process_Document_December_2017_\(final\).pdf](http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2017/Regulatory_Performance_Process_Document_December_2017_(final).pdf)

8. The fifth standard 'Governance and leadership' has been re-titled 'Well-led: governance and leadership', as we consider this more accurately describes the standard. In the context of our revised framework there is also an increased emphasis across all of the standards on the extent that a regulator:
 - Is well-led by its Chair and CEO, and well-governed by its leadership team.
 - Has the leadership capability and capacity, and corporate governance, to manage the organisation effectively.
 - Has a culture that encourages and uses learning to improve performance.
 - Promotes a transparent and consumer-focused environment.
9. The outcomes under each of the standards will now be described as 'required' rather than 'minimum' standards of performance. This is consistent with our draft strategic plan 2018-21 which says 'all regulators are assessed as meeting the required level of performance against all performance standards'.
10. The individual outcomes remain unchanged apart from a slight amendment to outcome E5 in the Enforcement standard and the addition of outcome WL: GL6 to the Well-Led: Governance and Leadership standard. See pages 8 and 9 below for more information on these changes.

Gradings and reporting

11. The proposed three-level grading scale, which measured whether a regulator has or has not met a particular standard or outcome, was welcomed. We have kept the three-level scale but in response to some comments we received on the distinction between 'Not met – 1' and 'Not met – 2' we have clarified the rating descriptions. More information is provided at page 22 below.

Background

12. 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 their performance and encourage them to be well-led organisations who strive to be more effective and efficient.
13. Through the current framework which was introduced in 2011, we have delivered two full assessments (2012/13 and 2015/16) of the regulators' performance. The framework was also used to carry out an update exercise in 2014/15. This 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.
14. 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 work was part of the performance, evaluation and oversight stream of our 2015-2018 strategy.
15. Consideration of our own experience in using the process, and consultation with the regulators about their views and experience of it, identified opportunities for improvement to ensure the assessment framework remained fit for purpose.
16. In developing our new framework, we undertook extensive environmental scanning of review processes across the United Kingdom (UK) and internationally. We also discussed with UK regulators in other sectors their approach to performance assessment.
17. 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 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 proportionate.
18. Initial pre-consultation on our revised assessment framework was undertaken with the regulators and with the Legal Services Consumer Panel (LSCP). The assessment framework has also been subject to review by internal auditors. The input received was extremely valuable and resulted in a number of refinements being made.

Summary of responses

19. The consultation document posed a number of questions about the different elements of the framework. We have set out below a summary of the comments we received and our responses to them.

Regulatory Performance Standards

(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.

20. Responses to the consultation identified that the standards were clear and transparent and that removing duplication provided additional clarity. Several respondents commented that the standards were logical, and consistent with those applied by other oversight bodies. The standards were considered to be outcomes-focused and Association of Chartered Certified Accountants (ACCA) remarked that it was positive that the LSB was not prescribing how the regulators should meet the standards.

21. While the Intellectual Property Regulation Board (IPReg) welcomed the new framework's focus on meeting minimum standards of performance, it suggested that the terminology would be better expressed as an 'expected' standard rather than a 'minimum' one, to avoid any negative connotations.

LSB response

We are pleased that respondents consider the proposed standards to be an improvement.

We agree with IPReg's view about the term minimum. However we do not consider the term 'expected' to accurately reflect the revised framework's focus on minimum standards. We will therefore be amending the language to 'required standard of performance'. In line with our regulatory approach, the regulatory performance standards will outline the outcomes we require regulators to achieve through their performance.

Potential improvements to the standards

22. While most comments were positive, we did receive some suggestions for how the standards could be improved. The Law Society (TLS) considered there to be scope for the standards to more closely reflect the regulatory objectives. It considered this was particularly true of the regulatory approach standard. TLS also considered that assessing the regulators' approach to altering regulatory arrangements was missing from the standards. It suggested the standards provide an opportunity to:

- require regulators to perform full economic assessments when submitting such applications.
- require regulators to provide an evaluation of the effectiveness of such alterations once they are implemented.
- strengthen requirements around only allowing the regulators to introduce regulation where it transparently supports the regulatory objectives.

23. TLS also commented that outcome RA3 (*RA3: robust evidence base from a range of sources on new and emerging policy developments*) should include policy developments driven by the regulators. It considers that the framework will not be fully risk-based if only external developments are considered.

LSB response

We are grateful for TLS's comments on the standards. The regulatory objectives were considered in the development of the proposed standards. The standards were developed in such a way that efforts undertaken by the regulator to meet them are likely to promote achievement of the regulatory objectives. As such, we do not consider that additional work to further align the standards with the regulatory objectives is necessary.

In relation to TLS's comments on regulators' rule changes, the evaluation of the impact of rule changes is an example of the evidence regulators can provide against outcome RA5 (*RA5: regulator's understanding of the impact of its regulatory arrangements and guidance on consumers, the regulated community, the market and the regulatory objectives*). We consider the inclusion of this in the suggested evidence regulators can provide to be sufficient because:

- The process for assessing rules change applications and the process for assessing regulatory performance will remain separate processes. Although, intelligence gathered through assessment of rule change applications will be used to inform our overall picture of regulator performance.
- The LSB's rules for rule change applications require the applicant to explain the desired outcome of the alteration and how the applicant intends to assess whether the desired outcome has been achieved.³
- The regulatory objectives are already considered within the LSB's rule change approval process. It is a requirement for regulators to include a statement within their application outlining how each alteration will help to promote, be neutral, or be detrimental to each of the regulatory objectives.

³ Legal Services Board (2010). Rules for Rule Change Applications. Available at: http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/rules_for_rule_change_applications_v2_November2010.pdf

In relation to TLS's final comment, we confirm that a robust evidence base on new and emerging policy developments refers to both internal and external policy developments.

Potential additional standards

24. The Chartered Institute of Patent Attorneys (CIPA) stated it would be beneficial to include minimum standards for a regulator's communication and financial performance. It identified that it has found communication between the regulatory body and the approved regulator (AR), and communication between the regulatory body and stakeholders, to be a significant factor in effective regulation. It also considered financial performance and the translation of financial health into the level of practice fees a key indicator of performance.
25. TLS noted the proposed framework does not include specific and relevant key performance indicators (KPIs), and considers this makes it difficult to assess performance in a consistent, transparent and accountable way. It encouraged the LSB to develop these measures and to publish comparison tables of regulators' performance. It believes this would increase transparency, and encourage the exchange of information amongst the front-line regulators. As well as making information on regulators' performance more accessible to the general public.

LSB response

We agree with CIPA's view that it would be beneficial to include a required standard for communication within the proposed standards. As such, we have developed an additional outcome under the Well Led: Governance and Leadership standard which focuses on effective communication and stakeholder satisfaction (*'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*). With regards to financial information, consideration of the transparency of financial performance and costs is already covered under the Well Led: Governance and Leadership standard.

Factors impacting financial health, including budget and reserves, are also considered when approving practising certificate fee applications. These processes will remain separate, however intelligence from this process may be used to assist in developing our overall picture of the regulators' performance.

We note TLS's comments about the framework lacking specific KPIs. However, as we will be making assessments of the regulators within their own contexts, developing KPIs that are relevant to all regulators would not be possible, nor would it be in line with our role as an oversight regulator rather than a front line regulator. Where we can, and where it is helpful to do so, we will draw comparisons between

the regulators' performance in the commentary that accompanies the performance ratings but it is not our intention to develop comparison tables.

Concerns about particular standards

26. Two respondents identified items within the proposed standards that they thought should be removed or that they had concerns about.
27. ACCA felt the wording in outcomes RA2 (*RA2: regulatory arrangements and supporting guidance documents are regularly reviewed and updated*) and S2 (*S2: education and training providers are monitored to ensure standards are met. Steps are taken to remedy this where they are not met*) was unhelpful. It considered to be unnecessarily prescriptive and to describe inputs not outputs. It was also concerned about outcome GL3 (*GL3: the regulator is transparent about its operations*) as it considers this standard may be seen as requiring transparency of information of a sensitive nature.
28. The BSB expressed concern about outcome E5 (*E5: keeping those involved in enforcement processes, and any others affected by them, informed of progress*). The BSB suggested that this standard should be revised as it may not always be necessary to keep the provider of a complaint, and all other parties, apprised of progress. The BSB further suggested that the idea of a complainant is now less relevant given the role the Legal Ombudsman plays in dealing with service complaints. It suggested that the regulator's role is now limited to dealing with conduct matters, and complainants can more appropriately be considered 'providers of information', with the regulator taking a decision on what use to make of the information provided.

LSB response

In response to ACCA's concerns about outcome RA2 and S2, our expectation is that the regulator is able to demonstrate that thought has been given to whether regulatory arrangements and education and training provision is effective and operating as intended. This will be made clearer in the final process documentation. In response to their concerns about the proposed standard GL3, we can clarify that, where it is not in the public interest to do so, we would not require regulators to be transparent about sensitive information.

We agree with the BSB's views on proposed standard E5 and will amend the standard 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 will also amend the wording of the proposed standard, replacing the term 'complainant' with the more relevant 'provider of information'.

Other issues raised

29. Four respondents identified concerns or sought clarification about other elements of the standards document, namely the examples of evidence, and the previous LSB statements about standards of performance. With outcome E3 which relates to the regulators' enforcement processes, TLS and the Chartered

Institute of Legal Executives (CILEx) expressed concerns about the inclusion of the statement, 'Civil standard of proof should be used at all stages of the enforcement process' in the list of previous LSB statements about standards of performance. CILEx said that it should be up to the regulator to determine the standard of proof required. TLS considers that it is inappropriate for the LSB to use its performance assessment framework to require a certain standard of proof.

30. ACCA and the BSB raised concerns that the examples of evidence and previous LSB statements about standards of performance listed had the potential to be quite prescriptive and may restrict an outcomes-based approach. While examples to illustrate the types of evidence that would support successful assessments were welcomed, the BSB was keen to ensure these are viewed as guides to help the regulators determine what evidence they provide against the outcome. ACCA also sought clarification as to whether suitable substitutes to those listed could be provided for outcomes RA3 (*RA3: robust evidence base from a range of sources on new and emerging policy developments*) and RA5 (*RA5: regulator's understanding of the impact of its regulatory arrangements and guidance on consumers, the regulated community, the market and the regulatory objectives*) as it identified its view that the information listed may be difficult to obtain.

LSB response

The LSB's view that the civil standard of proof should be used at all stages of the enforcement process has been informed by considerable policy work.⁴ As with any area where we have a clear position, we expect the regulators to either follow an approach if one is recommended, or to provide an explanation as to why it is not appropriate for them to do so.

We acknowledge ACCA's and the BSB's concerns about the examples of evidence. The examples listed are illustrative only and are intended to provide guidance as to the evidence that could be provided against an outcome. It will be at the discretion of the regulator to provide the type of evidence that it considers demonstrates performance against the standard or outcome. We do not expect regulators to create new pieces of evidence where substitutes are available. We will ensure our documentation and staff are clear on this point.

With regards to the clarification ACCA sought about finding suitable substitutes for robust evidence on customers' needs, we note that this concern was raised during pre-consultation with the legal services regulators and is addressed at paragraph 4

⁴ Legal Services Board (2014). Regulatory sanctions and appeals processes. Available at: http://www.legalservicesboard.org.uk/projects/thematic_review/pdf/20140306_LSB_Assessment_Of_Current_Arrangements_For_Sanctions_And_Appeals.pdf.

of the anonymised summary of feedback received during this process.⁵ During pre-consultation, several regulators noted that gathering such information had been difficult in the past, and the LSB must remain conscious of the need to use suitable substitutes for this information. 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. For example, regulators may rely on secondary data analysis in order to perform against this outcome and deliver their regulatory functions. Outside of this process, the LSB will give thought to how it can assist regulators with this issue, particularly those who are less well resourced. We note that we currently produce summaries of research findings, and a summary of our research on individual consumer legal needs is available on our website.⁶

Consumer focussed approach

31. In their response to the consultation ACCA sought greater clarity about what a consumer-focused approach to supervisory activity entails. The BSB sought clarification on how outcomes focussed the assessment will be, and whether the regulator's context will be considered in this process.

LSB response

We consider a consumer-focused approach to supervisory activity to be one which monitors and detects behaviours of the regulated community and of education and training providers, which would have a detrimental impact on outcomes for consumers, and in particular, vulnerable consumers.

In response to the BSB's query, we clarify that the regulator's context will be considered as a factor in our assessment of regulatory performance, in the same way it was considered as a factor in the LSB's assessment of the regulators' individual market transparency action plans.

Evidence-gathering streams

(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 Legal Services Board (2017). Summary of feedback: Regulatory Performance Assessment Framework. Available at: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/2017-200617/Reg_performance_consultation_-_Anonymised_summary_of_stakeholder_feedback.pdf.

⁶ Legal Services Board (2016). Research summary: Individual consumer legal needs. Available at: https://research.legalservicesboard.org.uk/wp-content/media/Research-summary_ILNS_v2-FINAL.pdf

- (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?*

32. Overall, respondents supported the formalisation of evidence-gathering streams. TLS, for example, felt that this would strengthen the performance assessment framework.

Performance Management Dataset

33. Many respondents provided comments, or had queries, about the metrics included within the template performance management dataset (the dataset).
- ACCA expressed a view that the metrics under the Well Led: Governance and Leadership section of the dataset should be restricted to the regulatory processes and activities that apply to legal services and persons authorised to undertake reserved legal activities.
 - The Solicitors Disciplinary Tribunal noted that the dataset does not include reference in the enforcement section to data collected for matters referred to the tribunal. In order to increase transparency the SDT considers that the dataset should include data in relation to such matters and offered to provide this.
 - CIPA suggested that 'Complaints – Number of justified complaints about the regulator' should be set out within the total number of complaints and accompanied by an explanation as to why complaints were not justified.
 - IPReg expressed a concern about the metrics relating to the timeliness of enforcement complaints. It considers that the handling of these is a product of the complexity of the complaint, rather than of a regulator's processes. It suggested that the LSB employ a minimum threshold number of complaints and only when that threshold is reached, will the minimum, maximum and median figures be calculated. In line with the Legal Ombudsman threshold to apply a costs-related fees levy, IPReg proposed that the threshold should be when 10 complaints have been received in the applicable timeframe.
 - IPReg, the BSB and CILEx all expressed a view that it was not appropriate for 'Business planning – number of planned business activities not completed within agreed timetable' to be included within the dataset as they consider this to be a matter for their respective Boards. For the same reason the BSB also considered 'Organisational health – staff turnover for those dedicated to regulatory activity for the financial year compared to the previous year' to be inappropriate. It advised that the LSB should not seek to duplicate the role of the Board, but rather seek to identify whether the

regulator has processes in place to scrutinise progress against these metrics.

- The SRA said that it is keen to avoid a bureaucratic and onerous system where it is collecting data solely for the purpose of reporting it to the LSB. It believes it already collects and publishes sufficient data to enable the LSB to measure its performance. CILEx welcomed the indication that the majority of the data that will be required is already being collected. However, CILEx also said that it would be useful to understand the extent to which the dataset requirement was mapped against the existing data regulators currently collect.

34. The SRA identified some concerns about the dataset's reliance on simple mean and median averages and ranges, and suggested that the proposed dataset would benefit from greater statistical insight and expertise. ACCA also queried why median was recorded in the dataset rather than mean, noting that not all regulators may report on this figure. It sought further clarification on whether reporting a simple mean to the LSB would be appropriate, if it was accompanied by additional sources of evidence. The BSB advised that the language within the dataset does not suit their operations.

LSB response

We agree with ACCA's view that regulators should only be required to provide metrics under the Well-Led: Governance and Leadership section of the dataset where they apply to legal services, or individuals or entities authorised to undertake reserved legal activities. This was also raised during pre-consultation and is addressed at paragraph 14 of the anonymised summary of feedback received during this process.⁷

We thank the SDT for its offer to provide figures for the number of matters the SRA refers to the tribunal. This is an example of the type of tailored individual metric we have agreed with the regulators.

We acknowledge CIPA's view that the number of justified complaints should be set out against the number of unjustified complaints, however we do not consider this necessary. If it is brought to our attention during an assessment (or otherwise) that there is a problem in this area, we may then look to this metric to further our understanding.

We note IPReg's concern about the timeliness of handling for enforcement complaints metrics, however we do not consider its proposed solution would allow us to effectively identify changes which may suggest risks to performance. In response,

⁷ Legal Services Board (2017). Summary of feedback: Regulatory Performance Assessment Framework. Available at: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/2017-200617/Reg_performance_consultation_-_Anonymised_summary_of_stakeholder_feedback.pdf.

we note that it is open to the regulators to provide context and commentary on this, and all other metrics, and we will take this into account.

We acknowledge the concerns IPReg, CILEx and the BSB raised about the 'Business planning' metrics. Similar concerns were raised during pre-consultation and are discussed at paragraphs 14 and 17 of the anonymised summary of the feedback received during this process.⁸ Following further consideration, we will be removing these metrics from the dataset as we consider we can gather such information through other means. We note the concerns about metrics surrounding staff turnover were also raised during pre-consultation. As identified in the anonymised summary, given there is a significant body of research which supports the use of staff turnover as an indicator of organisational health, we consider its inclusion justified.

In response to CILEx's query, we advise that the metrics in the dataset have been modelled on metrics we expect the regulators to already be collecting. We will also rely on publically available data where we are able to do so. However, where we are unable to, we will require regulators to report on the metrics we have agreed with them, and in line with the collection intervals we have agreed with them. This ongoing monitoring is essential for the risk-based approach to operate effectively.

We note that the concerns raised around reporting median rather than mean were also raised during pre-consultation and is addressed at paragraph 14 of the anonymised summary of feedback received during this process.⁹

Median is considered to be a fairer measurement as it discounts outliers which can distort performance figures. This is especially important where the number of data points will be small, such as the number of appeals received and concluded. Median is also very simple to calculate, and does not impose any additional data collection or reporting burden. Further we want to ensure consistency of measurement between the different regulators. We disagree that another measurement should be reported. However, as identified we note that it is open to the regulators to provide context and commentary around the metrics and we will take this into account.

We acknowledge the BSB's concerns about the language within the dataset not matching their operations, but note that this has been addressed through the tailoring of datasets with individual regulators which commenced in August 2017.

Proportionality of the datasets

35. Many respondents believed that collection of the dataset was unlikely to have a disproportionate cost or time impact for the regulators. ACCA believed that it would not be disproportionate if the dataset can be tailored to the regulators' existing reporting frameworks, but that the LSB should also seek to ensure that tailoring the datasets does not become burdensome. CIPA expressed a view

⁸ Ibid.

⁹ Ibid.

that the data being requested would have little impact on cost or time as it should already be systematically generated. The BSB supported this view advising that it already collects and reports the data and so it would not have a particular time or cost impact for it. However it did note that collection could be burdensome for regulators not already collecting the data. The ICAEW expressed a view that there may be a benefit to the LSB regimenting some of the data collection requirements into an annual request. They said that this would allow firms and regulators to plan and collate this data on a timely and efficient basis, and for the LSB to build its own data bank with which to assess trends and risks.

36. CILEx welcomed the indication that it will mostly be data that is already being collected which will be required as part of the dataset. However, it noted informal information requests could be used to fill any gaps where specific information is required. It encouraged the LSB to guard against any tendency towards the use of informal information requests.

LSB response

We are pleased that a number of respondents to the consultation considered that collection of the dataset was unlikely to create disproportionate time or cost burden for the regulators. The tailoring of datasets to regulators' operations, as detailed in the section on this below, is likely to further minimise the potential for this to be a disproportionate burden, as are our efforts to rely on data where it is publically available. We acknowledge ICAEW's suggestions for allowing regulators to collate data on a timely and efficient basis. We hope that our efforts to agree collection intervals with the regulators will assist with this.

We also acknowledge CILEx's concerns about informal information requests. As stated in the process document we will attempt to gather as much information as we can ourselves. We recognise this is not always possible and we will sometimes make information requests from the regulators. Where we do make informal information requests, all efforts will be made to ensure our requests are proportionate and targeted. As explained above, the tailoring of datasets with individual regulators should minimise the need for these requests.

Publication of the datasets

37. To allow increased scrutiny and transparency CIPA and TLS supported the view that completed datasets should be published. The BSB shared this view and commented that it was the LSB's role to ensure that regulators put this information into the public domain. ACCA said it would support some of the information being made publically available. However it urged the LSB to ensure that data is not placed in the public domain if it is provided on a confidential basis, or if it may be commercially sensitive. To that end ACCA said that it would be helpful to distinguish the types of information collected in the dataset and to clarify how the data will be used and disclosed. Further it considers transparency of data which allows the comparison of the performance of different regulators,

to be contrary to the public interest as this would allow for unhelpful and inaccurate comparisons.

LSB response

We intend to publish data collected through a regulator's dataset only where it has informed or been considered in a performance assessment. However, we note that the dataset does not request commercially sensitive data and an opportunity exists for the regulators to publish their completed datasets. We will further consider the level of transparency and determine whether we need to improve it by requiring the regulators to publish their dataset as part of any post-implementation review.

Third-party feedback

38. Most respondents supported the use of third-party feedback where appropriate, with many stressing the importance of engaging with a wide range of stakeholders in their response. Both CILEx and TLS believe third-party feedback should be given more prominence within the framework. CILEx suggested that third-party feedback can provide an insightful perspective on regulatory performance. Further, it considers that where regulators have specifically addressed observations from third parties, this could be a useful indication of the regulators' practical effectiveness, and may go some way to bolstering consumer confidence.
39. TLS suggested that it is important that the evaluation process is conducted in a transparent way and it is therefore in favour of the collected feedback being in the public domain. It also suggested that the LSB introduce more formal and standardised methods of collecting third-party feedback, alongside the current informal methods. It said that when feedback is collected in an ad hoc manner, this can lead to an impression that it is considered secondary to other evidence, for example, data collected from regulators.
40. We note that ACCA cautioned against the use of third-party feedback which is neither meaningful nor relevant. It urged the LSB to ensure the feedback is supported by evidence and balanced with other evidence collected about the regulators' performance.
41. The IP Federation expressed its view that feedback received from representative organisations, including itself, would be useful in demonstrating performance against outcomes under the Regulatory Approach standard. As such, it suggested that the LSB contact these organisations every six months or so and ask for an assessment of the quality of the engagement of the regulator.

LSB response

We are pleased about the positive responses we have received regarding the use of third-party feedback as we consider this to be an important evidence stream. As suggested by TLS we would like the evaluation process to be conducted in as transparent a way as possible. However, consideration of whether to publish the

responses will be taken on a case by case basis as there will be a number of factors to consider. We will however always share the feedback with the regulator.

We do not however agree with TLS's view that more formal and standardised methods of collecting third-party feedback are needed. We consider the inclusion of third-party feedback as a formal evidence gathering stream gives it sufficient prominence within the proposed framework. We will also continue to encourage regulators to seek their own consumer and stakeholder feedback in order to inform their operational processes and regulatory activities, in line with a number of the outcomes within the standards.

We acknowledge ACCA's concerns and note similar concerns were raised and addressed during pre-consultation. We consider that efforts to ensure engagement is more targeted and tailored in future will sufficiently address these concerns. We will, as with the other evidence streams, balance third-party feedback with other evidence to ensure we have a well-rounded assessment of performance.

We acknowledge the IP Federation's views and note that we will retain the flexibility to seek feedback against particular outcomes or standards wherever we consider it would provide assurance of a regulator's performance. This includes both planned and unplanned requests.

Additional evidence sources

42. A number of respondents identified additional sources of evidence which could be considered when assessing the regulators' performance. The BSB expressed the view that the regulators should be encouraged to provide evidence and data they believe provides assurance that they have met minimum standards, rather than to respond to a prescriptive set of requirements. However, others made specific suggestions for additional data to be included, such as:

- CIPA's suggestion for the inclusion of financial and management information.
- ACCA's suggestion for considering LSCP feedback and the findings of thematic reviews.
- The BSB's suggestion for relying on the reports of internal audit committees and the independent scrutiny of committees and boards.
- TLS's suggestion that the LSB consider annual surveys of regulated communities, including those TLS regularly carries out with its members.
- ICAEW's suggestion for seeking assurance on certain elements of the regulatory processes from the reports of other regulators, for example, the Financial Reporting Council inspection reports.
- LSCP's expectation that the LSB considers information from complaints data, consumer and market research, and that we engage with a wide range of consumers, including hard to reach groups. The LSCP believes

this would help to ensure our performance assessment is informed by the voice of the consumer.

43. ICAEW suggested the LSB seek an annual regulatory plan from the regulators. It believed this would allow the LSB to better understand the commitments of the regulators and would be a more proactive approach for the LSB to take.

LSB response

We agree with the BSB's view that regulators should provide evidence they consider demonstrates performance. Where we have provided examples of evidence within the framework, this is for illustrative purposes only and it is neither prescriptive nor exhaustive.

We agree with the views of CIPA, ACCA, the BSB and TLS and acknowledge that the pieces of information they suggested may very likely be useful in assuring us of a regulator's performance against a particular standard or outcome. We will consider these pieces of information through our ongoing monitoring, and make requests for this evidence where we consider it necessary and it has not already been provided.

We agree with the LSCP's view that greater reliance on consumer data would help to ensure that the framework is consumer-focused. We will utilise this data in our assessment of the regulators' performance and we will make reference to it in the evidence gathering section of the process document.

We acknowledge ICAEW's suggestion for seeking assurance from the reports of other regulators, such as the FRC. While we consider there may be an opportunity to take such reports into account, we note that these reports have been written for a different purpose, and often from a different perspective. We therefore do not consider it would be appropriate to rely on them as a sole measure for providing assurance.

In relation to the annual regulatory plan suggestion. Under the 'Well-Led: Governance and Leadership' standard we would welcome such information from the regulators, if they consider it will assist in demonstrating performance against this standard. However, as the standards are outcomes focused and we are moving away from being prescriptive about what we ask for in terms of pieces of evidence, we will not make it mandatory for regulators to provide such a plan.

Assessment

- (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?*

44. Overall, respondents were positive about the assessment process proposed within the revised framework. The LSCP, ACCA, CIPA and BSB all expressed support for the shift towards an outcomes-focused, risk-based assessment, noting that it appears sensible, targeted and proportionate.
45. ACCA, CIPA and the BSB all believed that the risk-based process will provide sufficient evidence and information for providing assurance about the regulators' performance. The BSB stated that the proposed approach reflects the distance the regulators have travelled in providing assurance to the LSB about their performance since the Legal Services Act (the Act).
46. TLS said it would be concerned if the risk-based process resulted in reduced scrutiny of the performance of the frontline regulators. The LSCP expressed a similar concern in relation to the proposal not to carry out performance assessments at set intervals, as it felt that this might be perceived, or inadvertently become, light-touch regulation. The LSCP urged the LSB to keep this approach under review and to carry out benchmarking exercises at appropriate intervals.
47. ACCA noted that the proposed approach of only undertaking an assessment where there is not sufficient assurance, or there is an area of concern, minimises burden and cost. It encourages the LSB to engage fully with the regulators at all stages of the performance assessment process. It considers that, this can assist in mitigating the risk of misunderstandings arising.
48. The BSB noted an indication of the number of assessments is not provided and that it appears the LSB can decide to commence an assessment, without scope for appeal or challenge. It seeks assurance that assessments should be an exceptional measure where there is cause for concern and other options have been exhausted, rather than as a routine measure of assuring regulatory performance.

LSB response

We are pleased with the support respondents have expressed for the risk-based assessment process. We agree with respondents and consider this will enable us to be more targeted and proportionate in our approach. We also agree that the process will enable us to obtain assurance about the regulators' performance, or to identify areas where further attention may be required.

We acknowledge the BSB's comment on the distance regulators have travelled and agree that the regulators have sufficiently developed in their approach since the introduction of the Act.

We acknowledge the risks raised by TLS and the LSCP in relation to reduced scrutiny and light-touch regulation. However, we consider that as a risk-based approach is able to be targeted, it will allow us to complete more up-to-date performance assessments. This will allow us to more confidently identify a regulator's current level of performance. We also note that the impact of the move to

a risk-based approach will be an area we consider when we review the operation of the framework.

We acknowledge and agree with ACCA's views about engaging with regulators at all stages of the assessment process.

In response to the BSB's comment on the number of assessments. Assessments will not be a routine measure of assuring regulatory performance and we hope not commonplace. Decisions to undertake an assessment will be made where, in our ongoing monitoring, we have either not found sufficient information to be assured about the regulator's performance, or identified an area of concern.

Identification and assessment of risk

49. TLS said the LSB should more precisely define what it considers to be a risk, as it does not consider this to be sufficiently clear. This could lead to ambiguity and subjectivity in interpretation of the assessment of regulators' performance. CILEx said greater detail is needed about what is required of regulators in relation to the capture, analysis and management of risks identified. It also commented that stakeholder feedback could feature in the risk identification process, rather than simply at the stage of a possible assessment.

50. CIPA advised it would be helpful to understand how the LSB will work with the ARs to identify risk. Further, it said it would be helpful to understand how the LSB will share information in order to satisfy the ARs that the responsibilities delegated to the regulatory bodies are being properly discharged.

LSB response

In the assessment process we consider a risk to be a situation or an event which may prevent regulators from meeting the standards. Examples of risk that we will consider have been highlighted in the process document.¹⁰ We note that the context that each regulator operates in will be considered in determining whether a situation or event presents a risk. In order to identify, capture and analyse these risks we will collect information through our evidence gathering streams, policy work, and from publically available information. We agree with CILEx's view that stakeholder feedback could inform the risk identification process and, where it is beneficial to do so, will use it through any and all stages of the process.

With respect to CIPA's query about sharing information with ARs, we note that performance information will be shared through the publication of our regulatory performance reports. We also note that we are currently seeking views on our

¹⁰ Legal Services Board (2017). Regulatory performance assessments. The process. Available at: [http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2017/Regulatory_Performance_Process_Document_December_2017_\(final\).pdf](http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2017/Regulatory_Performance_Process_Document_December_2017_(final).pdf)

Internal Governance Rules and will take account of any relevant outcome from this relating to communication with representative bodies on performance.¹¹

Transitional arrangements

51. While not included within the scope of the formal consultation, during pre-consultation we sought the views of the front line regulators on three potential options for transitioning from the current framework to the proposed revised framework. The three options were:

- (1) full assessments of regulators' performance against all the standards.
- (2) assessments of regulators' performance against only those standards or outcomes where the LSB is not assured of performance or has knowledge gaps.
- (3) individual assessments of each function, each assessment taking approximately six months to complete.

Option 2 was selected for the proposed revised framework.

52. In its formal consultation response, ICAEW restated its preference for option 3. IPReg expressed its view that the LSB already holds large amounts of data about its performance from previous assessments, and as such, it does not consider that it would be proportionate to undertake transitional assessments. In its view, this would add an unnecessary layer of complexity and cost to the assessment process. It encouraged the LSB to consider moving to a fully risk-based process from the outset.

LSB response

We acknowledge the views ICAEW and IPReg have raised regarding the assessment options for the transition period. We note that we addressed these in the anonymised summary of feedback received during this pre-consultation.¹² Option 2 was selected as it was considered to be the most closely aligned with the risk-based process, and with the aim of identifying and addressing underperformance (one of the key aims of the regulatory performance assessment exercise). This option was also preferred by the majority of the regulators.

In response to IPReg's comments, we will make efforts to minimise the time and cost implications for regulators in carrying out our transitional reviews. We will ensure findings from the last regulatory performance exercise, as well as the recent updates provided against the regulators' action plans, inform the transitional assessments. We will also be undertaking a gap analysis on each regulator to identify areas for

¹¹ Legal Services Board (2017). Reviewing the Internal Governance Rules: Enhancing regulatory independence within the current legislative framework. Available at:

http://www.legalservicesboard.org.uk/what_we_do/consultations/open/pdf/2017/IGR_consultation_doc_-_final_version.pdf

¹² Ibid.

assessment. The assessments should therefore only require a regulator’s input where we are unable to assure ourselves about a regulator’s performance.

Grading scale

- (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?*

53. The revised grading scale was broadly welcomed. CILEx considered it to be an improvement on the previous one, and both it and ACCA said it would enable the reader to understand how the regulator is performing. ACCA also encouraged the LSB to ensure that the grading scale was applied objectively in order to maintain confidence in the assessment process and facilitate comparisons.

54. CIPA, the LSCP and the BSB did not consider the distinction between the grading’s of ‘not met – 1’ and ‘not met – 2’ to be sufficiently clear. The BSB also suggested that the grading scale was too blunt a measure to reflect the performance of a regulator or its progress towards improvement. It noted that this contrasted with the previous criteria, which included an option for “undertaking improvement and work is well underway”.

LSB response

We welcome the comments that the grading scale is an improvement. In relation to ACCA’s comments, while we will ensure the grading scale is applied objectively, facilitating comparisons is not an aim of the grading scale and we do not intend for it to be used in this way.

Since the consultation closed we have had additional discussions with the regulators on the grading scale. The supplementary language to the ‘not met’ grades has been revised. We believe the revisions provide further clarification on a regulator’s performance assessment without complicating the grading scale proposed in the consultation. The revisions also address the BSB’s comments about needing to reflect the action that the regulator may be taking place to address concerns. The revised grading scale is:

- **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.

Consequences of receiving a not met grade

55. TLS and CLC both sought clarification about what happens if a regulator receives a ‘not met’ rating and what the resulting enforcement action would look like. CLC questioned whether the LSB is enforcing against the risk of failure or against actual failure by a regulator.

LSB response

Enforcement action is likely to only be appropriate where a regulator receives a ‘Not Met – action required’ grading. Appropriate activities to manage risks to the delivery of effective regulation will be considered on an individual basis. If needed, it will be open to the LSB to take formal action to tackle concerns about a regulator’s performance. Enforcement actions will be identified and carried out in line with our ‘Enforcement Policy’, which outlines what resulting enforcement could look like.¹³ We note that our powers are largely based around risks to the regulatory objectives.

Sharing best practice

56. Comments were made by the CLC and ICAEW that, as ‘meets minimum standards’ is the top grading, they do not believe the grading scale incentivises regulators and their firms to outperform and drive up quality.

57. ACCA, CIPA and the BSB all believed that where good and best practice is identified in the regulators’ performance, this should be shared both formally and informally.

LSB response

We acknowledge the CLC and ICAEW’s views about driving up performance. As stated in the consultation, we believe that the regulators have sufficiently developed since the introduction of the Act and our oversight should now focus on whether they meet the required standard of performance. It is for the regulator’s Board to then decide where it wishes to position itself. When we review the implementation of the revised regulatory performance assessment framework we will consider whether this is still the correct approach.

¹³ Legal Services Board (2009). Compliance and Enforcement: Statement of Policy. Decision document on compliance and enforcement strategy and Statement of Policy on enforcement powers. Available at: http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/statement_of_policy_compliance_and_enforcement_v2_november10.pdf

We note that assessing performance against a required standard, rather than good practice, does not mean we will not share or encourage good practice where it is appropriate. We confirm that this will be done both formally and informally with regulators.

Presentation of grades

58. The BSB and CILEx sought clarification over how the grades will be presented, the level of detail that will accompany them, and whether the reports will be made publically available. ACCA questioned whether it is in the public interest to publish a performance assessment report which includes the regulator's comments where there is disagreement between the regulator and the LSB.

LSB response

In response to the BSB and CILEx's queries, we note that performance assessment reports will continue to be made publically available. These reports will include the grades awarded and will include commentary that, at a minimum, touches on the context of the regulator, justification for the grading awarded and, if appropriate, the extent of improvement required.

In response to ACCA's query, while we consider it will happen rarely, in circumstances where regulators adamantly disagree with our grades, we will consider if it is appropriate to offer the option of publishing their comments alongside the final report. While we anticipate that this would happen very infrequently we consider it fair that the regulator has the opportunity to state their view where it disagrees with ours.

Process document

(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?

59. No specific concerns were raised as to the transparency of the process document. ACCA commented that the process document provided sufficient transparency on the LSB's framework for performance assessment and that it explained the assessment process in a clear and structured manner.

60. While CIPA said the process document provided a clear direction of travel, it thought it was less clear on how regulatory performance assessments relate to other LSB regulatory management processes such as budget setting, business planning and the application of Internal Governance Rules. To clarify this, it recommended that the LSB hold a seminar or similar event for regulators following the consultation, to set out how these processes complement one another.

LSB response

We agree with CIPA's view that it would be useful to identify more clearly how our regulatory performance assessments relate to and inform the LSB's other regulatory processes. To address this we have amended the process document to include information on this. We will also include this information on the appropriate pages of our website and consider the most appropriate method for communicating this to the regulators following the consultation.

Other issues

61. The BSB encouraged the LSB to commit to conducting an assessment of the revised framework after a reasonable period, suggesting three years from implementation. Similarly TLS suggested that the required outcomes within the standards needed to be reviewed periodically to take account of the changing policy environment and emerging issues.
62. The BSB noted that the revised framework changes the emphasis from self-evaluation to an assessment by the LSB on whether regulators are meeting the published standards. It commented that such an approach would place an additional burden on the LSB and that it would be interested in understanding how this will be achieved given the current staffing model of the LSB.

LSB response

As stated in the process document, after each regulatory performance assessment we will ask the regulators for their views on the assessment process, the standards, and on the performance assessment reporting. In addition, we will conduct a full assessment of the regulatory performance framework five years after the end of the transitional arrangements. The review will consider whether the framework is operating as intended, in a risk-based and proportionate way.

In response to the BSB's query, we consider that the revised framework will require the same amount of resources as the previous framework. It will require these resources on an ongoing basis, yet in a more focused and efficient manner. This reflects the shift toward ongoing monitoring, rather than point in time assessments. However, we note the BSB's concerns, and this will be an area we consider when we review the operation of the framework.

Tailored performance management datasets

63. A key source of evidence we proposed to utilise in the revised framework is the dataset. The dataset will be used to monitor performance and to assure ourselves of the regulators' performance. We outlined in the consultation document our intention to work with the regulators to tailor the datasets to meet their specific circumstances, and reflect differences in their language and processes.
64. This work commenced during the consultation period and we held individual discussions with the regulators about their datasets. We advised that we are not expecting regulators to create large amounts of new information for the purposes of the dataset. Rather, we viewed the discussions as an opportunity to amend individual datasets, where possible, to reflect processes and language used by the regulators in their current reporting. Appropriate intervals for collection were also discussed during these meetings as datasets will be collected from regulators at different intervals reflecting the differences in the scale of their activities.
65. Amended datasets and reporting intervals are being agreed with the regulators and reporting will begin by April 2018 at the latest.

Next Steps

66. The final regulatory performance assessment process document is publically available on the LSB website.¹⁴ It outlines the finalised regulatory performance assessment framework.
67. Transitional assessments will be performed over an approximately 18 month period and will commence in April 2018. The scope of these assessments will be informed by the gap analyses we undertake in Winter 2017/18 on the regulators' performance.
68. Once the transitional assessments have provided us with a baseline measure of performance for each regulator, we will then assess the performance of the regulators through a fully risk-based approach.
69. After each regulatory performance assessment we will ask the regulators for their views on the process. We also commit to a full review of the framework five years after the end of the transitional arrangements. The review will consider whether the framework is operating as intended, in a risk-based and proportionate way.

¹⁴Legal Services Board (2017). Regulatory performance assessments. The process. Available at: [http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2017/Regulatory_Performance_Process_Document_December_2017_\(final\).pdf](http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2017/Regulatory_Performance_Process_Document_December_2017_(final).pdf)

Annex: List of respondents

Association of Chartered Certified Accountants
Bar Standards Board
Chartered Institute of Legal Executives
Chartered Institute of Patent Attorneys
Chartered Institute of Trade Mark Attorneys – Confidential response
CILEx Regulation
Citizens Advice
Costs Lawyer Standards Board
Council for Licensed Conveyancers
Institute of Chartered Accountants in England and Wales
Intellectual Property Regulation Board
IP Federation
Legal Services Consumer Panel
Office of the Immigration Services Commissioner
Patent Examination Board
Solicitors Disciplinary Tribunal
Solicitors Regulation Authority
The Law Society
The Lord Chief Justice