

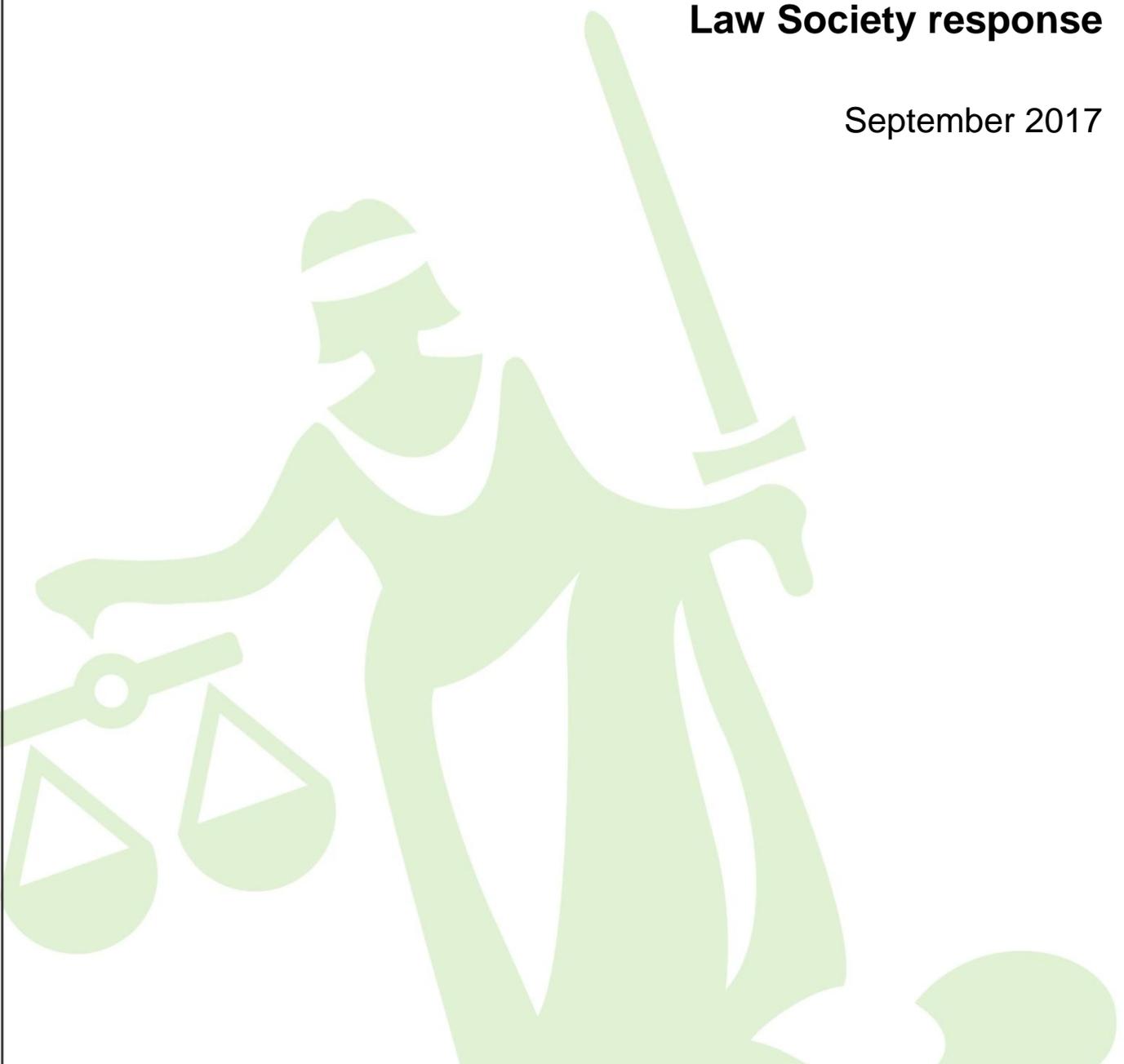


The Law Society

LSB consultation on regulatory performance assessment

Law Society response

September 2017



Introduction

1. The Law Society is responding to this consultation in its capacity as a representative body for the solicitors' profession. The Society supports the aim of the legal services regulators attaining the best possible levels of effectiveness and efficiency. In order for this to be credible, it is essential that there is improved consistency and transparency. As an approved regulator the Law Society takes a keen interest in this work of the Legal Services Board and what it publishes.
2. This response builds on points raised in our response to the LSB's 2015/16 assessment of the SRA's performance, where we suggested the need for:
 - A measure requiring front line regulators to provide evidence justifying the need for proposed regulatory changes, including relevance and priority. This should always include a robust and consistent means of measuring whether changes have achieved the expected outcomes.
 - Proportionality, transparency and consistency in the front-line regulators' approach to different types of rule change, enforcement and supervision.
 - Proportionality, transparency and consistency in decision-making processes.
 - Proportionality in allocation of cost burden on the regulated community.
 - Clear and stronger compliance with the Regulators' Code.
3. Though many of these points have been raised previously, they remain relevant. We are pleased that some are recognised by the LSB and we hope that the LSB will take them into account in its review of the regulatory performance assessment framework, and in any future assessments.
4. Overall, we support proposals to improve clarity around regulatory performance standards and removal of duplication and ambiguity amongst the key performance indicators for each standard. However, we have also identified scope for further improvement of the regulatory performance assessment framework.
5. The Legal Services Act requires the legal services regulators to ensure that regulation is transparent, proportionate, accountable and supported by economic evidence. Changes in regulation must only be introduced where they transparently support the regulatory objectives. Otherwise there could be negative impacts on the productivity of the regulated community, and unintended consequences for the public.
6. The performance assessment framework needs to be strengthened to ensure that robust evidence is presented by frontline regulators in a consistent format, prior to regulatory changes being made. This review of the LSB's performance represents an opportunity to strengthen these requirements, and our response contains practical suggestions to support this.

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.

Legal Services Act

7. We are pleased to see the additional clarity around performance standards. However, we would like to see the standards more closely reflect the regulatory objectives set out in section 1 of the Legal Services Act:
 - protecting and promoting the public interest
 - supporting the constitutional principle of the rule of law
 - improving access to justice
 - protecting and promoting the interest of consumers
 - promoting competition in the provision of services
 - encouraging an independent, strong and diverse legal profession
 - increasing public understanding of the citizen's legal rights and duties
 - promoting and maintaining adherence to the professional principles.
8. We note that the 'regulatory approach' standard would benefit from clearer links to the regulatory objectives in the Act, and, in particular, clearer articulation of the protection and promotion of the public interest.

Principles of Good Regulation

9. We welcome the LSB's commitment to ensure that the standards are assessed against the five principles of good regulation, i.e. regulation should be transparent, proportionate, accountable, consistent and targeted.
10. We would expect the LSB to set specific and relevant KPIs within the revised performance assessment framework. The current performance framework lacks such KPIs, which makes it difficult to assess performance in a consistent, transparent and accountable way.
11. We would encourage the LSB to develop these measures and publish comparison tables of regulators' performance. This would increase transparency, understanding and awareness of the process among the regulated communities. It could also facilitate the transfer of 'know how' and encourage exchange of good practice amongst the front-line regulators. This would make information on regulators' performance more accessible to the general public, and satisfy the need for better quality information and reporting.

Regulators' Code

12. We welcome the LSB's decision to recognise and take account of the Regulators' Code in the revised framework. The Regulators' Code requires regulators to take account of the effect on the regulated communities, and needs to be considered when assessing regulators' performance.
13. In particular, the Regulators' Code recommends that regulators should support those that they regulate to comply and grow, hear their views, and base their regulatory activities on risk. The Regulators' Code also recommends that any regulatory activity should be evidence-based.
14. We would propose a better alignment of the assessment framework with the Regulator's Code for areas such as regulators' processes and decision-making. For example, during the LSB review of the regulators' performance, carried out in 2015, the Law Society noted that the slowness of the SRA's processes and the lack of clarity with regard to decision-making was an obstacle for individual firms complying and growing. We suggest the development of KPIs around quality and consistency of decision-making to reflect the Regulators' Code would improve confidence among the regulated community.

Impact assessments for regulatory rule changes

15. The most significant gap in the performance standards is in assessing a frontline regulator's approach to regulatory rule changes. Changes in rules will often require regulated communities to modify their operating procedures. This can represent a cost for the regulated community as a whole, with differing impacts for different sections of the market. Rule changes can also have consumer protection impacts. It is critical that the LSB is presented with sufficient evidence on these impacts, in particular with regard to significant changes which are likely to have a material effect on the profession, to assess whether front-line regulators are acting in accordance with the regulatory objectives and regulatory best practice.
16. Performance standard RA2 sets the regulatory outcome to be achieved. It states that regulatory arrangements and supporting guidance must be "updated based on a robust evidence base". We agree with this outcome.
17. However, the "examples of evidence" that the LSB requires from frontline regulators in RA2 are insufficient to assess whether the outcome has been met. The only impact assessment that is mentioned is an equality impact assessment. On its own, an equality impact assessment is not enough to demonstrate a robust evidence base.
18. Unless the LSB requires frontline regulators to produce a full economic impact assessment alongside proposals for rule changes, it is impossible to assess what the impact of a change will be on consumers and on the

profession. Without a full economic impact assessment, it is impossible for the LSB to determine whether the sixth regulatory objective¹ has been met, which requires a strong, independent and diverse profession. Without requiring a full economic impact assessment, it is impossible to determine whether a measure has a "robust evidence base". This must, therefore, be added to the list of examples of evidence under RA2.

19. The Better Regulation Executive has published a template setting out best practice in terms of economic impact assessments². While we note that the LSB is not bound to follow this approach, we believe that the template provided by the Better Regulation Executive represents best practice. If the LSB were to require front-line regulators to accompany consultations and applications for rule changes with an impact assessment in this format, it would substantially improve the evidence base for regulatory rule changes. Such approach would also improve transparency and accountability.
20. We are aware that it can be challenging to estimate the impacts of certain regulatory changes before they are implemented. However, in order to meet the test of proportionality, the most significant regulatory changes should be supported by the most robust evidence-base. And while we recognise that it is difficult to accurately predict the impact of a policy before it is implemented, the impact assessment tool allows for uncertainties to be acknowledged and estimates to be made.

Standard of Proof

21. The Law Society believes that the LSB has over stretched its position on the standard of proof used in enforcement. Outcome E3 notes that the LSB has previously stated that the "Civil standard of proof should be used at all stages of the enforcement process."
22. The Solicitors Disciplinary Tribunal currently applies the criminal standard of proof. Very strong weight of authoritative and relevant case law supports the use of the criminal standard of proof in Tribunal proceedings. We think it is inappropriate for the LSB to use its performance assessment framework to require a certain standard of proof. Before any decision is taken on the standard of proof to be used in the future, there should be broad engagement and consultation.
23. It would be more appropriate for the LSB, in its performance assessment framework, to state that the standard of proof used in enforcement procedures must appropriately and sufficiently protect the public interest.

New and emerging policy developments

¹ In section 1 of the Legal Services Act.

² <https://www.gov.uk/government/publications/impact-assessment-template-for-government-policies>

24. If the assessment framework is to be future-proofed, the LSB needs to periodically review the expected outcomes set within the standards to take account of the changing policy environment and emerging issues. For the purpose of clarity and accountability, the LSB needs to clearly define new and emerging policy developments. The two emerging policy developments highlighted in the consultation paper - Brexit and the CMA market study - are both significant. But if the LSB's oversight approach is to be truly risk-based, then the LSB needs to give equal weight and attention to new initiatives which are driven by the regulators themselves, not just those driven by external forces.

25. For example, we are concerned that the SRA Handbook review - a significant reform, is not considered by the LSB under this section. Given that this review proposes significant changes in relation to the regulation of non reserved legal activities and regulatory remit under the Legal Services Act, it would seem appropriate for the LSB to consider this matter as a high priority. The changes proposed involve reductions in consumer protection, large-scale change in the scope of regulations, and affect the largest regulated community. These are the proposals we would expect the LSB to scrutinise closely.

26. The implementation of the recommendations from the CMA report should be risk-based, targeted and proportionate. We would be concerned if measures proposed by front-line regulators led to either increased red tape and cost for regulated communities, and consequently for consumers; or a reduction in competition and market diversity. As such, we suggest the LSB sets additional criteria which would allow them to monitor and assess the impact on regulated communities in terms of compliance costs, and safeguards for open competition.

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?

27. We agree with the proposal to formalise the four evidence gathering methods used in previous performance assessments. This should strengthen the assessment process.

28. In our view it is important that the evaluation process is conducted in a transparent way. That is why we are in favour of making the collected data available in the public domain. This should encourage more public scrutiny of

whether front-line regulators are meeting the regulatory objectives as prescribed by the Act.

29. In order to make the assessment more robust we suggest giving more prominence to third party feedback, in particular from the regulated professions. As acknowledged in the consultation, third party feedback offers a valuable insight to the regulators, and can help them to evaluate whether they meet their regulatory objectives, expectations of the regulated communities, and the wider public.
30. At present, third party feedback is collected in an ad hoc manner. This can lead to an impression that third party feedback is considered secondary to, for example, data collected from regulators. Such approach can also make it difficult to include third party feedback in comparative analysis, because of the lack of a standardised methodological approach.
31. To address this, we propose the LSB brings forward more formal and standardised methods of collecting third party feedback, alongside the current more informal ways. These could include, for example, an annual survey of regulated communities. The Law Society carries out regular surveys of its members, and we are willing to share our experiences.

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?

32. We would be concerned if the risk based assessment process resulted in reduced scrutiny of the performance of the front line regulators, and in particular assessments of how effective the regulators are in delivering their regulatory objectives. That is why, as mentioned earlier, it is of utmost importance to clearly align standards and perceived risks with the objectives set out in the Act.
33. In addition, for the purpose of clarity and accountability, we suggest the LSB defines more precisely what it considers as a risk. As it stands, it is not clear what constitutes a risk and this could lead to ambiguity and subjectivity in interpretation in regulators' assessment. For example, the SRA risk reporting, although helpful, can sometimes be selective and subjective and reflect what the SRA is interested in rather than provide an objective evidence-based assessment.
34. As noted in paragraphs 16-21, regulatory rule changes which reduce consumer protections raise significant risks both to the public interest and to consumer interests. Where these changes affect a large regulated

community and a large number of consumers, it is essential that the LSB requires a high level of evidence and analysis from the frontline regulators. The large-scale reform of the SRA Handbook is an example of a high-risk area. Requiring robust analysis prior to introducing such rule changes is critical.

35. We recommend that the LSB requires the front-line regulators to provide an evaluation of the effectiveness of regulatory changes once they are implemented. Such evaluations can help to assess the performance of the regulators, and determine if the regulatory objectives have been met. Again, post-implementation assessments are commonly conducted by the government and other sector regulators, and they should become standard practice for any significant regulatory rule change in the legal sector.

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?

36. We consider the revised grading scale as an improvement in comparison to the one used in previous performance assessments.
37. We also welcome efforts to reduce the risk of subjectivity in the LSB grading by providing examples of what type of evidence the LSB may consider and describing what equates to minimum performance. However, we would welcome more clarity and examples of potential actions in the event that a regulator does not meet the minimum standards of regulatory performance.