

Regulatory Performance and proposed regulatory independence monitoring

A consultation on amendments to the regulatory performance framework to incorporate monitoring regulatory independence as set out in the Internal Governance Rules.

This consultation will close **at 5pm on 3 April 2020**

This Consultation Paper will be of interest to:

Approved Regulators

Regulatory Bodies

Legal Representative Bodies

Consumer Groups

Members of the Legal Profession

Accountancy Bodies

Government Departments

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Executive summary

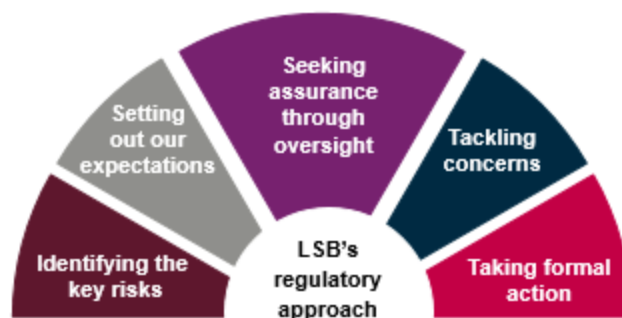
1. This consultation sets out the future direction of our regulatory performance framework and explains the Legal Services Board (LSB) plans to expand the framework to incorporate monitoring regulatory independence.
2. Approved Regulators and Regulatory Bodies have until 23 July 2020 to submit a certificate of compliance confirming they meet the requirements of the new IGR. Ongoing monitoring of regulatory independence as set out in the IGR will then be carried out as part of the LSB assessment of regulatory performance.
3. In our decision document *Internal Governance Rules - Enhancing regulatory independence*, published on 24 July 2019, we explained that we would be gaining assurance on compliance with the IGR through the regulatory performance framework. We are proposing to assess the regulatory independence intended by the IGRs by including it in the Well-led standard of the regulatory performance framework. We also explained that Approved Regulators would be subject to the regulatory performance framework in future but only in regard to their residual regulatory functions.
4. This development of the regulatory performance framework will mean:
 - a. the addition of a new IGR outcome to the Well-led standard in our regulatory performance framework which will apply to all Approved Regulators and Regulatory Bodies; and
 - b. the inclusion in our regulatory performance framework of the six Approved Regulators that also have separate Regulatory Bodies but only in relation to monitoring their delegation and assurance of regulatory functions as required under the IGR.¹
5. We consider that the regulatory performance framework is now established and all Regulatory Bodies are aware of our expectations. As set out in the [Regulatory performance: Performance assessment November 2019](#) report, in 2020 our focus will extend to risk-based reviews of Regulatory Bodies and their practices which will provide us with a higher level of performance assurance. These will be in-depth reviews which will provide the LSB with a greater degree of understanding of the procedures and practices followed by the Regulatory Bodies which subsequently inform our performance assessments. As we and the Regulatory Bodies build up experience of operating within the performance assessment framework, our expectation in future is that all regulators will adopt reflective and evaluative practices which ensure that their performance against the regulatory standards improves year-on-year.
6. This consultation will close at 5pm on **3 April 2020**.

¹ The six Approved Regulators are the Association of Costs Lawyers, Bar Council, Chartered Institute of Legal Executives, Chartered Institute of Patent Attorneys, Chartered Institute of Trademark Attorneys and The Law Society.

Introduction

Regulatory performance framework

7. The LSB regulatory approach is set out below. Our Regulatory performance framework is a key tool through which we set out our expectations and seek assurance through oversight.



8. In January 2018, the LSB introduced the regulatory performance framework to assess the performance of Regulatory Bodies across a common set of standards and outcomes. We assess the Regulatory Bodies' performance against five function-based standards. The first four standards (Regulatory Approach, Authorisation, Supervision and Enforcement) cover the core regulatory functions carried out by the regulators. The fifth standard (Well-led), assesses the regulator's ability to carry out its functions effectively. Under each standard are between four and six outcomes we expect the regulators to achieve. The standards and outcomes can be found in Annex A and more information about our Regulatory performance framework can be found on our [website](#).
9. Each Regulatory Body has an LSB relationship manager. The relationship manager is the first point of contact and generally holds bi-monthly meetings with the Regulatory Body. The ongoing monitoring of performance is carried out through these meetings. For each Regulatory Body, we publish assessments of their performance and any actions they need to complete to remedy *unmet* outcomes from the performance framework. In January 2019 we published an action plan for each Regulatory Body and carried out two progress reviews in June and November. These have been published on our [website](#).
10. We consider that the framework is now established and all Regulatory Bodies are aware of our expectations of what good performance looks like. Whilst we will continue to hold Regulatory Bodies to account for progress on addressing unmet outcomes, we expect this to be less of a focus as the number of unmet outcomes across the regulators reduces. In 2020 our focus will extend to risk-based reviews of Regulatory Bodies and their practices which will provide us with a higher level of performance assurance. These will be in-depth reviews which will provide the LSB with a greater degree of understanding of the procedures and practices followed by the Regulatory Bodies which subsequently inform our performance assessments.

11. We intend to formally report on all regulators' performance on an annual basis following our internal review. We consider that a public report is consistent with our transparency commitment. This will be informed by ongoing monitoring by relationship managers, evidence and information gathered through risk-based reviews and submissions from Regulatory Bodies and Approved Regulators. With our framework maturing, our expectation in future is that all regulators will adopt reflective and evaluative practices which ensure that their performance against the regulatory standards improves year-on-year.
12. Additional support and guidance will be given to Approved Regulators who are new to the regulatory performance framework.
13. To ensure the framework remains relevant we expect to review its effectiveness on a regular basis and at least every three years. In addition, between major revisions we expect to make incremental improvements in specific areas.

Internal Governance Rules

14. Section 30 of the Act obliges the LSB to make internal governance rules which set out requirements for each Approved Regulator to ensure the separation of regulatory and representative functions (amongst other obligations). These requirements must ensure that:
 - a. the exercise of regulatory functions by an Approved Regulator is not prejudiced by its representative functions or interests; and
 - b. decisions relating to the exercise of regulatory functions by an Approved Regulator are, so far as reasonably practicable, taken independently from decisions relating to the exercise of any representative functions or interests.
15. On 24 July 2019, the new IGR and supporting guidance came into effect and a 12-month transition period began. More information about the IGR including the accompanying statutory guidance, can be found on our website.² In our accompanying decision document *Internal Governance Rules - Enhancing regulatory independence*, we explained that assurance on compliance with the IGR would be carried out through the regulatory performance framework. We also explained that Approved Regulators would be subject to the regulatory performance framework in future but only in regard to their residual regulatory functions
16. Approved Regulators and Regulatory Bodies are expected to assess their internal procedures and working practices and put in place arrangements to ensure full compliance with the revised IGR by the end of the transition period. We explain what is required to certify compliance with the revised IGR in our decision

² See the independent regulation [webpage](#)

document published on 24 July 2019 and in our ongoing communications with Approved Regulators and Regulatory Bodies.³

17. By 23 July 2020, each Approved Regulator and Regulatory Body must submit a certificate of compliance. The certificate will confirm that the arrangements required for the regulatory functions and Rules which apply are in place. The template certificate is attached at Annex B.

Proposed changes to performance framework

18. Regulatory independence monitoring will be incorporated into our regulatory performance framework as explained in the IGR decision document, published on 24 July 2019. This will mean extending the framework to include Approved Regulators and creating a new outcome.

19. Incorporation of regulatory independence monitoring into our regulatory performance framework will be achieved through the following two actions:

- a. **The addition of a new IGR outcome to the Well-led standard.** A key element of our Well-led standard concerns the corporate governance required to manage an organisation effectively. As compliance with the IGR is primarily an integral part of an Approved Regulator or Regulatory Body's governance arrangements the IGR outcome will be included under the Well-led standard.
- b. **Inclusion into our regulatory performance framework of the six Approved Regulators that also have separate Regulatory Bodies, namely:** the Association of Costs Lawyers, Bar Council, Chartered Institute of Legal Executives, Chartered Institute of Patent Attorneys, Chartered Institute of Trademark Attorneys and The Law Society. To be clear, the six Approved Regulators will only be monitored on two regulatory functions as required under the IGR; delegation and assurance. The LSB will not seek assurance from these six Approved Regulators on the full regulatory performance framework.

20. While regulatory independence will be monitored through our regulatory performance work, if any breaches of the IGR are identified, we would expect that they will be dealt with through our formal enforcement powers and not through our regulatory performance framework.⁴

New IGR outcome

21. The proposed IGR outcome in the Well-led standard is as follows:

³ See the LSB [decision document](#) on the revised IGR

⁴ See the LSB's [statement of policy for enforcement](#)

Well-led Standard	Outcome WL7	Short form descriptor
	<p>The Approved Regulator/Regulatory Body meets the outcome to enhance regulatory independence:</p> <ul style="list-style-type: none"> • The Approved Regulator has the necessary delegation arrangements in place and gains assurance that its regulatory functions are effectively carried out in line with the IGR. • The Regulatory Body carries out its regulatory functions in line with the IGR and provides assurance to its Approved Regulator if required by Section 28 of the Legal Services Act 2007. 	Regulatory independence delivered by the IGR
Examples of evidence	<ul style="list-style-type: none"> • Protocols setting out: delegation agreements; separation arrangements and the justification for choosing these arrangements. • Protocols for information exchange between the Regulatory Body and Approved Regulator. • Agreements for any shared services between a Regulatory Body and Approved Regulator. • Logs of any referrals to the LSB for clarification including the efforts made internally (including between an Approved Regulator with a residual role and its Regulatory Body, where relevant) to resolve the issue. • Records of any disputes referred to the LSB and the discussion between the Regulatory Body and Approved Regulator prior to the referral. • Logs of non-compliance issues, action taken and result. • Logs of training provided to relevant individuals. 	

Table A – Regulatory performance IGR outcome

22. Alongside the proposed IGR outcome, we have listed examples of evidence Approved Regulators and Regulatory Bodies may need to provide to demonstrate regulatory independence. The list of examples of evidence is drawn from the IGR Rules and Guidance and is not exhaustive.

23. Approved regulators and Regulatory Bodies must have regard to the requirements set out in the IGR and statutory guidance documents when ensuring their compliance.

Implementation of regulatory independence monitoring

24. By 23 July 2020, each Approved Regulator and Regulatory Body must submit a certificate of compliance. We will review all certificates and will carry out sample checks of 2-3 regulators to gain assurance of the interpretation and application of the new IGR.

25. Regulatory independence will be monitored as follows:

Approved regulators

- a. Approved regulators will only be subject to the regulatory independence outcome and will not be subject to the full performance framework. We will also introduce relationship management meetings, similar to those we hold with Regulatory Bodies and we expect these to take place approximately 2-3 times each year.

Regulatory bodies

- b. Regulatory bodies will continue to be subject to the full regulatory performance framework as described at paragraph 8 and including the regulatory independence outcome. Relationship management meetings with each Regulatory Body will continue to be held every two months.

Question: Is it clear how the LSB will monitor how Approved Regulators and Regulatory Bodies ensure regulatory independence? If not, then we welcome your views on alternative approaches.

Equality Act assessment

26. The LSB has given due consideration to its obligations under the Equality Act 2010⁵. We do not consider that this consultation raises any issues in light of the public sector equality duty, as the LSB is proposing amendments to the regulatory performance framework we apply to Approved Regulators and Regulatory Bodies and not directly to authorised persons or members of the public. However, we would welcome any comments respondents may have on any equality issues they believe arise as a result of the proposals in this consultation.

Next steps

27. This consultation closes on **3 April 2020**. Once the consultation has closed, we will consider all feedback received and make any resulting amendments to our regulatory performance framework.

⁵ [Public Sector Equality Duty](#): public authorities must consider all individuals when carrying out their day-to-day work – in shaping policy, in delivering services and in relation to their own employees. It also requires that public authorities have due regard to the need to: eliminate discrimination, advance equality of opportunity, and foster good relations between different people when carrying out their activities. The LSB is a public authority listed in [Schedule 19](#) of the Equality Act 2010.

28. We will publish our response to the consultation, alongside any changes to the regulatory performance framework, by 23 July 2020.

Responding to the consultation

29. The question posed in this consultation is listed below for reference:

Question: Is it clear how the LSB will monitor how Approved Regulators and Regulatory Bodies ensure regulatory independence? If not, then we welcome your views on alternative approaches.

30. Any representations should be made to the Board by 5pm on **3 April 2020**. Please ensure that responses reach us by the closing date as we cannot guarantee that responses received after this date will be considered.

31. We would prefer to receive responses electronically (in MS Word format) but hard copy responses by post are also welcome.

32. Responses should be sent to:

- Email: consultations@legalservicesboard.org.uk
- Post: Legal Services Board, 3rd floor, The Rookery, 2 Dyott Street, London [WC1A 1DE](#)

33. We intend to publish all responses to this consultation on our website unless a respondent explicitly requests that a specific part of the response, or its entirety, should be kept confidential. We will record the identity of the respondent and the fact that they have submitted a confidential response in our summary of responses.

34. If you wish to discuss any aspect of this paper or need advice on how to respond to the consultation, please contact the LSB by one of the methods described above or by telephone (020 7271 0050).

35. Any complaints or queries about this process should be directed to the Consultation Co-ordinator, Tim Borthwick, at the following address:

Consultation Co-ordinator, Legal Services Board, 3rd floor, The Rookery, 2 Dyott Street, London WC1A 1DE

Email: consultations@legalservicesboard.org.uk

Annex A: Current regulatory performance standards and outcomes

Regulatory Approach	<p>RA1: Regulatory arrangements and supporting guidance documentation are:</p> <ul style="list-style-type: none"> • outcomes-focused • written in plain English • maintain professional principles <p>with detailed rules limited to where evidence and analysis justifies them.</p>
	<p>RA2: So they are effective and operate as intended, regulatory arrangements and supporting guidance documentation are regularly reviewed and, where necessary, updated based on a robust evidence-base.</p>
	<p>RA3: The regulator has a robust evidence base from a range of sources on: (a) consumers' needs and use of legal services (b) new and emerging policy developments (c) the regulated community and (d) the market(s) regulated by it which informs its regulatory arrangements and approach.</p>
	<p>RA4: Regulatory arrangements and associated guidance documentation are informed by learning gathered from all of the regulators work including its risk assessment and enforcement work.</p>
	<p>RA5: The regulator understands the impact of its regulatory arrangements and guidance on consumers, the regulated community, the market and the regulatory objectives.</p>
Authorisation	<p>A1: Only those who meet the regulator's standards are authorised to provide education and training.</p>
	<p>A2: The regulator's standards of education and training set the competencies required for authorisation for entry to the profession.</p>
	<p>A3: Only those who meet the regulator's standards are authorised to practise.</p>
	<p>A4: The authorisation process, including the management of appeals, is fair, based on the regulator's standards, efficient and transparent.</p>
	<p>A5: The regulator's list of those they regulate is accessible, accurate and provides information on the disciplinary records of those regulated.</p>
Supervision	<p>S1: The regulator has an: outcomes-focused, evidence-based, transparent, risk-based and consumer-focused approach to supervisory activity. Supervisory activity is both proactive and reactive and uses a range of tools.</p>
	<p>S2: Education and training providers are monitored to provide assurance that standards are met. If they are not, steps are taken to remedy this.</p>
	<p>S3: The regulated community are monitored to provide assurance that standards are met. If they are not, steps are taken to remedy this.</p>
	<p>S4: Those under review and the wider regulatory community have the opportunity to benefit from the learning and good practice identified from the supervisory activity.</p>
Enforcement	<p>E1: The regulator has an accessible and clear process so that concerns can be raised about an authorised person which sets out who a person can complain to, the process that will be used and the possible outcomes.</p>
	<p>E2: The regulator ensures that all complaints are reviewed on receipt and serious cases are prioritised and, where appropriate, referred to an interim orders panel.</p>
	<p>E3: The enforcement process and any associated appeals process is: consistent; independent; risk-based; evidence-based; documented; transparent; proportionate; focused on consumer protection, maintaining professional principles and protecting the public interest.</p>
	<p>E4: The enforcement and any associated appeals process is timely taking into account the complexity and type of case, and the conduct of both sides.</p>
	<p>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.</p>
	<p>E6: The regulator clearly explains the reasons for its decisions to take or not to take things forward at each stage of the process.</p>
Well-led:	<p>WL1: The Board/Council holds the executive to account for the regulator's performance to ensure that it operates effectively and efficiently and in a way which is compatible with the regulatory objectives.</p>
	<p>WL2: The regulator understands the resources (financial, human and technical) and organisational structure it needs to carry out its regulatory functions (including authorisation, supervision and enforcement) effectively and efficiently and these are implemented.</p>
	<p>WL3: The regulator is transparent about its own: decision-making; regulatory approach; the risks it and its regulated community faces and how these are being mitigated; performance; regulated community and related markets; financial costs.</p>
	<p>WL4: The regulator learns from its own work, stakeholders, the legal sector and other sectors and uses that learning to improve its work.</p>
	<p>WL5: The Board considers its own effectiveness in ensuring the regulator is a well-led, independent, transparent, and consumer-focused organisation, which acts in a way that is compatible with the regulatory objectives</p>
	<p>WL6: 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 and ensure appropriate and accurate information is effectively taken into account in its work.</p>

Annex B: Certificate of compliance



Certificate of compliance with Internal governance rules 2019

On behalf of [board of AR or RB] I [insert name of leader of board of AR or RB] certify that the obligations are understood and that [Approved Regulator or Regulatory Body] is in compliance with the Internal governance rules 2019 made under Section 30 of the Legal Services Act 2007.

Each rule is initialled to certify compliance.

Rule 1	The overarching duty	[]
Rule 2	Duty to delegate	[]
Rule 3	Provision of assurance to Approved Regulator	[]
Rule 4	Regulatory Autonomy	[]
Rule 5	Prohibition on dual roles	[]
Rule 6	Individual conduct	[]
Rule 7	Governance: lay composition	[]
Rule 8	The regulatory board: appointments and terminations	[]
Rule 9	Regulatory resources	[]
Rule 10	Regulatory body budget	[]
Rule 11	Shared services	[]
Rule 12	Communication by persons involved in regulation	[]
Rule 13	Candour about compliance	[]
Rule 14	Disputes and referrals for clarification	[]
Rule 15	Guidance	[]
Rule 16	Saving provisions	[]
Rule 17	Exemptions	[]

This certificate is accompanied by an explanation of the actions taken by [Approved Regulator/Regulatory Body] to ensure compliance. (Annex A)

This certificate is accompanied by a copy of the Board minute recording the decision taken to certify compliance. (Annex B)

Signed:

On behalf of the Board of [Approved Regulator or Regulatory Body]