

Regulatory performance framework: Monitoring regulatory independence

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

13 July 2020

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Executive summary

1. Following a consultation process, the Legal Services Board (LSB) is expanding the regulatory performance 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 explained that we would assess the regulatory independence intended by the IGRs through 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 regarding their residual role.
4. This development of the regulatory performance framework means:
 - 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

Changes we have made

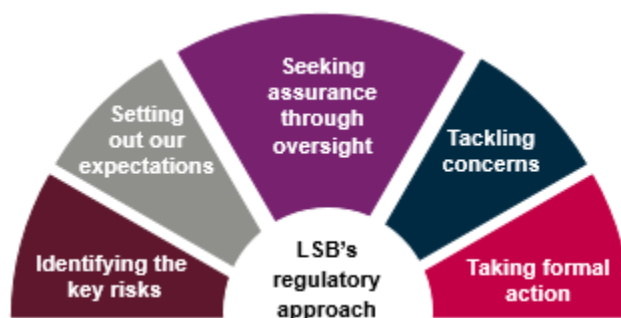
5. This document sets out the LSB position on the issues raised by consultation respondents. As a result, we have made two changes to the proposed text of the WL7 outcome in the consultation document:
 - a) We have revised the wording in the outcome description to replace the word *enhance* with *ensure* so it now reads: *The Approved Regulator/Regulatory Body meets the outcome under the IGR to separate and maintain the independence of regulatory functions.*
 - b) We have revised the wording in the second bullet point of the outcome to replace *if required* by *as required* so that this now reads: *The Regulatory Body carries out its regulatory functions in line with the IGR and provides assurance to its Approved Regulator as required by Section 28 of the Legal Services Act 2007*

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

6. 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.



7. 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](#).
8. Each Regulatory Body and Approved Regulator will have an LSB relationship manager. Our reviews 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. For each Regulatory Body, we have published assessments of their performance including actions required to remedy *unmet* outcomes from the performance framework. All assessments have been published on our [website](#). In future, we will include assessments of approved regulators under the new Well-led 7 outcome.

Internal Governance Rules

9. 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:
- the exercise of regulatory functions by an Approved Regulator is not prejudiced by its representative functions or interests; and
 - 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.

10. 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](#).
11. By 23 July 2020, each Approved Regulator and Regulatory Body must submit a certificate of compliance. The certificate will confirm that arrangements are in place to ensure compliance with the revised IGR.

Changes to performance framework

12. Monitoring regulatory independence will be incorporated into our regulatory performance framework effective from 24 July 2020. This will mean:
 - 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 and 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.
13. While regulatory independence will be monitored through our regulatory performance work, if any non-compliance of the IGR is identified we would expect that these matters will be dealt with under our Enforcement Policy, which sets out when we may exercise our formal enforcement powers, and not through our regulatory performance framework.² This is because we consider that judgements on compliance with the IGR relate to whether the rules have been followed; the performance framework assesses how well the Approved Regulator or Regulatory Body has met the standard required.

² See the LSB's [statement of policy for enforcement](#)

New IGR outcome

14. The new IGR outcome in the Well-led standard is as follows:

Well-led Standard	Outcome WL7	Short form descriptor
	<p>The Approved Regulator/Regulatory Body meets the outcome under the IGR to separate and maintain the independence of regulatory functions:</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 as 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

15. 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 but represents the information each body should create and maintain in carrying out their respective roles.

LSB responses to issues raised in the consultation

16. We received six responses to the consultation: The Bar Council; CILEx and CILEx Regulation (joint submission); CLC; IPREG; SRA; The Law Society.

17. All respondents accepted the principles of the new outcome and the inclusion of the six approved regulators into the regulatory framework. We received four substantive points, summarised here with our response:

- a) An Approved Regulator noted that WL7 states that the outcome is to be met is 'to enhance regulatory independence'. 'Enhance' does not appear in the IGRs or the statutory framework (the Legal Services Act 2007). The overarching duty is the 'maintain' independence and, only if reasonably practicable, 'improve' it. Please could the LSB clarify the standard to which ARs will be held under this outcome and ensure that this is squarely aligned to the IGRs.

LSB response:

The preamble to the IGR explains that they are intended to enhance regulatory independence as far as reasonably practicable. However, we agree that it would be best to mirror the terminology used in the Act on this outcome and therefore we have changed the wording of the introduction to the outcome to read:

The Approved Regulator/Regulatory Body meets the outcome under the IGR to separate and maintain the independence of regulatory functions

- b) An Approved Regulator noted that by the reference (in the second bullet point of Outcome WL7) to the regulatory body providing 'assurance to its Approved Regulator if required by section 28 of the Legal Services Act 2007'. This suggests that the provision of assurance by the regulatory body is (or may be) optional or conditional, which does not accord with our understanding of the AR role under section 28 and the circumstances when assurance must be provided under the IGRs.

LSB response:

The WL7 outcome has been written to take account of the two forms of approved regulators; those responsible for representative and regulatory functions and those with only regulatory functions. For clarity, we have replaced 'if required' with 'as required'.

- c) An Approved Regulator asked why the formal enforcement powers would be used in the event of a breach by an AR of the IGRs and not the regulatory performance framework that is applied to other breaches of regulatory performance. We would always favour the opportunity to inform all and speedily resolve any issues by working with the LSB.

LSB response:

We consider that the judgement on compliance with the IGR relates to whether the rules have been followed; the performance framework assesses how well

the Approved Regulator or Regulatory Body has met the standard required. Therefore, an ineffective arrangement need not necessarily result in an assessment of non-compliance with a rule but steps may be required to improve how well the arrangements work in practice.

Both our enforcement policy and regulatory performance framework explain the circumstances where we will use our enforcement powers. We will always consider whether it is appropriate and proportionate, in any particular case, to resolve matters informally. Consistent with our Enforcement Policy we will seek to achieve an appropriate balance between informal and formal action, based on best practice.

- d) Several Approved Regulators asked for greater clarity on the relationship management process and the requirements for submissions from approved regulators as part of the performance review process.

LSB response:

There is no rigid template for submission of information in support of the performance assessments from approved regulators and regulatory bodies. We expect a summary account of relevant activities carried out through the year in meeting the performance standards and where there are actions set for outcomes which have been assessed as unmet, we expect more detail on steps taken to remedy the situation. As approved regulators will only report against one outcome, we do not expect the reporting requirements to be onerous.

18. We also received three points seeking clarity on how we will implement the changes:

- a) Clarity was sought from some approved regulators on the planned relationship management meetings regarding the purpose, agenda setting and scheduling.

LSB response:

We will agree with each approved regulator the most appropriate scheduling of meetings. The agenda will remain flexible but we would expect there to be some regular standing items related to the performance review as well as other wider matters for discussion. This is the approach that we have adopted for Regulatory Body meetings. The agenda is drawn up by both the LSB and regulators and will be agreed before each meeting. We will write to all Approved Regulators explaining in more detail, as we did for Regulatory Bodies when we introduced relationship management meetings.

- b) From the evidence section of the outcome, we received a request to consider separating the evidence expected from approved regulators and evidence expected from regulatory bodies.

LSB response:

We considered the need to differentiate between the evidence required by an Approved Regulator and the evidence required by a Regulatory Body in demonstrating regulatory independence. We have decided to make no change to the text as we consider that this general list contained in the statutory guidance applies to each type of body. Therefore each is required to create and maintain the same type of information in support of their own actions carried out in meeting the standards required.

- c) We were asked by an Approved Regulator to consider that the frequency of monitoring, type of evidence and level of assurance that the LSB require will vary depending on the structure, or arrangement that is entered into between approved regulator and regulatory body.

LSB response:

We have set out our planned regulatory performance reviews in the December 2019 report (proper ref). We will continue to monitor performance on an ongoing basis through relationship management meetings and will carry out a fuller review of progress reports submitted by regulators once each year, currently at the end of the calendar year. We consider this to be proportionate approach.

Equality Act assessment

19. We received no representations from Approved Regulators or Regulatory Bodies referencing equality matters. We therefore expect that there will be no adverse equality impacts as a result of this change to the performance framework. The EIA we undertook for IGR is also applicable here, as proposals will measure performance against the IGRs.

Next steps

20. Changes to the performance framework will come into effect on 24 July 2020 after the end of the transition period. We will write to each approved regulator and regulatory body explaining our expectations as a result of the changes.

Annex A: Revised regulatory performance standards framework effective from 24 July 2020

Regulatory Approach	RA1: Regulatory arrangements and supporting guidance documentation are: <ul style="list-style-type: none"> • outcomes-focused • written in plain English • maintain professional principles with detailed rules limited to where evidence and analysis justifies them.
	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.
	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.
	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.
	RA5: The regulator understands the impact of its regulatory arrangements and guidance on consumers, the regulated community, the market and the regulatory objectives.
Authorisation	A1: Only those who meet the regulator's standards are authorised to provide education and training.
	A2: The regulator's standards of education and training set the competencies required for authorisation for entry to the profession.
	A3: Only those who meet the regulator's standards are authorised to practise.
	A4: The authorisation process, including the management of appeals, is fair, based on the regulator's standards, efficient and transparent.
	A5: The regulator's list of those they regulate is accessible, accurate and provides information on the disciplinary records of those regulated.
Supervision	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.
	S2: Education and training providers are monitored to provide assurance that standards are met. If they are not, steps are taken to remedy this.
	S3: The regulated community are monitored to provide assurance that standards are met. If they are not, steps are taken to remedy this.
	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.
Enforcement	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.

Enforcement	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.
	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.
	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.
	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.
	E6: The regulator clearly explains the reasons for its decisions to take or not to take things forward at each stage of the process.
	Well-led:
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.	
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.	
WL4: The regulator learns from its own work, stakeholders, the legal sector and other sectors and uses that learning to improve its work.	
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	
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.	
WL7: The Approved Regulator/Regulatory Body meets the outcome to ensure regulatory independence: <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 as required by Section 28 of the Legal Services Act 2007: 	