

By email only

Matthew Hill
CEO
Legal Services Board

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Dear Matthew

Proposed regulatory performance assessment framework

Thank you for the opportunity to respond to this consultation and for the helpful presentation and discussion at the webinar on 9 June.

We welcome the LSB's aim to reflect more closely the requirements in the Legal Services Act 2007 (LSA), including the proposal to move away from prescribing specific outcomes to an approach that sets Standards for regulators to achieve. We also welcome the shift to allowing regulatory Boards to determine their own outcomes and the activities that are required to achieve them. We consider that this reflects the requirement in the Legal Services Act 2007 (LSA) section 28(2) that:

The approved regulator must, so far as is reasonably practicable, act in a way: (a) which is compatible with the regulatory objectives, and (b) which the approved regulator considers most appropriate for the purpose of meeting those objectives. (Emphasis added.)

Reflecting this approach, we are pleased that the LSB is proposing to drop the requirement for the annual performance management dataset; this will provide regulators with more autonomy to set their own performance indicators.

In terms of the detailed proposals, IPReg would like to make the following comments:

General approach and assessment process

1. We note that the LSB states that the process it uses to assess regulatory performance is risk-based and is tailored to the risks presented by each regulator.¹ It would be helpful if the LSB were able to share its risk-assessment of IPReg; this would introduce more transparency about the assessment process itself. It would also be helpful if the LSB could set out in more detail how it will assess the documentation that each regulator provides to it. The consultation document² indicates that the LSB will expect to see information provided to Boards is of "an appropriate quality" and includes:

¹ Annex B paragraph 22

² Paragraph 15 of Annex B

- That there is sufficient and appropriate evidence to inform board decision-making processes;
- That the evidence demonstrates that the regulator has taken account of the regulatory objectives and better regulation principles when making decisions;
- There is evidence that the regulator has clearly assessed the likely impact of their decisions including relevant risks, costs, and benefits to a range of stakeholders.

These are important criteria; and it would be helpful if the LSB could provide more information about the criteria it will use to determine whether the information provided is of “an appropriate quality”, including how it will mitigate the risk that it might form a different view to that of the regulatory Board about what is the “most appropriate” way to meet the regulatory objectives.

2. We welcome the proposal by the LSB to offer an option for regulators to publish their comments alongside the final report if they disagree with the LSB’s findings. However, we are concerned to see that the LSB states that its assessment Reports “will not necessarily set out in detail all the evidence and data considered in an assessment”.³ In order for IPReg to understand fully the rationale for the LSB’s findings, it would be crucial for our decision-making for the LSB to set out in detail the evidence and data that it has considered and how that evidence and data has led it to the conclusions that it has made in its Report.

Proposed Standards

3. We have some concerns about the drafting of the proposed new Standards in that they do not reflect the drafting of the LSA. The LSB proposes to introduce three Standards (and 20 associated Characteristics). The first two Standards suggest that the LSB is introducing a new requirement for regulators to work “for” and “on behalf of” “the public”. Although there is a regulatory objective to protect and promote the public interest, none of the regulatory objectives place obligations on regulators in relation to “the public” and the LSB does not explain what it means by “the public”. We note that “the public” is used in a very limited way in the LSA, most notably in section 15 which gives the Lord Chancellor the power (which has never been used) to make an Order in relation to the provision of reserved legal activities to “the public” or “a section of the public”. It would therefore be helpful if we could understand better the LSB’s rationale for introducing this new obligation, particularly as the new framework is intended to follow more closely the language used in the LSA.
4. In addition, we are concerned that the drafting of the third Standard appears to suggest that regulators should focus more on the regulatory objective to protect and promote the public interest than the other objectives, whereas regulatory Boards often have to come to a judgment about the balance between (sometimes competing) regulatory objectives.
5. We suggest that the wording of the Standards could be more closely aligned to the wording of the regulatory objectives in the LSA. An alternative form of drafting might be:

³ Annex B: paragraph 33

- a. Standard 1: Regulators are well led with the resources and capability required to ~~work for the public~~ **protect consumers and promote their interests** and to meet the regulatory objectives effectively.
- b. Standard 2: Regulators ~~act on behalf of the public to~~ apply their knowledge to identify opportunities and address risks to meeting the regulatory objectives.
- c. Standard 3: Regulators' operational activity (e.g. education and training, authorisation, supervision, enforcement) is effective and ~~clearly focused on~~ **includes proper consideration of protecting and promoting** the public interest.

Transitional arrangements

6. We are concerned that the LSB has not allowed sufficient time for regulators to consider what changes they may need to make to their current approach to the LSB's performance monitoring framework. The LSB states that it will prepare a final version of the revised framework for publication in autumn 2022. However, it also plans to issue information requests to regulators in September 2022. The LSB states that the responses to that information request will be assessed against the current standards – but using the new ratings. Given the timescale for the LSB's final decision on the new framework, it appears possible that the information requests will be issued and the assessment of the information will start before a decision has been made on what form the final ratings will take.
7. An additional timing point of concern is that next year the LSB plans to issue an information request in June covering the period October 2022 – May 2023. However, if the LSB's decision on the new performance framework is not made until autumn 2022, this gives regulators no time to review their approach to the new Standards and Characteristics in order to ensure that they can provide sufficient information under the new framework from October 2022.
8. Given the significant change in approach that is being proposed, we would encourage the LSB to adjust its planned approach to implementation to ensure that regulators have sufficient time to adjust to the new arrangements. Our preferred approach would be the option to undertake the 2022 assessment against the current framework (since this is the basis on which we have all developed our Action Plans) and implement the proposed framework at the start of 2023.⁴

We would be very happy to discuss this response with the LSB.

Yours sincerely



Fran Gillon
Chief Executive

⁴ Option (a) in paragraph 52 of the consultation document.