

BAR STANDARDS BOARD

REGULATING BARRISTERS

Regulatory Performance Assessment Consultation

Response of the Bar Standards Board

Introduction

1. The Bar Standards Board (BSB) welcomes the opportunity to comment upon the LSB's proposed revised approach to monitoring the performance of the front-line regulators. We have been supportive of the previous Regulatory Standards Framework and have found it a useful means of managing our own regulatory reform programme. We are pleased to note that the LSB intends to adopt a risk based approach to its oversight monitoring. Our response is framed with the aim of helping the LSB to achieve that objective, so that oversight can be proportionate, targeted and not unduly interventionist in the operational functions of the regulators.
2. The BSB is also keen to ensure that we can strike the right balance between developing our regulatory approach and meeting the LSB's expectations around reducing the cost of regulation. There is a risk that the proposed approach to performance monitoring places greater financial burden on the regulators, for example, to build its evidence base and understanding of the market. In doing so, additional pressure will be put on the already stretched resources of regulators. We are mindful of the need to be responsible and proportionate in our budget and business planning and the LSB are encouraged to ensure that its assessment of regulatory performance does not compromise the drive for a reduction in regulatory costs.
3. The BSB supports the role that the LSB sees for itself in monitoring regulator performance. It reflects the BSB's view of the type of activities that should be carried out by an oversight regulator. However, the BSB also notes that the revised approach changes the emphasis from self-evaluation to assessment by the LSB on whether regulators are meeting the published standards. Such an approach places additional burden on the capacity and capability of the LSB to be in a position to conduct such assessments whilst at the same time meeting its own strategic aim of reducing its costs. The BSB would be interested to understand how this will be achieved given the current staffing model of the LSB.

4. Turning to each consultation question:

Q1 Please could you set out any other minimum standards required of a regulator which are not covered by the proposed regulatory performance standards?

5. There are no additional standards that we would suggest. They are a comprehensive list of outcomes that build upon the indicators in place for the Regulatory Standards Framework.

Q2 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

6. We do not believe that any of the standards should be removed. However, the BSB is keen to understand how outcomes focussed the LSB will be in its assessment and the degree to which the context of specific regulators will be taken into account. The examples of evidence are numerous and the LSB's previous standards of performance are detailed; we are keen to ensure that these are viewed not as prescriptive indicators but rather as guides to help the regulators determine what evidence they believe is necessary to support their assessment against the outcome. The success of the RSF was that it was sufficiently broad to apply to all regulators, irrespective of size or governance arrangements and the characteristics of the regulated community. This allowed for flexibility of application and for each regulator to form its own view on whether it satisfied the outcome free from unnecessary prescription or detail from the LSB. The BSB would be keen for this approach to be maintained in any new performance monitoring system.
7. As currently drafted there is a risk that the evidence and reference to previous LSB pronouncements could be seen as a means of fettering the operational approach of front line regulators. Regulators may, with a regard to the standards, set up systems that provide the LSB with the evidence that be used as part of their assessment of outcomes rather than putting in place appropriate regulatory arrangements to support the needs of their organisation. That should not be the purpose of performance monitoring.
8. We also note that there is, within the new standards, considerable emphasis placed on evidence gathering and on understanding the market. The BSB is supportive of this as a means of effective regulation but this should be balanced against the pressure on regulators to manage its costs in a proportionate and targeted way. The narrowing of the grading scale to 'met' and 'not met' does not allow for an incremental approach to meeting minimum standards to be recognised. For example, the BSB may have a three-year programme of research to develop its evidence base – assessment against the standards in year one might result in a not met grading whereas assessment in year three could result in a met rating. This seems too blunt a measure to reflect that the BSB is taking a proportionate and economic approach to gathering evidence, and is operating effectively considering that improvements take time and may only be possible to achieve as part of a well-planned strategy. This contrasts with the previous criteria, which included an option for "undertaking improvement and work is well underway".
9. We are supportive of the standards as set out with one exception as set out below.

E5 – the idea of a complainant is increasingly outmoded given the role that the Legal Ombudsman now plays in dealing with service complaints. The regulator's role is now limited to dealing with conduct matters and complainants may well be treated as 'providers of information', with the regulator taking a decision what use to make of the information provided. In some cases, it may be appropriate to keep the provider or information apprised of progress, but in other cases that approach may not be necessary. It is suggested that this outcome be revised to make it clear that it may not always be necessary to keep the person bringing information to the regulator apprised of progress and that the purpose of the regulatory system is not to satisfy the concerns of individuals. Indeed, there is a tension between the extent of resources expended on addressing the concerns of 'complainants' and the resources needed to regulate the profession effectively.

Q3 Other than the items already listed in the revised dataset, please could you list any other items that we should be collecting? Please identify why we should be collecting them.

10. The BSB is of the view that the dataset is appropriate subject to what we say in the paragraph below. In discussions with the LSB we have explained the language used does not translate to the work of the BSB. We understand that these concerns are being addressed separately. For example, the request for data around the application process for authorising authorised persons does not reflect the authorisation to practise approach that is operated for barristers. It may be preferable to see the proposed dataset as illustrative rather than exhaustive or mandated. Given the emphasis of the LSB approach is on risk and outcomes focusses, regulators should be encouraged to provide evidence and data that they believe provides assurance that they have met minimum standards, rather than respond to a prescriptive set of requirements. Such an approach aligns with the point made above of considering the specific context of each regulator when monitoring performance.
11. At a more fundamental level, the data the LSB is seeking is data which the BSB provides to its Board and its own internal assurance and performance monitoring committees for detailed scrutiny. These reports are publicly available and it is suggested that the LSB should not seek to replicate that level of scrutiny but instead to assure itself that regulators have appropriate governance arrangements in place to manage their own performance. For example, the LSB seeks data in relation to business planning and staff turnover. It is not clear what use the LSB would make of that data to assess regulatory performance. It is suggested that instead the LSB should focus on whether the regulators have in place means to scrutinise their progress against business plans and to analyse staff turnover. The latter would be a more proportionate means of assessing the effectiveness of leadership and governance and would be more in line with audit good practice which it is suggested the LSB, as oversight regulator, should seek to operate.

Q4 Are there any items listed in the revised data set that should not be included in this?

12. See answer to Q3 above

Q5. Is it necessary for information collected in the revised dataset to be put into the public domain? What is the LSB's role, if any, in encouraging this?

13. The BSB believes that the information should be put into the public domain by each regulator unless there is a specific reason not to do so. The LSB's role is ensuring that this happens.

Q6. If you believe that the collection of this dataset would have a disproportionate cost/time impact on the regulators, what would you estimate this to be?

14. The BSB collects the information required by the LSB in the dataset so it would not have any particular cost or time impact. However, we imagine that other regulators who are not similarly placed could find collection burdensome. We will leave them to advise whether this is the case.

Q7. Are there any other evidence gathering approaches we should be using, or any evidence gathering approaches listed which we should not use?

15. The BSB has in place robust assurance and performance monitoring arrangements. This includes an internal audit function as well as close and independent scrutiny by our Planning Resources and Performance Committee and our Governance, Risk and Audit Committee (as well as the BSB Board). We operate the four line of defence model for assurance which provides appropriate levels of scrutiny of our regulatory approach by the senior BSB executive, BSB committees and the board as well as through independent internal audit (the BSB has just appointed independent internal auditors as part of its regulatory assurance framework). Detailed assurance and performance monitoring papers and reports are prepared and evidence provided in support of the executive's evaluation of its performance. Many of these reports are considered as part of public meetings of the Board and are published on our website. The BSB is of the view that these should form the basis of any evidence gathering that the LSB may wish to carry out when assessing regulator performance. They provide the foundation upon which an external oversight body should be able to establish where regulatory performance is at risk.

Q8. Will a move to a risk based process, with the ongoing monitoring proposed, provide sufficient evidence through which we can gain assurance about the regulator's performance?

16. The risk based approach reflects the distance that regulators have travelled in providing assurance to the LSB about their performance. For example, when the BSB was first monitored under the Regulatory Standards Framework (RSF) in 2012, we did not have an established risk based approach to regulation. In applying the RSF we developed that approach between 2012-2016 to a 'satisfactory' rating. In 2017 we are embedding and continuing to evolve as a risk based regulator. Other regulators will similarly have matured in their regulatory approach and it is therefore proportionate for the LSB to adopt a similar approach to its oversight regulation. We agree therefore that the proposed performance monitoring system will provide the evidence and information required to assure the LSB of the performance of each regulator.

Q9. Do you have any comments on the proposed methods of assessment and review for the regulators?

17. The proposed methods of assessment and review seem reasonable as long as they are applied in a proportionate and risk based way. An indication of the anticipated number of reviews is not stated. It would appear that the LSB can decide, without scope for appeal or challenge, to commence a review. Reviews have the potential to be burdensome for regulators and a drain on resources (likely to be at the expense of other planned for activity by the regulator or at the expense of increased practising certificate fees with the inevitable knock on the costs paid by consumers) and should therefore be reserved for high risk areas of concern. The BSB would seek assurances from the LSB that this is how reviews are intended to be used. They should be an exceptional measure where there is a real cause for concern and where other options have been expended, rather than as a routine means of assuring regulator performance in one or more area of their activity.

10. Please provide your views as to whether the revised grading scale supports accurate measurement of the regulators' performance against the standards?

18. We support the removal of subjectivity from the grading system but would echo our concerns as set out in paragraph 8 above. There is a risk that, without some

explanation that is made available alongside any grading, the grading itself could be too blunt a snap shot in time to accurately reflect the performance of a regulator or its progress towards improvement. In earlier versions of the grading scheme the LSB had included an additional 'met' grade which stated that "the regulator meets the minimum standard of regulatory performance but there are limited areas of improvement which could be made". The BSB suggests that the LSB consider re-introducing this grade or provides some other means of recognising that a regulator is making appropriate progress and that plans are in place for that progress to be completed. Alternatively, the LSB is encouraged to be more explicit in how it will apply its grading criteria, for example, to indicate that they will view a regulator as meeting the standards if they have adopted a strategic and cost effective approach to improving its regulatory approach by having in place phased action plans. Such an approach reflects a desire by regulators to operate within its resources.

19. It is not clear from the paper how gradings would be reported but we would be in favour of them being made publicly available only if they were supported by explanatory narrative.

Q11. 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?

20. Yes, subject to the concerns highlighted in paragraphs 8 and 18 above being addressed.

Q12. Where we identify good practice within a regulator's performance, how do you think we should share this with the other regulators?

21. Good practice should be shared as part of any formal annual report on regulator performance. It should also be shared informally as it arises.

Q13. If you consider that the regulatory performance assessment process document does not provide sufficient transparency about our process to performance assessment, what could we do to make it more transparent?

22. Subject to the points raised above the process looks reasonably transparent on paper. We suggest that whether it is transparent in practice should form part of any review of the process. At a more general level, the BSB would encourage the LSB to commit to conducting a review of its new approach after a reasonable period, say three years from implementation.

Bar Standards Board

25 September 2017