



Bar Council response to the Legal Services Board's (LSB) "Proposed Regulatory Performance Assessment Framework" consultation paper

1. This is the response of the General Council of the Bar to the Legal Services Board's (LSB) "Proposed Regulatory Performance Assessment Framework" consultation paper.¹
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.
4. The Bar Council has significant concerns about the LSB's proposals.
5. Those concerns are fundamental as the LSB's proposals go to the heart of the proper role of the frontline regulators and the role of the LSB as oversight regulator.
6. The existing standards are, correctly, directed at the core regulatory functions: authorisation, supervision and enforcement.
7. The outcomes for these core standards are, for the most part, clearly expressed. They are comprehensible by the frontline regulators, the professions and the general

¹ LSB 2022 [consultation](#)

public. They state what all participants in the justice system would expect the frontline regulators to be doing and the manner in which they would expect them to be doing it. They, therefore, provide a framework against which the performance of frontline regulators can be objectively, consistently and proportionately assessed.

8. The existing standards supplement these core regulatory functions with two additional standards directed at the “regulatory approach” and the need for regulators to be “well-led”. Again, although there may be room for argument about some of the outcomes, these standards and the outcomes for these standards are largely appropriate, proportionate, predictable and not over-bearing.

9. The LSB performs its oversight function in relation to the existing standards and outcomes by a planned, predictable, standardised process. Again, this is an appropriate approach that is consistent with a credible and comprehensible approach to oversight regulation.

10. As the Bar Council understands the position, the existing standards and outcomes were only fully implemented in 2019. This was the year before the pandemic. It is not credible to argue that a sufficient body of information is available to justify a fundamental change. On analysis, the parts of the consultation document that purport to suggest that there is such a body of information do not do so. We refer to our response to Request 13 below. It is also relevant that some regulators are failing to meet their KPIs in respect of the core regulatory functions. This is another reason to focus on the existing framework rather than be distracted by fundamental change.

11. Notwithstanding this, the LSB proposes a change that completely removes the standards that state the core regulatory functions. This is a fundamental change that goes to the heart of the role of a frontline regulator.

12. It replaces them with two vague standards that do not have an appropriate regulatory focus. While the characteristics that support the standard, “operational delivery”, are largely regulatory in nature, the characteristics that support the standard, “effective approach to regulation”, include some that are more appropriate to a policy making body than a regulator.

13. In addition, the LSB appears to be taking a quasi-governance role over the frontline regulators, essentially placing it in the role of a non-executive board, rather than its proper role as exercising oversight, at a distance. On the one hand there is a more passive approach to its oversight functions in relation to the operational core regulatory functions, relying to an inappropriate extent on information provided at the discretion of those it is supposed to be supervising. However, this is coupled with (i) a requirement to provide the materials that the regulator would provide to its own board and (ii) more worryingly, provision of a draconian power to demand from

frontline regulators responses to enquiries/investigations on a thematic basis. When coupled with the wide-ranging nature of the proposed standards, we are concerned this latter power would be largely in relation to the wider vague regulatory objectives, would be unpredictable and, potentially, oppressive in nature and would certainly detract from the regulator's focus on the core regulatory functions. The Bar Council is concerned that this is part of a drift by the LSB away from its proper statutory functions. The Bar Council has expressed similar concerns in the past.

14. It is the Bar Council's view that the fundamental changes referred to above, if at all, should only properly be done after:

- a) An open discussion with Approved Regulators, professional representative bodies, first tier regulators, the government, stakeholders and others as to the role of first tier regulators;
- b) An analysis of the remit of Approved Regulators / first tier regulators by reference to the Legal Services Act 2007²;
- c) The establishment of relevant consensus as to the role of first tier regulators;
- d) Only then should a performance assessment framework be devised around that established consensus understanding of the role of the first-tier regulators.

As matters stand the Bar Council does not see any argument, evidence or need for change in the role of the first-tier regulators and none is made in the consultation paper.

Question 1- Do you agree with the stated aims of our proposed performance framework to place the responsibility on regulators and their boards to meet the standards in order to provide assurance that they are well-led and effective in their approach to, and delivery of, regulation for the public?

15. The Bar Council agrees that regulators and their boards should provide assurance that they are well led and effective in their approach to regulation. This is provided for in the current standards and outcomes. We generally support the approach that places some emphasis on this. We would particularly stress the need for regulators at all levels to have sufficient experience of the profession they are regulating and the activities it undertakes. However, it is not necessary to make the proposed changes in order to do this.

² [Legal Services Act 2007](#)

Question 2- Do you agree that the proposed standards are clear in their focus and expectations to provide assurance of effective regulators? If not, what changes would you propose and please explain your reasons

16. We do not agree that the proposed standards are clear in their focus and expectations. They are high level and general in terms. Some, (such as Standards 2, 13 and 15) are simply aspirations of the most high-level kind. They do not provide a workable performance assessment framework. We repeat what we say above about the current standards which state the core regulatory functions. The proposed change is a change to standards that are less clear in their focus and expectations. It allows too much discretion to the LSB to interfere in the working of the frontline regulators.

Question 3- Do you agree that the proposed characteristics which support the standards are reasonable expectations of the skills and processes that an effective regulator will have? If not, what changes would you propose and please explain your reasons.

17. As to standard 1, well-led, it is hard to come to a value judgment as to whether, as a whole, the characteristics under this heading are more appropriate generally than the outcomes under this heading in the existing framework. Given the (properly) limited resources of the LSB and the need for it to focus on its statutory functions, the question is whether there is a demonstrated need to change. We repeat that we do not think that the case has been made for changes at this stage. The LSB does, for example, deal expressly with its removal of WL 7 but it does not provide an adequate reason for the change.

18. In terms of characteristics 1, 2, 5 and 8, these are reasonable expectations of the skills and processes that an effective regulator will have. The Bar Council has the following comments in relation to the other characteristics:

- a) In relation to characteristic 3 we would emphasise the need for both the oversight regulator and the frontline regulators to understand the professions and the work that they do. This must involve appropriate involvement of practitioners in both types of regulator. There is a credible view that this understanding is, at times, not of an appropriate standard. Also, in relation to characteristic 3, “collaborates effectively” should be changed to “works constructively and in collaboration” so that characteristics 3 and 7 are consistent;
- b) Characteristic 4 needs to be amended and clarified. It also needs to be consistent with the regulatory objectives in the 2007 Act. In so far as there is a reference to the public it should be to the public interest rather than

“the broader public’s needs”. We do not object to the reference to the needs of consumers. There then needs to be a consequential amendment to the reference to assessing the impact of its work;

- c) In relation to characteristic 6, there needs to be a reference to the requirements of section 28 (3) of the 2007 Act. When considering what resources to secure and deploy, the frontline regulators have a statutory duty to have regard to what is proportionate and to whether the relevant activity is targeted at cases where action is needed. This duty applies particularly to the process of setting the budget of the regulator. It should be made clear that the cost of regulation should be proportionate for the profession and consumer. In addition, the phrase “including through collaboration where relevant” is unclear;
- d) in relation to characteristic 7 the independence of the frontline regulators from both the LSB and the professions should be referred to expressly. The independence of the frontline regulator from the LSB is not currently referred to anywhere in the proposed characteristics. It is clearly required both by reference to sections 1 (1)(f), 28 (2)(b) and expressly in section 32 (5) of the 2007 Act and by recent experience of the working relationship between the BSB and the LSB, for example, where the BSB came under what may be regarded as undue pressure to fund the Legal Choices website. The 2007 Act is quite clear that frontline regulators should not be the subject of ‘capture’ by the LSB or, of course, the regulated professions.

19. As to standard 2, “Effective approach to regulation”, the characteristics are inadequate, and as set out above, cover ground that is more appropriate to a policy making body rather than a regulator. It is hard to see how a standard headed “effective approach to regulation” can be appropriately supported by a series of characteristics, not one of which mentions any core regulatory function. This is particularly startling given that it is part of a proposal that replaces a framework that has the core regulatory functions as standards and supports them by clear statements as to the effective way to achieve them. In relation to specific characteristics:

- a) we accept that characteristics 9 and 11 are reasonable expectations of the skills and processes of an effective regulator;
- b) we are concerned by the prominence given to characteristics 10 and 12. They risk resources being expended unnecessarily and disproportionately on these activities in order to satisfy the LSB and distracting the frontline regulators from their core regulatory functions;

- c) characteristic 13 is not an appropriate characteristic. It is vague and unclear. It does not focus on properly regulatory functions. Innovation in the provision of legal services is a matter for practitioners and others. The role of the regulator is one of oversight of these trends to ensure that they do not conflict with core principles that the regulator is obliged to protect by way of minimum standards. Again, and in addition, this characteristic runs the risk of distracting the frontline regulators from their core functions;
- d) a similar comment can be made about characteristic 14. The promotion of diversity in the profession is a matter best suited to practitioners and for bodies like the Bar Council. A large amount of work is done in this area by the Bar Council. The role of the regulator, properly understood, is, again, one of setting minimum standards and oversight.
- e) Again, characteristic 15 is vague, impossible to objectively assess performance against, and runs the risk of distracting the frontline regulators. In carrying out their functions the frontline regulators are obliged to have regard to the regulatory objectives in section 1 of the 2007 Act. There is no place in a workable performance assessment framework to simply set out, in terms, one of the regulatory objectives. It is entirely unhelpful, impractical and, in practice, allows the LSB maximum discretion to interfere in the working of the frontline regulator.

20. As to standard 3 “Operational delivery”. Our objections to the characteristics under this heading will by now be well understood. The proposal makes a fundamental change to the clarity, scope and focus of the frontline regulators. Instead of three clear standards supported by 15 clear outcomes, the proposal shoehorns all that is dealt with in those part of the current framework into 5 vague characteristics. This process will have at least the following effects:

- a) It will reduce the proportion of the frontline regulators’ time and resources spent on properly regulatory functions;
- b) It will reduce the standard and depth of scrutiny of the way in which the frontline regulators carry out those functions;
- c) It will reduce the public’s confidence in the role of a frontline regulator and in the essential functions that such a regulator is supposed to perform in the public interest. This in turn runs the risk of undermining public trust in the integrity of the professions.

Question 4- Does the sourcebook provide sufficient information to assist regulators in providing assurance in meeting the standards? If not, how could we better achieve this? Do you have any comments about the examples of evidence and publications noted in the sourcebook?

21. Once again, the Bar Council has significant concerns about the sourcebook. It will not be helpful for us to go through every item in the sourcebook and make individual comments. One only has to read the standards, characteristics and sourcebook together as set out in Annex A to see that what is being proposed requires a proper period of consultation, reflection and analysis before it could properly be implemented.

22. The Bar Council makes three broad observations:

- a) There is insufficient analysis in the consultation document to support the detail of the content of the sourcebook. This is a significant omission;
- b) The sourcebook entries under the heading “effective approach to regulation” are particularly troubling. They are in places vague, they are bureaucratic and they go beyond what a properly focussed regulator should be doing and will obviously require the deployment of significant resources. It is hard to see how they are compatible with the statutory requirement that regulators act proportionately;
- c) The sourcebook entries under the heading “operational delivery” which do go to the heart of the proper functions of a regulator require much closer analysis, analysis that is not possible to do so properly without proper engagement with relevant parties and proper consideration of the core regulatory functions, the strengths and weaknesses in the system and how these core functions are carried out in practice.

Question 5- Do you agree with our proposal to maintain the sourcebook as a living document to ensure it remains current, including taking account of new LSB policies, Rules and guidance? If not, what other approach would you propose?

23. Given the criticisms we have of the way that the current proposals have been formulated and proposed, we would have significant concerns about the sourcebook being a “living document”. We do not have sufficient confidence that the LSB is taking an appropriately rigorous approach to the content of such a sourcebook. Any changes to sourcebook content should be the subject of an appropriate system of consultation.

Question 6- Do you agree with the proposal that we would primarily rely on information used by each regulator's board and its executive to monitor its own performance to provide assurance? What changes, if any, would you suggest?

24. We have some concerns about the proposed approach to the LSB's oversight functions. The LSB is an oversight regulator. Its core function is to oversee the frontline regulators. As we understand the proposals, the LSB proposes to adopt a less active approach in relation to performance assessment of the core regulatory operations of the frontline regulators. It proposes to rely primarily on those it oversees for information as to whether they are complying with relevant standards. The Bar Council has significant concerns about this approach. It seems to us to be less rigorous in relation to the core regulatory functions. It seems to us that a system that relies on the person being overseen to provide relevant information makes it more likely that problems the LSB exists to prevent will go unnoticed or undiscovered.

25. Conversely, the thematic inquiry-based approach is not predictable for frontline regulators, allows the LSB extraordinary discretion as to matters on which to inquire into, and could be oppressive and distracting for the frontline regulator.

26. The Bar Council also repeats the concerns it has expressed in response to previous consultations that the LSB is straying from its proper role and is insufficiently focussed on what it is set up to do.

Question 7- Do you have any comments on the proposed introduction of narrative assessments and the revised rating system?

27. The Bar Council repeats its comments above. The focus of the LSB ought to be on assessment of KPIs in relation to the core regulatory functions, for example, clarifying complaints-handling rules; time taken to deal with complaints; transparency of the complaints handling system etc. It has no comments on the rating system which seems to be largely formal.

Question 8- Do you agree that the regulatory performance assessment process document is sufficiently clear about our proposed approach to performance assessment and how we will use our assessment tools? If not, how could it be clearer?

28. We have already outlined our concerns about the changes to standards and characteristics that are less clear in their focus and expectations. The assessment process, therefore, would be more arbitrary, unpredictable and provide the LSB with too great a degree of discretion on all sorts of matters of policy, rather than

concentrating on the proper operation of frontline regulators in their core regulatory functions.

Questions 9 - Do you have any comments about our proposal to undertake a hybrid approach to our 2022 annual performance assessments of regulators? and, 10- Do you have any comments about the proposed focus, timing, and process for our assessments under the revised framework from 2023 onwards?

29. These questions are largely for the frontline regulators to answer. We have significant concerns about the cost and necessity of what is proposed and consider that any change should be managed in the most cost-effective manner.

Question 11- Do you have any comments on the proposed framework's impact on equality issues? Are there any wider equality issues and interventions that we should consider?

30. We have not identified any concerns in relation to this.

Question 12- Do you have any comments on the potential impact of the proposed framework, including the likely costs and anticipated benefits?

31. We repeat much of what we have already said. We identify only potential threats with the proposed changes, increased costs and no benefits.

Question 13- Do you have any other comments about the proposed framework?

32. The need for this revolution in the role of the regulators is not identified clearly by way of the supporting text to the consultation.

33. Further and in any event, it is submitted that the proposed change is based on a misunderstanding of both the LSB's role under s. 3, and a misunderstanding of the role of the regulator, under s. 28 of the 2007 Act.

34. The revision to the performance assessment framework is premature, unevicenced and has the potential to be oppressive to the regulators.

35. The 2018 Regime was only implemented just over three years ago. This coincided, of course, with the COVID-19 pandemic, one of the biggest shocks felt by regulators and the regulated probably since the Second World War. In no way can the period 2019 to date be regarded as ordinary conditions within which the performance of the assessment framework can be assessed.

36. The LSB itself has fairly recognised that regulators and the professions have been in massively difficult circumstances over the past few years, with both still in the recovery phase.

37. In such circumstances on the face of it the LSB has no adequate evidence base on which to understand how well the 2018 Regime is working.

38. No evidence base is published with the consultation paper and, indeed, all of the LSB comments about the operation of the current framework are positive in nature and that the framework works well (see paragraphs 4 and 19).

39. We note that it is said that to understand any issues with the current framework the LSB has “gathered views from the regulators and the LSCP” (paragraph 21). None of that has, however, been provided with the consultation. We know of no demand by the Bar Standards Board for a change and widening of the scope of the performance assessment framework and certainly not of the nature contemplated. Indeed, we do not understand there to have been any prior consultation with the BSB contrary to what is suggested. At least, there is a lack of transparency in relation to the drive to further change.

40. We note as an Approved Regulator that we have not been consulted as to the effectiveness of the current performance framework and we infer that, surprisingly, it would appear that no Approved Regulators have been asked for evidence and their views. If asked, we would say it is too early to say.

41. The basis upon which the LSB concludes that “we and the regulators have now accumulated sufficient experience of how the current framework operates”, is surprising, given the impact of the COVID-19 pandemic, and it is not transparently evidenced.

42. The assertions that changes are proposed because the LSB has “conducted a review of how regulators in other sectors approach performance monitoring, including the Professional Standards Authority and the financial regulators. We also considered the National Audit Office report on performance measurement by regulators”, can only be taken by the consultees as unevidenced assertions since:

- a) None of the reviews or reports are appended to the consultation.
- b) There is no reference elsewhere in the consultation to how any of these reviews or reports informed a particular “Characteristic” or other point.

43. Given the regulators and professions remain in a recovery phase, now is, in any event, not the time for substantial change in the performance framework within which the regulators are to operate. Any changes in the assessment will, of course, filter down to how the regulator expect the regulated professions to behave. It is, therefore, inappropriate to seek to impose these substantial changes at this point in time, even with the transitional proposals raised by the consultation paper.

Bar Council
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