

Consultation response

LSB's proposed regulatory performance assessment framework

20 June 2022

Introduction

The Costs Lawyer Standards Board (CLSB) welcomes the LSB's review of its framework for assessing the performance of the regulatory bodies that it oversees. We agree with the description in the consultation paper of the difficulties inherent in the existing framework and, overall, we support the LSB's proposed approach to reform.

We have had the opportunity to comment on the LSB's proposals at various stages of their development, including through one-to-one meetings with the project team and at the stakeholder event on 9 June. We have therefore already provided feedback as to the improvements we feel could be made to the existing scheme and some initial comments on the consultation paper. This written response focuses on a few remaining areas where we hope further feedback will be useful, responding to three of the questions posed in the consultation paper.

Q3. 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?

Characteristic 3

We have concerns about two of the proposed characteristics. The first is characteristic 3 under standard 1, which reads:

"Independent of the regulated professions but understands and collaborates effectively with the profession and representative groups to meet the regulatory objectives"

We understand from the stakeholder event that the SRA has concerns about use of the phrase "collaborates effectively" in this characteristic, and has suggested that "collaborates appropriately" be used instead to reflect that collaboration between independent bodies who might disagree on certain issues from time to time will not always be appropriate. We agree with the SRA's reasoning.

However, we also wanted to highlight that it might not always be possible for regulatory bodies to collaborate *appropriately* with representative groups either. Collaboration is a two-way street, and even the best efforts of a regulatory body at collaboration might not be successful. From the CLSB's perspective, we are mindful that the Association of Costs Lawyers is run largely by a Council of volunteers with minimal resources. That organisation has its own strategic priorities that will (correctly) be narrow and focused. We appreciate that finding resource to collaborate on other priorities, however important from a regulatory standpoint, can be challenging for the Association.

We will continue to look for creative ways to collaborate with ACL, as well as individual practitioners, but we are concerned about being assessed against a characteristic that is couched in absolute terms, and which requires behaviour that is often outside our control (i.e. that we *do* collaborate

appropriately with ACL) rather than in terms that reflect behaviours within our control (e.g. we *take proactive steps with the aim of* collaborating appropriately).

In our view, characteristic 3 would be better focused solely on regulatory independence. It is through characteristic 3 that the LSB intends to assess the regulatory bodies' compliance with the Internal Governance Rules 2019,¹ and thus characteristic 3 carries substantial expectations even without reference to collaboration.

At the same time, effective collaboration is already covered elsewhere. In particular, characteristic 6 includes acting "through collaboration where relevant" and characteristic 7 refers to working "in collaboration with the LSB, other relevant authorities and other stakeholders". Both of these implicitly include collaboration with representative bodies, but without the difficulties posed by characteristic 3. Characteristic 9 also requires regulators to have "a comprehensive understanding of the market", which inevitably requires a degree of collaboration with the wider profession.

We would therefore suggest wording characteristic 3 as "Independent of the regulated professions" (or similar), without muddying the waters or creating duplication through further references to collaboration.

Characteristic 20

Characteristic 20 refers to maintaining "high" standards of conduct amongst authorised individuals. We wonder what is meant by "high" and how this will be measured. The very highest standards (which are in any event difficult to define objectively and universally) come at a price, which is ultimately borne by consumers.

Section 4 of the Legal Services Act 2007 refers to the LSB "assisting in the maintenance and development of standards", without assigning an adjective to those standards. In our view, standards are better couched in the language of the professional principles in section 1 of the Act, which ties them to the regulatory objectives. We would suggest replacing the term "high standards" with "appropriate standards", "relevant standards", "standards that promote adherence to the professional principles" or similar.

Q8. 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?

More clarity is needed around the moment at which a "partial assurance" rating crystallises.

The description of this rating² states:

"In this instance, the regulator would need to provide further information."

The words "in this instance" appear to relate to an instance in which a partial assurance rating has already been given. It was not clear to us from the materials why the regulator would not be afforded the opportunity of providing such information before the rating crystallised, in order to receive an adequate assurance rating.

We raised this question at the stakeholder event in June. The LSB helpfully explained that, because the new process envisages a more detailed dialogue prior to publication of the ratings (in contrast to

¹ As distinct from the approved regulators' compliance, which will be assessed separately, according to the first paragraph on page 10 of the consultation paper.

² See, for example, paragraph 43 of the consultation paper.

the limited fact-check that is currently offered), regulators would be put on notice that a partial assurance rating was likely and, consequently, they would have the opportunity to provide the further information before the rating crystallised. A partial assurance rating would therefore only be given in practice where a regulator failed to provide the requisite information in a timely fashion.

We suggest that this position be set out in the process document (Annex B to the consultation), because the LSB's intentions are not apparent from the current drafting. In our view, clarification is needed at:

- paragraph 16, where the document mentions that further information may be requested, but does not explain how this relates to a partial assurance rating;
- paragraph 21, where the partial assurance rating is described; and
- paragraph 25, which explains that the regulators will be provided with the draft assessment and given the opportunity to "respond and raise queries about the proposed ratings" – presumably this should also mention providing additional information in response to a proposed partial assurance rating, given the LSB's stated position (currently the provision of further information is not mentioned at all in the process described in paragraph 25).

This should also be taken into account in the LSB's proposed timetable for the first assessment under the new framework, as set out in the table at Figure 3 of the main consultation document. The table indicates that the following will happen in October, with no mention of the provision of additional information in response to a proposed partial assurance rating:

"LSB sends draft assessments to regulators for their comments on the assessments' substance and factual accuracy. Regulators have three weeks to respond, including identifying any actions that are necessary to address the issues raised."

We note that, on one view, you could say this is a semantic distinction; whether a regulator receives a partial assurance rating and later corrects misinformation, or corrects misinformation straight away and avoids the partial assurance rating, achieves the same outcome in the end. However the LSB will be aware that its ratings are often picked up and interpreted by sector commentators to give stakeholders information about the regulators' performance.³ Indeed, making the assessments more informative for the public and interested stakeholders is one of the LSB's stated aims of these reforms.⁴ It is therefore important that the ratings accurately reflect performance at the time of publication.

Q10. Do you have any comments about the proposed focus, timing and process for our assessments under the revised framework from 2023 onward?

We have a practical observation on this aspect of the proposals, relating to the time of year that regulators will be asked for information.

Figure 3 of the consultation document indicates that information requests will be issued at some point in June, with regulators being asked to respond within four weeks, at some point in July. At the stakeholder event we asked whether, if the LSB knows what the information requests are likely to

³ See for example: <https://www.legalservicesconsumerpanel.org.uk/blog/regulatory-performance-room-for-improvement-for-all>; <https://www.legalfutures.co.uk/latest-news/panel-questions-future-of-underperforming-regulator>; <https://www.associationofcostslawyers.co.uk/News/clsb-under-fire-from-oversight-regulator-and-consumer-panel-over-performance/220069> in relation to the CLSB's historic performance in 2019. To be clear, we view this type of commentary as useful and appropriate scrutiny, but it demonstrates the importance of accuracy.

⁴ Paragraph 6 of the consultation document.

contain, the requests could be provided in advance so that regulators could compile evidence on an ongoing basis during the assessed period. The LSB responded that this would be difficult because the information request would be shaped by issues arising throughout the whole assessed period as well as discussions in relationship management meetings. We understand that response.

Against that background, we express our hope that the process can begin as early as possible in the proposed window, by issuing information requests at the start of June. If information requests are received at the end of June, the relatively short timeframe to respond will fall across the holiday period in July, with the potential to put unnecessary pressure on small regulators (with few staff) and large regulators (with complex approval processes) due to the absence of key personnel during that period.