LEGAL SERVICES BOARD

Regulatory Standards 2015/16

A thematic report on the performance of legal services regulators

May 2016

This paper will be of interest to:

- approved regulators and related disciplinary tribunals
- the Judiciary of England and Wales
- providers of legal services
- legal representative bodies
- legal advisory organisations
- third Sector organisations (representing the interests of consumers or providers of legal services)
- consumer groups
- law schools/universities
- law students (and prospective students)
- legal and regulatory academics
- members of the legal profession
- accountancy bodies
- potential new entrants to the alternative business structures market
- Government departments.

Contents

Chairman's foreword

The LSB's work to hold the legal services regulators to account for their performance is key to delivering public confidence in legal services and is a core statutory function for us in our oversight role. Through it, we drive improvements in the eight regulators' performance and challenge them to become more effective and efficient.

Our first standards assessments were published in 2012 and, since then, the landscape for legal services has changed significantly. We have seen a new regulator enter the market and extensive changes to the approach taken by others.

The eight organisations who are the subjects of this review vary widely. Some regulate many thousands of individuals and entities; others regulate only a few hundred. This means the risks and complexities vary and while all are subject to scrutiny in the same areas, our expectations for each are of course proportionate to the tasks they each face.

This report, and the individual reports for each of the legal services regulators, represent the culmination of an extensive and rigorous programme of activity to collect and assess evidence about their performance against our regulatory standards.

Our assessments have been informed by the views of a wide range of stakeholders with relevant experience. These contributions have been immensely helpful. We have undertaken an extensive assessment of all of the information available to us in our oversight role and we have carefully considered the views of the legal services regulators in their own assessments of their performance. It has also meant that we can provide a complete picture of the journey that the regulators have been on over the last four years.

We are pleased to have seen evidence of substantive progress since then. There is a more outcomes-focused approach to regulation, almost all regulators have developed their risk assessment processes and for many this has contributed to developing risk-based approaches to supervision (to varying degrees of sophistication). There has been positive change in the capacity and capability standard and all of the legal services regulators have maintained, and in some cases improved, their approach to enforcement.

There are many examples of good, and in certain cases best, practice including concerted efforts made to collect evidence to inform regulatory approaches and to

seek to better understand consumers – websites have been updated to be more consumer friendly and more consumer focused research is being undertaken. We welcome the joint work that has taken place between the regulators. For example, activity to engage and work with consumer organisations and review client care letters.

I was particularly pleased to see the legal services regulators taking steps to address the priority areas which we highlighted in our Update report 2015 on performance. They are developing their evidence base and many of them have made improvements to their governance arrangements.

There is however, a lot more that needs to be done. The areas for development inevitably vary between the regulators and we have concerns about the overall effectiveness of the Cost Lawyers Standards Board (CLSB) as in our view it has made insufficient progress against the standards since 2012/13. We hope that through our ongoing engagement with the CLSB we can work with it to address these concerns.

There were some common themes. We noted in a number of areas the need for improvements to their transparency. We would also urge the legal services regulators to address how they identify, monitor and measure the impact that their rules and regulatory arrangements have. This will not be easy, but it is vital if they are to demonstrate that they are delivering the outcomes that consumers need. In future years the LSB will also be paying greater attention to the cost of regulation and value for money.

In order to maintain the current constructive momentum and focus on the areas for development, we will agree an action plan with each legal services regulator. These will be published and will form the basis of future monitoring. These action plans will enable the LSB to work with the legal services regulators so we can be sure they are addressing those areas identified as having scope for improvement.

Finally, legal services regulators will continually need to respond to change as regulatory practice is not static and we all need to respond to changing risks.

For the LSB, this means that our approach to reviewing the legal services regulators' performance will evolve too. We think that now is the time to consider whether our current approach will continue to provide us with the right level of assurance about how the legal services regulators perform and we will assess whether changes are needed during 2016/17.

Sir Michael Pitt, Chairman

1. Our role

Who we are

1. The Legal Services Board (LSB) is responsible for overseeing approved regulators in England and Wales. We are independent of Government and of the legal profession.

What we do

2. We hold to account the approved regulators for the different branches of the legal profession. We drive change in pursuit of a modern and effective legal services sector: one that better meets the needs of consumers, citizens and practitioners.

How we work

3. We are guided by the regulatory objectives agreed by Parliament in the Legal Services Act 2007 (the Act). Our work balances these objectives.

4. We take into account the government's better regulation principles and aim to be transparent, accountable, proportionate, consistent and targeted in all our activities. We also have regard to our obligations outside the Act. These include the Regulators' Code and our statutory equality responsibilities.

5. All the work we carry out is designed to ensure that the approved regulators have the competence, capability and capacity to promote and adhere to the regulatory objectives, free from prejudicial representative influence.

The legal services regulators (or the regulators)

6. All approved regulators (the bodies identified in the Act, see Annex B for a glossary of terms) are required to separate their representative and regulatory functions. In some cases this has led to the creation of separate organisations providing the regulatory functions. This report is solely focused on the performance of those organisations which carry out the regulatory functions – the legal services regulators.

7. The eight legal services regulators we oversee and assessed in this report are:

   - Bar Standards Board (BSB)
   - CILEx Regulation
   - Costs Lawyer Standards Board (CLSB)
   - Council for Licensed Conveyancers (CLC)
   - Institute of Chartered Accountants in England and Wales (ICAEW)

- Intellectual Property Regulation Board (IPReg)
- Master of the Faculties (assisted in his duties by the Faculty Office (FO))
- Solicitors Regulation Authority (SRA)

8. Details of the professions regulated by each body and their functions can be found in Annex A.

9. In general terms the role of the regulator is to:

- set standards of education and training
- authorise entry into the regulated community
- maintain a register of those authorised
- set standards of practice and conduct
- take action to enforce those standards
- monitor and supervise the regulated community.

2. The regulatory standards exercise

10. We have a process in place to hold the regulators to account for their performance. Our regulatory standards work is a core part of our function and is a key means through which we drive improvements in the performance of legal services regulators. Our oversight of the regulators helps to command public confidence that the regulation of legal services is not compromised by representative interests and that the public interest is protected.

11. We consider the regulators' performance against the following regulatory standards (which were agreed in 2011):

    - **Outcomes-focused regulation** - do regulators deliver an outcomes-based approach to regulation that creates benefits for consumers?
    - **Effective risk identification** - do regulators have a robust understanding of the risks to consumers presented by the market?
    - **Proportionate supervision** - do regulators supervise the regulated community at an individual and an entity level to mitigate risks?
    - **An appropriate enforcement strategy** - do regulators have compliance and enforcement processes that deters and punishes appropriately?

12. We also ask the legal services regulators to demonstrate that they have the capability and capacity to deliver the regulatory outcomes.

13. The regulatory standards exercise focuses on these aspects of the legal services regulators' performance as we consider these are their core regulatory functions. However, we acknowledge that their work is wider than this and includes matters which we have not commented on in this or their individual reports.

14. We ask the regulators to grade their performance against each of the regulatory standards using an agreed scale.

    - Good – all indicators embedded appropriately in the organisation and inform day-to-day working practices.
    - Satisfactory – significant progress is being made to embed indicators and use them in day-to-day working practices.
    - Undertaking improvement and work is well underway – indicators have been introduced but are not yet embedded appropriately in the organisation and do not yet inform day-to-day working practices.
    - Needs improvement and work has started recently.
    - Recognise this needs to be done but work has not yet started.

15. It is our view that effective delivery of the regulatory standards should lead to:

- higher standards of professional conduct and competence amongst the regulated professions
- create a legal services market with increased consumer choice and consumer confidence
- encourage innovative practitioners who, if posing fewer risks, are not subject to intrusive or inflexible regulation
- a level of consistency in the approach to the regulation of legal services.

Previous exercises

2012/13 self-assessment exercise

16. In December 2011, we asked regulators to assess themselves against the regulatory standards. Our views on these self-assessments were reported on and published during 2012 and 2013.[1]

17. As part of that exercise, the regulators were required to provide action plans detailing ongoing work or activities planned to address the areas for improvement identified by their own 2012/13 self-assessments. We monitored the delivery of the action plans throughout 2013/14 and we published the outcomes of that monitoring as part of our quarterly reporting.[2]

Update exercise 2015

18. In April 2014, we required regulators to report to us on the progress made since the 2013/14 self-assessments were completed. We received these update self-assessments between October and November 2014. A report based on these update self-assessments was published in February 2015.[3]

2015/16 Regulatory Standards Review

19. In our 2015/16 Business Plan, we committed to undertaking a complete review of the regulatory standards of all legal services regulators.

20. Four years on from the original exercise, we thought that it was appropriate to build on lessons learnt from previous work and from other regulated sectors. While the self-assessment remains an important part of the assessment of performance against the regulatory standards, we drew on a wider evidence base available by also considering:

- performance Information obtained through a data request to the regulators

[1]Information on the 2012/13 regulatory standards reports can be found here: http://www.legalservicesboard.org.uk/Projects/developing_regulatory_standards/index.htm

[2] Outcomes of the monitoring of the action plans can be found here: LSB Board paper April 2014), Paper (14) 26 – Q4 performance report: January to March 2014 (appendix 1a) http://www.legalservicesboard.org.uk/about_us/board_meetings/pdf/Paper_(14)_26_Q4_perf_report_App_1a.pdf

[3]The Update Report 2015 can be found here: http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2015/20150225_Regulatory_Standards_FINAL.pdf

- the results of a questionnaire aimed at understanding the experiences of individual users of legal services regulators. This provided us with 54 useable responses in our first year of running it
- targeted self-assessments completed by the regulators between 31 July 2015 and 30 October 2015
- in-depth interviews with, and written responses from, 34 key regulator stakeholder organisations and individuals (a list of the organisations can be found at Annex C)
- information gained in other areas of the LSB's work, such as statutory decisions and thematic reviews
- findings from previous self-assessments of legal services regulators, in particular from the 2015 Update report
- discussions with legal services regulators about any specific areas of concern that emerged from our assessment process.

21. The extensive evidence base we have gathered over the course of 2015/16 has meant that we have been able to undertake a comprehensive and rigorous exercise that has highlighted areas where improvements have been made as well as areas for further development. It has also enabled us to provide a complete picture of the journey that the regulators have been on since our first assessment of their performance in 2012 and 2013.

22. This report pulls together what we have learnt from the evidence we gathered and details our views on the performance of the legal services regulators. We have published separately individual performance reports for each of the regulators. These can be found on our website.

23. When reading this report and the individual reports for each of the regulators, care should be taken to ensure that misleading comparisons are not made, particularly in relation to the grades given. There are differences in:

    - the size of the regulators, in terms of staff numbers, budget, and the regulated communities
    - the risk profiles
    - who they regulate (individuals, entities and Alternative Business Structures (ABS))
    - the types of consumers their regulated communities engage with.

    While we have subjected all regulators to scrutiny in the same areas, our expectations for each must be proportionate. We have therefore taken the context of the regulator into account when considering performance against the regulatory standards.

24. We would like to thank all those who contributed time, energy and insights to the review.

3. How are the regulators performing against the regulatory standards?

25. In this section of the report we summarise how the regulators are performing against the five regulatory standards. We also highlight some key areas of progress, areas where there is still scope for improvement and some case studies which the regulators may find helpful.

Regulatory standard: outcomes-focused regulation

What is needed?

To **deliver** this standard we consider the legal services regulators must:

- have high quality, up-to-date and reliable evidence on what legal services consumers need and how they use the services
- have effective engagement with consumers
- demonstrate that outcomes are being achieved
- review and update their arrangements based on the evidence they gather.

In our Update report 2015 we set out our expectation that all regulators would focus on the following two **priority** areas (although we recognised that the extent to which they needed to would vary):

- the collection of high quality, up-to-date evidence about how all groups of consumers need and use the legal services they regulate
- the collection of evidence to understand the impact of the rules they impose and whether those rules are delivering the outcomes consumers expect.

What have we learnt?

26. We have found that:

- all of the regulators have adopted an outcomes-focused approach to regulation. There is still scope for this to be better reflected within their regulatory arrangements, for example, through the introduction of more outcomes-focused education and training standards
- across the regulators there is great variation in the level of understanding of consumers' needs and use of services. There is scope for this to improve. As such, it is encouraging that all of the regulators are developing or have plans to develop an evidence base on what legal services consumers need and how they use services. In doing this they are engaging with consumers

- all of the regulators aim to review and update their arrangements based on the evidence that they gather. There is still scope for the regulators to improve their approach to gathering sufficient evidence and to being transparent as to how this is taken into account

- all of the regulators appear to find it very challenging to demonstrate that the outcomes that consumers need are being achieved.

27. We comment below on the work being undertaken by the regulators to develop their evidence bases on consumer needs and their use of services; the regulators' approach to reviewing and updating their regulatory arrangements and a specific area of practice where there is room for improvement across all of the regulators – namely demonstrating that outcomes are being achieved.

Consumer focus

28. It is essential that the regulators understand how consumers need and use legal services. Without this knowledge it may be difficult for the regulators to be able to meet the regulatory objective to protect and promote the interests of consumers. We therefore set an expectation in our Update report 2015 that the regulators should collect high quality and up-to-date evidence about how consumers need and use legal services. We are aware that the regulators can find it difficult to obtain this evidence in a manner which is cost-effective and delivers useful results. We are therefore encouraged that this is an area of the regulators' work where they have all made progress (although the extent of that progress varies).

29. We have seen work undertaken to embed a focus on consumers within the regulators' work (see the capability and capacity section) as well as work undertaken or planned to understand the needs of consumers and their use of services. This includes both active tasks such as meeting consumers but also reflective tasks such as reviewing research which has already been commissioned by the legal services regulators and others on consumers' needs. We have seen the work undertaken on consumers completed in a proportionate manner which fits the context in which the regulators work.

Examples of the work undertaken include:

Taking a different approach

The **CLC** determined that its voluntary consumer feedback survey was not generating sufficient responses. It reconsidered how it could obtain feedback. It held two small focus groups with consumers on particular areas of its work. This feedback has been helpful to the CLC and was a contributing factor to its decision to review its professional indemnity insurance arrangements.

Joint working

The **BSB** and **CILEx Regulation** pooled resources and jointly funded research on a common area of interest - youth advocacy services.

Targeted information, rather than a greater amount of information requested from the regulated community

The **CLC** and **FO** have amended the information that they request in their annual regulatory returns so that they are gathering more focused information on how consumers use their respective regulated community's services.

Engagement with a wide range of consumers

The **SRA** ran "The Question of Trust" campaign to support the development of a professional standards framework that will set out the SRA's thresholds for how seriously it will take different issues as a regulator. The activities undertaken to inform this work have involved a significant amount of engagement with a wide range of groups, including consumers and efforts have been made to engage with groups that can usually be hard to reach, such as the traveller community. The SRA also held sessions with stakeholders representing consumers' interests, such as Citizens Advice.

30. Given that this is an area where the regulators are only just beginning to gather information, we would encourage all of them (but particularly those where such work is only in the planning stages, CLSB, FO and ICAEW) to learn from each other and from outside of the legal sector so that resources can be used wisely and proportionately.

Reviewing regulatory arrangements

31. It is incumbent on regulators to regulate in line with best regulatory practice, to be outcomes-focused and evidence-based, and to review requirements with a view to only imposing what is needed to address the risk identified. Best regulatory practice is not a static concept, it changes over time as businesses respond to changing needs of consumers, new technology, and business models. Therefore, the regulator should always be alert to the possibility of necessary change.

32. We have noted in our previous regulatory standards reports examples of the regulators performing in such a manner. For example, we have noted that as a result of reviews of regulatory arrangements, regulators have introduced outcomes-focused codes of conduct and outcomes-focused continuing professional development schemes. It is positive that we have seen the regulators generally continue to act in this way. Examples of this are set down below.

Reviewing regulatory arrangements

The **SRA** has removed the most restrictive elements of its separate business rule, following a comprehensive review and consultation. This saw the removal of prohibitions on authorised bodies and individuals having links with separate businesses that carry on non-reserved legal activities.

The **SRA** has introduced a competence statement for those it regulates and the **BSB** is in the process of introducing such a statement. These documents support the SRA's and BSB's move to a more outcomes-focused approach to pre-and post-qualification education and training and is in line with the expectations of the LSB's Education and Training Statutory Guidance.[4]

The **CLC** and **FO** have taken steps to simplify their enforcement processes. For example, the FO has introduced a single enforcement process for both notaries and scrivener notaries. The CLC has removed the need for the chair of the adjudication panel to be legally qualified and removed the specific numeric requirement for lay members (a person appointed who is not eligible to sit as a CLC Lawyer member) to exceed CLC lawyer members by one; the requirement for a lay majority remains.

33. However, through the course of our work, we have identified occasions where we have been concerned about the approach taken by the regulators to reviews of regulatory arrangements. For example we reported on our concerns in November 2014 about the sufficiency of the evidence base used by the SRA in its application to change its rules on professional indemnity insurance. We had similar concerns with the BSB in its review of the standard contractual terms (as part of its compliance with its undertaking to us) which we reported on in September 2015. In that case we were also concerned about the process it followed and the quality and consistency of its analysis. Whilst understanding the need to be proportionate we consider that regulators must ensure that they have high quality, up-to-date evidence on which to base their decisions and that this evidence should be fairly and transparently taken into account. Taking such an approach enables the regulator to:

    - clearly demonstrate to the LSB, the regulated community, consumers and others the reasons for the change. This helps with acceptance of the change
    - manage the risks associated with a lack of independence from the profession
    - demonstrate that the change is the least restrictive and is the most proportionate measure to introduce.

[4] The LSB's Guidance (March 2014) Statutory guidance on legal education and training: http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/20140304_LSB_Education_And_Training_Guidance.pdf

Learning points

For those regulators that are planning to review their Handbooks (the **BSB**, **CLC** and the **SRA**) or planning to undertake reviews of their regulatory arrangements we encourage them to:

- ensure that they take a 'first principles' approach (where appropriate)
- take account of a robust evidence base to support any changes or decisions not to change aspects of their Handbooks or regulatory arrangements
- ensure that there is an adequate consumer focus in their review.

The resulting Handbooks and regulatory arrangements should be outcomes-focused, proportionate and less complex and provide the right incentives for professional behaviour.

Room for improvement: outcomes

34. We have seen some isolated examples of the regulators attempting to gather some evidence on the impact of their rules and where there may be gaps in their arrangements. An example of this is set out below.

IPReg's approach

IPReg has started to categorise the enquiries its receives and from whom, as a way to begin to understand whether there are any gaps in its arrangements or if there are any particular areas where it needs to engage more fully with either consumers or the regulated community.

35. However, we have seen little evidence that the regulators have a coherent approach to identifying, monitoring and measuring the impact that their rules and regulatory arrangements have and whether they are delivering the outcomes that consumers need. Without this evidence it is difficult for the regulators to understand if they are achieving what they should be and if their resources are effectively directed where they should be.

Learning points

Whilst we recognise that it can be difficult to identify, monitor and measure the impact of their rules, we would encourage the regulators to consider creatively how they can do this in a proportionate manner. This could include:

- monitoring the types of service and conduct complaints made
- carrying out post-implementation reviews of new regulatory arrangements.

Regulatory standard: risk assessment

What is needed?

To **deliver** this standard we consider the legal services regulators must:

- have formal, structured, transparent, evidence-based approaches to the collection, identification and mitigation of current and future risks which inform all regulatory processes
- focus their risk analysis on vulnerable consumers and consumer detriment
- have processes in place which are understood by the Board and staff
- demonstrate that outcomes are being achieved.

In our Update report 2015 we set out our expectation that all regulators would focus on the following two **priority** areas (although we recognised that the extent to which they needed to would vary):

- the building of a useable evidence base to identify risks faced by consumers that use regulated legal services
- the development of learning programmes and tools to ensure that a consistent evidence-based assessment of risk informs all regulatory processes.

What have we learnt?

36. All of the regulators have risk assessment processes in place. However, we have identified wide variations across the regulators in terms of the sophistication of the approach used as outlined below.

- The BSB has a newly developed sophisticated approach to risk assessment which is in use and supported by dedicated staff. However, this now needs to be embedded within the organisation.
- CILEx Regulation has a sophisticated approach to risk assessment for entities which is in use but has not yet been fully tested due to the low number of entities. However, its approach to risk assessment of individuals is limited. We have previously accepted that CILEx Regulation would use the development of its approach to entity regulation to inform its approach to individuals. However, as the uptake of entities has progressed a lot slower than expected, in its report we have noted that it cannot rely on this. We note that it must start thinking about how it can risk assess individual practitioners in an evidence-based and proactive manner.
- The CLC has an embedded and tested sophisticated approach to risk assessment.

- The CLSB says it has a “steady and proportionate” risk assessment process in place. It considers that risks associated with its regulated community are minimal. We do not think that it has gathered sufficient information on risks to be confident that this is the case. In its report we have encouraged it to develop a sufficient evidence base, including on consumer needs, to enable it to identify and assess risks. We have also questioned the adequacy of its risk register, in particular whether it can inform and support the CLSB’s decision-making and response to risk effectively.

- The ICAEW has an established approach to risk assessment in place which is able to identify generic risks such as the holding of client monies, and specific risks to probate activities. This system is yet to be fully tested in terms of legal services regulation.

- IPReg has a sophisticated approach to risk assessment. This was developed as part of its licensing authority application and has been in use since January 2015.

- The FO does not have a documented risk assessment process in place nor any formal risk management tools or processes. It has a relatively unsophisticated approach to risk assessment. We comment in its report, and in paragraph 40 on the importance of having a structured, transparent approach in place. That said, we recognised in its report that this a function which is taken seriously at the FO.

- The SRA has an embedded and tested sophisticated approach to risk assessment supported by dedicated staff.

37. To some extent we accept that the variation of the sophistication of approach is appropriate because of the differences in the regulated communities, consumers and type of work undertaken. That said, we have highlighted in the individual regulators’ performance reports where we are concerned that such factors are being inappropriately used as a justification for not having in place an appropriate approach to risk management.

38. We consider that effective risk assessment processes give regulators the ability to target limited resources at areas of highest risk to the regulatory objectives. By understanding risk, a regulator can tailor its approach to improve consumer outcomes through proportionate regulation, for example, by targeting its supervisory activity at those practitioners who pose the greatest risk because of the type of work they undertake or consumers they deal with. Absent or weak risk assessment processes could make the regulators’ approach untargeted and/or of limited substantive impact.

39. We comment below on the importance of having a structured and transparent approach to risk assessment; tools to use to ensure a consistent approach to risk assessment and a wide evidence base for the assessments. We also comment on one area where we consider there is room for improvement: demonstrating an understanding of whether the correct outcomes are being achieved as a result of the risk assessments.

Structured transparent approach

40. Most of the regulators have a structured transparent approach to risk assessment. Where this is not the case, we have set out in the relevant individual reports that this should be remedied. Without a documented structured approach an impression is given that risk assessment is undertaken on an ad-hoc basis. This means that there is the potential that risks are missed and that the correct outcomes are not being achieved. Further by making clear how decisions have been informed by an assessment of risks, regulators can promote an understanding of risks that consumers face and foster a more collaborative approach between themselves and those they regulate to addressing those matters.

Structured, transparent approach

The **SRA** was highlighted for good practice in this area in the Update report 2015 and it continues to do good work including through the release of its risk outlook.

The **BSB** has developed a 'risk framework' and a 'risk index' and these have been used to create a 'risk outlook'. The risk framework is the structured approach the BSB uses to collect, identify and mitigate risks. The risk index is a list of the risks the BSB has identified, categorised into particular groupings such as market and external risks and ethical conduct risks. The risk outlook sets out an overview of the key risks facing the legal services market. The BSB has used a wide and varied evidence base to create these three documents and has engaged with key stakeholders (particularly the regulated community and consumers) to ensure that they are comprehensive and easily understood.

Sharing information on specific risks

The **SRA** has made efforts to engage the regulated community in its management of risk. It has released a webinar, topic papers and an interactive online tool.

The **CLC** and **SRA** have also both been active in informing their regulated community about the risk of cybercrime. They have established dedicated webpages on this subject, have issued direct mailings, included information in e-newsletters and talked about the issue in the trade media. They have made clear that this is a risk that they have identified through their frameworks and are trying to develop a collaborative approach to both protecting the consumer and the regulated community from the materialised risk.

Risk assessment tools

41. The second priority area we asked the regulators to focus on in our Update report 2015 was the development of tools to ensure that a consistent evidence-based assessment of risk informs all regulatory processes. We note

that there is a wide variation in the tools used by the regulators to inform their risk assessments. This may be appropriate given the different sizes of the organisation (in terms of staff numbers). However, we would continue to encourage the regulators to keep the tools that they use under review to ensure that they remain fit for purpose.

Risk assessment tools

The **SRA** has internal risk guides, which are available to all SRA employees. They are used by authorisation and supervision teams to assist their understanding of regulatory risk and encourage consistent decision-making. The guides are updated frequently. **CILEx Regulation** has also developed similar guides for entity regulation.

The **CLC** and **SRA** have a triage system for managing intelligence from different sources where new information is logged centrally, assessed by specific members of staff and a decision taken and recorded on whether any further action is needed. Its staff also regularly meet to share information on risks, concerns and regulatory activities.

Cultural change

Due to the starting position of the **BSB**, it has had to take a different approach to developing tools and staff knowledge to ensure that a consistent evidence-based assessment of risk informs all regulatory processes. First, the BSB's Board and executive have demonstrated a commitment to introducing a risk-based approach to regulation. To operationalise this commitment it has:

- provided staff and the Board with a variety of training from e-learning to bespoke and interactive training exercises on risk-based decision-making and taking a risk-based approach
- involved staff in the development of its approach to risk assessment to encourage 'buy in' and acceptance as well as to develop understanding of risk-based regulation
- appointed risk leads throughout the organisation from Board members to staff
- established a Risk Forum to share knowledge and information across the organisation so that its corporate understanding of regulatory risk can be continually updated
- built specific capacity and capability within the organisation which is dedicated to risk assessment - the appointment of a Head of Regulatory Risk and a Risk Analyst
- established processes, information and systems needed to support and monitor the approach internally.

Evidence base

42. The size of the evidence base which the regulators use for their risk assessments varies. We asked all the regulators, in our Update report 2015, to build a useable evidence base to identify risks faced by consumers that use regulated legal services. We have identified that some work is underway to improve the regulators' evidence base.

43. Ways in which the regulators have developed their evidence base are set out below. They have:

- used a wider range of tools to engage with consumers including building constructive working relationships with consumer umbrella groups, holding focus groups, and holding public events on specific policy topics
- collaborated with other participants in the legal services market, and other bodies with a common interest to share intelligence and information on the regulated communities
- collected targeted data from the regulated community which enables gaps in information to be filled, trends to be monitored and specific areas of consumer vulnerability to be focused upon. Data collected includes: consumer demographics and also (amongst other things) areas of law, location of service provision, business model of service provider, method of service offering and entity size or age
- made better use of their own data such as using the information obtained through supervisory activity or enforcement cases to identify potential risks or emerging themes. However, we note that improvements could be made to sharing such information (where relevant) with other regulators. At the moment, we have heard concerns from some regulators that this is not done in a consistent and efficient manner.

44. An example of these methods being used in practice is set down below.

Developing an evidence base

The **CLC** has taken steps to build its evidence base in a proportionate and cost-effective manner. It has:

- developed constructive working relationships with organisations with common interests such as the Council for Mortgage Lenders, to identify licensed conveyancing firms or practitioners that represent a risk to consumers
- amended its annual regulatory return so that it is collecting risk-based information which has enabled it to assess consumer vulnerability and develop a greater understanding of the regulated community

- held two small focus groups to gather information directly from consumers on specific areas of its work which it had identified as needing further consideration
- improved the way in which it records incoming information to better manage and use the information that it holds.

45. Most of the regulators have also made progress in obtaining greater evidence about consumers' needs and how they use services but we consider that there is still more that could be done. We recognise the challenge for the regulators, particularly the smaller regulators, to be proportionate and cost-effective in their activities but it is important for all aspects of the regulators' work that there is a robust understanding of the needs of consumers. We are therefore encouraged by the agreement of the regulators to carry out some joint work on understanding consumers' needs. By pooling resources the regulators should be able to achieve more than they can do on their own and the work should benefit them all.

Joint regulators' work

The regulators have agreed terms of reference for joint working on their approach to engaging and working with consumer organisations. They have identified two projects to focus their resources on which they consider will be the most beneficial to them all.

The first piece of work is improving the approach taken to client care letters. Client care letters can often be written in a language which is not consumer friendly and they may also not include all the relevant information. For example, they may not include clear and easy information on how to complain about poor service. The content of client care letters is a common area of concern for all the regulators. It is likely that research will be commissioned as the first stage of this project.

The second piece of work recognises that the separate approaches taken by the regulators to approaching consumer umbrella organisations has had mixed results. A joint programme of engagement work will be developed to maximise the power of a unified approach and voice amongst the regulators. The first stage of this work is likely to be a roundtable event for the regulators and consumer umbrella organisations.

Room for improvement: outcomes

46. All of the regulators appear to be struggling to identify whether their approach to risk assessment works in practice. It is important that the regulators are confident that they are identifying the correct risks and taking appropriate mitigating action. We recognise that this is not straightforward nor is it work that can necessarily be undertaken quickly, but without measuring outcomes the work undertaken by the regulators on risk is potentially undermined.

Learning points

Two possible ways regulators could monitor whether their approach is working are:

- assessing how they use risk information internally and the outcomes of this use. For example, monitoring if their supervisory activity is appropriately focused on the right practices, practitioners etc
- observing the changes that their regulatory interventions make in the market. For example, monitoring if the increased information available on how to reduce the risk of cyber-crime has an impact.

Regulatory standard: supervision

What is needed?

To **deliver** this standard, we consider the legal services regulators must:

- have a supervision policy that is carried out with reference to identified risks and is underpinned by an evidence base
- have a range of supervisory tools and capacity and willingness to use them
- have processes in place to enable learning to be shared and performance to be monitored.

In our Update report 2015, we set out our expectations that all regulators would focus on the following two **priority** areas (although we recognised that the extent to which they needed to would vary):

- the publication of proactive supervision policies that are informed by evidence and risk
- monitoring and reporting on the effectiveness, proportionality and value for money of supervision approaches.

What have we learnt?

47. All of the regulators have supervision processes in place. However like their risk assessment processes, these vary in sophistication. The current position of the regulators is set out below.

- Significant progress has been made by the BSB. It has implemented a proactive, risk-based approach to supervision. It has a range of tools available to it and the willingness and capacity to use them.
- CILEx Regulation has a risk and evidence-based approach to supervision of entities in place but due to the low number of entities regulated this has not yet been used. It has a range of tools available to it and the willingness and capacity to use them. It has not yet determined how it can use this system for the supervision of individuals but we are encouraged that this is being actively considered by CILEx Regulation. We have noted in its individual report that it must start thinking about how it can supervise individual practitioners in an evidence based and proactive manner.
- The CLC has continued to take an actively risk-based approach to supervision. It has a range of tools available to it and the willingness and capacity to use them.
- The CLSB considers that it has a proactive, proportionate, risk and evidence-based approach to supervision. It argues that the low risk presented by the regulated community means that its compliance approach is sufficient to supervise the profession. We disagree. We have

noted in its individual report that we consider it imperative that it reviews and improves its approach to supervision.

- The FO has implemented a proactive, risk-based approach to supervision. It has a range of tools available to it and the willingness and capacity to use them.
- The ICAEW does have a system of 'practice assurance' in place (which it uses for other areas of its work) but work is underway to develop a more risk-based approach to supervision for probate activities. Its current system does include a range of supervisory tools which the ICAEW has the willingness and capacity to use.
- IPReg is currently rolling out an assurance approach to supervision which has not yet been fully tested. IPReg will have a range of tools available to it to use depending on the risk posed.
- The SRA has continued to take an actively risk-based approach to supervision. It has a range of tools available to it and the willingness and capacity to use them.

48. We comment below on the variety of approaches in place and the benefits to both the regulated community and the regulator of having a supervisory system in place. We also comment on one common area of improvement: transparency in the monitoring of the approaches taken by the regulators to supervision.

Supervisory approaches in use

49. The approach taken to supervision varies across the regulators which is entirely appropriate. This is because supervision systems should be proportionate, aligned with the risks identified and evidence gathered by the regulators, and should take account of the resources of a regulator. Below are three examples of different approaches to supervision used by regulators. Whilst it is unlikely that they will be suitable for wholesale adoption by others, there may be aspects of the regimes which could be learnt from, adapted or adopted.

IPReg's assurance regime

IPReg has stated that engagement with firms may be triggered by either a thematic review or a particular event that will mean IPReg needs to check to assure itself of a firm's compliance. In practice, IPReg plans to take a three-step approach: thematic review, desk-based review, and if necessary visit-based. The desk-based approach will involve the collection of information, analysis of that information and where necessary, questioning of that evidence (via telephone calls for instance). IPReg only plans to visit firms where it considers it necessary to properly assess the risks or issues identified. The assurance policy has undergone some testing as part of IPReg's approach to transitioning firms to ABS status.

BSB supervision regime

In 2014 the **BSB**'s supervision team carried out an impact assessment of all 794 chambers and sole practitioners by issuing a survey to them all. The impact assessment was based on criteria such as the volume of new cases, the type of legal services delivered and whether or not pupillages were in place. The survey sought to measure the potential impact of a range of risks to the achievement of the regulatory objectives should those risks materialise. The BSB graded all chambers and sole practitioners as either high, medium or low impact. The BSB then issued supervision returns to the 170 highest impact chambers. The return included 44 questions about matters like their governance arrangements and their risk management. Of the 170, it only assessed 16 as having a high risk and these were subject to supervision visits and ongoing monitoring. Those which were rated low risk received relatively little supervisory attention. The BSB is now in the process of completing the same exercise for those chambers and sole practitioners assessed as high risk/medium impact. The supervision returns will not be issued on an annual basis. Once the high risk/medium impact exercise ends, the BSB will manage supervision on a day-to-day basis using the risk profiles it has developed for chambers and sole practitioners.

CLC's regime

The **CLC** assesses each practice by identifying the risks it presents against set outcomes and mitigating those risks through proportionate and targeted supervision. The CLC has access to a range of supervisory tools such as inspections, desk-based reviews, and reviews of accountants' reports and approval of aged balance applications.[5] This enables it to take targeted action depending on the risk posed. Its approach to supervision focuses on the protection of the interests of consumers and allows practitioners to be innovative in the way they deliver their products. This is in line with our view that supervision should be outcomes-focused, risk-based and proportionate.

50. As well as having systems in place which tackle discrete and specific risks, some of the regulators also have approaches which enable them to identify emerging themes and carry out thematic reviews. This enables the regulators to use limited resources in a proportionate, targeted, and risk-based manner.

Thematic approaches

The **SRA** has started to underpin its supervisory activity with an understanding of different market segments. It has established a dedicated thematic team to respond to potential risks that it identifies in the legal market. For example, it has undertaken a review of anti-money laundering activity and it has issued guidance about a number of 'high risk' areas such as management of client accounts.

[5] Aged balances are a sum outstanding to the credit of an individual ledger account, where there has been completion of a legal transaction or it has become abortive and there has been no movement on the account for a period of 12 months except for monies held in accordance with the terms of an undertaking. Aged balances cannot be withdrawn from the client account without the written authority of the CLC.

The **BSB** identified through a review of information it held that immigration advice and services were a high risk area of legal work and decided to carry out a thematic review. As part of its review it has held a round-table event with other organisations who shared a common interest and analysed the information it held. It is due to report on this work later in 2016.

IPReg intends to carry out thematic reviews. These will focus on areas of risk identified by IPReg such as holding clients' monies or complaints handling. These areas of risk could apply to only a small number of firms or the entire regulated community. IPReg will assess firms' compliance in relation to these matters. IPReg says its approach to this work will include individual correspondence and meetings, together with making 'FAQs' and 'lessons learnt' sections available on its website. Training seminars may also be made available to firms on relevant topics.

51. As well as having a supervision system in place, we set out our expectation in the Update report 2015 that the regulators would publish their approach to supervision. Transparency enables the public, consumers, the regulated community and others to understand, and have confidence in the regulators' approach to supervision. Whilst half of the regulators have done this, we have highlighted in the individual reports for the CLC, CLSB, FO and SRA the need for them to do so.

Benefits gained from supervision

52. Those that have recently developed risk and evidence-based approaches to supervision such as the FO and the BSB have told us that they have seen significant benefits from introducing such a system. This is encouraging. In particular, the BSB told us that: *'Operating a supervision function provided us with information that previously would not have been available and has introduced a new and effective means of engaging with the profession. The information that is being gathered is proving valuable to all sections of the BSB and will play an important part in determining our strategic and operational priorities as well as in ensuring that decision-making is informed, aligned and proportionate*.'

53. We have been told by the regulators, and some of their stakeholders, that the regulated communities have seen the benefits of supervision. The regulated communities have seen that the supervision processes (although potentially resource intensive for them) are worthwhile because they lead to improvements within their own practice/chamber. We were also told that it is evident that they lead to the regulator understanding the market and regulated community better too. We consider that sharing learning from supervisory processes with the regulated community is a key outcome of this work. Without this, the benefits of supervision are limited to those directly affected by a supervisory exercise.

Sharing learning

The **BSB** and the **FO** have both published reports on the findings of their supervisory activity. The reports include findings on areas of practice which can be improved, possible good practice and lessons learned from the supervisory process itself. The reports can be found on their websites and, have been, and will continue to be, discussed at regulated community events.

The **ICAEW** shares a wealth of information with its entire regulated community on the outcomes of its practice assurance work. For example, it has published 'Practice Assurance Essentials 2015' which contains a summary of best practice suggestions and essential actions for firms, using findings from over 2,000 practice assurance reviews (this covered reviews not related to probate activities). It also publishes guidance on good practice and the outcomes of thematic reviews. This information is available on its website, can be discussed with staff via its helpline and is also shared at events with the regulated community. It says that it plans to use the same approach when sharing information on the practice assurance of its regulated community of legal services providers.

The **SRA** identified that sharing tailored learning and offering targeted support to a particular group of its regulated community was necessary. It has developed a dedicated webpage for 'supervision for small firms' which includes useful resources and links to help sole practitioners and small firms comply with the rules which apply to them. The SRA has also established a small team of regulatory supervisors who are there to help small firms and sole practitioners with regulatory issues and compliance.

54. The benefits of regulatory interventions are easier to identify if a regulator has a monitoring system in place. The second priority area we asked the regulators to focus on in our Update report 2015 was on monitoring and reporting on the effectiveness, proportionality and value for money of supervision approaches. There is variation in performance demonstrated by the regulators in terms of this priority.

Learning points

The regulators should be transparent in their approach to monitoring the effectiveness of their approaches to supervision. It should be clear to consumers, the regulated community and others, whether the regulator considers its approach to be effective and proportionate. It should also be clear whether it is being managed in line with its plans in respect of time, budget and staff.

Regulatory standard: enforcement

What is needed?

To **deliver** this standard we consider the legal services regulators must:

- have a range of effective and proportionate enforcement tools
- ensure the operation of the enforcement function is timely, evidence-based, proportionate and fair
- publish policies and guidance that enables others to understand the regulator's criteria for taking or not taking actions
- have appeal processes that are independent from the body or persons who made the original decision
- have processes in place to ensure that learning is shared and performance is monitored.

In our Update report 2015 we set out our expectation that all regulators would focus on the following two **priority** areas (although we recognised that the extent to which they needed to would vary):

- improving the timeliness and transparency of enforcement processes (this includes end-to-end reporting, procedures in plain language and easily searchable records of determinations)
- ensuring that the process for notifying a regulator of potential misconduct of a regulated person is accessible and user friendly, and works effectively alongside the Legal Ombudsmen complaints scheme.

What have we learnt?

55. We have found that all of the regulators have fit for purpose enforcement processes, the majority of which have been tested and proved to be effective. We have also found that all of the regulators have met our other requirements for delivery against this standard, although there is still room for improvement particularly in relation to transparency.

56. We comment below on the two areas we were particularly concerned about in our Update report 2015: timeliness and transparency. We also comment on the importance of quality of decision-making, and as set down in that report, the progress made since our *Regulatory sanctions and appeals processes report – an assessment of the current arrangements (March 2014)*. [6]

[6]Legal Services Board (March 2014) Regulatory sanctions and appeals report – an assessment of the current arrangements http://www.legalservicesboard.org.uk/projects/thematic_review/pdf/20140306_LSB_Assessment_Of_Current_Arrangements_For_Sanctions_And_Appeals.pdf Hereafter referred to as 2014 report on regulatory sanctions and appeal

Timeliness

57. In our Update report 2015 we expressed our concerns about the timeliness of the SRA's and BSB's enforcement processes. We noted that they needed to improve this aspect of their performance. We have seen that the BSB has reduced the time taken to investigate cases and that the percentage of long-running cases has decreased. The SRA has also made improvements to the timeliness of its enforcement processes. Both regulators have used similar methods to help reduce the time taken for cases to progress. They have improved monitoring and reporting on the progress of individual matters, introduced regular reviews of individual matters through 1-2-1 meetings with line managers, and regular case file review meetings with senior members of staff. There is also regular scrutiny of the performance of the enforcement function by the Board and relevant committees.

58. Such progress is encouraging. We recognise that there are many factors that can affect the timeliness of cases which are outside the control of the regulator such as the complexity of the subject, the approach taken by the professional involved and whether there are any other ongoing legal proceedings related to the case. However, failure to progress cases in a timely manner can lead to risks to members of the public suffering harm from that professional (unless an interim order is put in place); have an adverse impact on the quality of the evidence that is available at the final hearing; cause unnecessary distress to all those involved; and damage confidence in the regulator. It is therefore important that all regulators keep the timeliness of their enforcement processes under review.

Transparency of process

59. In our 2014 report on regulatory sanctions and appeals, we found that all of the regulators' enforcement, disciplinary and appeals regulatory arrangements were in the public domain. However, we considered that there was scope for the regulators to be more transparent and consumer-friendly about explaining how their arrangements worked in practice. We commented similarly in our Update report 2015. We are encouraged by the commitment made and the steps taken by the regulators to increase their transparency and the accessibility of their documentation and processes.

Examples of this commitment in practice include:

CILEx Regulation, **IPReg**, **CLC** and **SRA** have dedicated webpages for consumers which include information on the enforcement process.

The **BSB** has worked with a charity specialising in public legal education to make the information on its website clear, accessible and understandable to the consumer. The aim of this project is that those wishing to make a complaint or facing a complaint can navigate the pages easily, locate the information that they need, and understand the processes that will be used by the BSB.

The **FO** has developed a dedicated webpage on the enforcement process where the stages of the process are explained in plain language. It has also published the guidance given to the nominated notary who is charged with investigating a complaint.

The **BSB**, **SRA** and **CILEx Regulation** report regularly and publicly at Board meetings on performance against the key performance indicators for the enforcement function and the reasons for any targets that have been missed.

CILEx Regulation also publishes information in the trade press on cases that have concluded, in order to educate the regulated community on the standards and conduct expected of them.

60. Transparency is more than just making documents available. It is equally as important that documentation is easy to locate and written using language which is easy for consumers to understand.

Examples of where a regulator is transparent but not easily accessible:

The **CLC** makes a wealth of information available on its website such as its rules, disciplinary determinations, hearing dates and a document containing frequently asked questions. However, this information is difficult to locate and in some cases is not published in line with its own publication policy.

The **CLSB** has published a policy on *'Expectations of a complainant and Internal Complaint Handling'.* The policy aims to set out what is required of the complainant in terms of the enforcement process and then defines behaviours that are not acceptable to the CLSB. The contents of the policy is useful information for consumers to be aware of and understand. However, we consider that it would be more consumer- friendly to separate these issues into two policy documents. It is our view that in its current form, there is a risk that this document could discourage complaints.

61. It is important that when drafting documentation or making documentation available; a regulator considers the intended audience, and where possible and appropriate, tests its proposals with the intended audience. This should assure the regulator that its efforts and resources are being effectively used and give it confidence that it is meeting its obligation under the Act to be transparent.

Transparency of decision-making

62. It is important for confidence in regulation that the public, consumers and regulated communities are aware of how a regulator decides whether, and what, sanction might be imposed as well as knowing the sanction which has been imposed.

63. There is some variation in whether the regulators have decision-making guidance in place. The BSB, CILEx Regulation, ICAEW and SRA have decision-making guidance in place which is publicly available. The others do

not but we note that they only deal with a low level of cases. That said, the CLC (which manages a small caseload) is in the process of developing such guidance following a recent case where its Council was concerned about the leniency of the decision. Arguably the number of cases each regulator has is not a relevant consideration. Decision-making guidance is commonplace in regulation generally. Such guidance assists decision-makers to make decisions which are transparent, proportionate and consistent. It also enables the complainant and regulated community to understand how a decision is made. We would encourage those who do not have such guidance in place to consider developing it.

64. In the Legal Services Consumer Panel's (LSCP) report *Opening up data in legal services* (2016) it recommended that there should be a presumption in favour of publishing enforcement data by all regulators at the end of an investigation that leads to a sanction.[7] This echoes the view we expressed in our 2014 regulatory sanctions and appeals report. We have found that all bar one regulator (the CLSB) takes the approach of routinely publishing those sanctions, with the exception of lesser administrative penalties, unless it is not in the public interest to do so. This is encouraging. We continue to consider that publication of all regulatory sanctions, including those lesser administrative sanctions, is best regulatory practice and there are other regulators both within and outside of the legal sector who do this as a matter of routine. We will continue to encourage the regulators to take such an approach.

Quality of decision-making

65. Enforcement cases is an area of the regulators' work that generates a significant amount of public interest and media attention. Confidence in the regulator can be damaged by repeated public criticisms about the quality of its decision-making and case preparation. Therefore whilst this section references only the SRA, there is potential for the other regulators to learn from its experience. The SRA has recently faced such public criticism from the Solicitors Disciplinary Tribunal (SDT) (its adjudicating body) and the High Court in relation to its case preparation, the drafting of its allegations and the quality of the evidence presented. We are aware that the SRA is reviewing its approach to enforcement from the structure of its teams to the decision-making guidance that it uses and has established a quality assurance team to review and audit closed cases. We strongly encourage the SRA to take account of the criticisms when carrying out its review of its enforcement work and the other regulators to consider what they can learn from the SRA's experiences.

[7] Legal Services Consumer Panel's report on Opening up data in legal services (February 2016) http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/OpenDatainLegalServicesFinal.pdf

Regulatory sanctions and appeals processes

66. In our 2014 report on regulatory sanctions and appeals, we highlighted four areas of best regulatory practice which we considered the regulators should adopt.

    - Transparency of regulatory arrangements, sanctions and decision-making criteria (discussed above at paragraphs 59-64).
    - Use of the civil standard of proof at all stages of the enforcement process.
    - Consistency of sanctions, in particular in relation to the financial penalties imposed.
    - Consistent appeal arrangements in place – the appeals process should be independent from the body or persons who made the original decision. Ideally the First-tier Tribunal (FTT) should be used as the single body for all appeals against regulatory decisions.

67. We comment below on whether there have been any changes in the regulator's practices following this report.

Standard of proof

68. In our 2014 report on regulatory sanctions and appeals, we stated that the civil standard of proof was the most appropriate standard to use and that its use should be introduced across all regulators, tribunals and appellate bodies. This is a view that has also been expressed in two recent reports: the Insurance Fraud Taskforce and the Independent Review of Claims Management Regulation. We noted that this standard was not used by all of the regulators and that for some regulators it was not used at each stage of either the enforcement or appeals process. We said that such inconsistency worked against public interest. We note that this inconsistent position remains the case and has to some extent become more complex because the FO has introduced a sliding scale whereby the standard of proof to be applied depends on the severity of the allegation. For example, the criminal standard of proof will be applied by the FO if the facts of the case relate to fraud, dishonesty or criminal activities. That said, we are encouraged by the SRA's recent public statement (in January 2016) that it agrees that a single civil standard of proof should be used across its enforcement and appeals processes (including those managed by the SDT).[8] We continue to encourage the SRA, BSB and FO to use the civil standard of proof at all stages of its enforcement and appeals processes.

Consistency of sanction

69. In our 2014 report on regulatory sanctions and appeals, we found that there was variation in the financial penalties that could be imposed by regulators when compared against each other and sometimes within their own regimes. We said it was important that a regulator's enforcement powers should

[8] The Solicitors' Disciplinary Tribunal considers itself bound by case law, and in the absence of a court ruling on this issue considers primary legislation would be required for it to make a change to the standard of proof used.

discourage any financial gain or benefit from non-compliance. They should also minimise the risk from firms misusing the system so that they deliberately do not comply because penalties do not have deterrent weight.

70. CILEx Regulation and IPReg now have identical and significant fining powers whether a case involves an ABS or non-ABS firm. It is expected that the BSB will also be in this position when it becomes a licensing authority. However, there is still considerable variation in fining powers amongst the regulators. The SRA has publicly stated that reviewing and making consistent its fining powers for non-ABS and ABS firms would make the system more efficient and effective. We agree with this position. We continue to encourage the regulators to ensure that they have adequate fining powers and that they use them in a way which provides appropriate incentives for compliance.

Appeal arrangements

71. We noted in our 2014 report on regulatory sanctions and appeals that generally enforcement decisions can be challenged and appealed. However, we considered that the wide variation and complexity of arrangements made it more difficult to ascertain if consistent decisions were being made. We suggested that as a minimum the FTT should be used as the single body for all appeals against regulatory decisions. Since that time, the CLC and IPReg have moved to using the FTT as their appellate body for all cases and the ICAEW has indicated that if designated for a wider range of reserved legal activities, its intention is that all appeals in respect of cases linked to the provision of reserved legal services will be directed to the FTT. The BSB will also use the FTT for regulatory (not disciplinary) decisions. This is encouraging. We will continue to press the regulators to consider moving their appeal mechanisms to the FTT and will work with them on this matter.

Learning points

We continue to consider that:

- the regulators should be transparent in terms of their regulatory arrangements, sanctions and decision-making criteria. Transparency is more than just making documentation available. It should be easy to locate and written in language which is easy to understand. Where possible documentation aimed at consumers should be tested with them to provide assurance that they are user-friendly
- the civil standard of proof should be used
- there should be consistent and adequate fining powers for each of the regulators that can be applied to all those they regulate
- the FTT should be used as the single body for all appeals against regulatory decisions.

Regulatory standard: capability and capacity

What is needed?

To **deliver** this standard we consider the legal services regulators must:

- have clear and consistent leadership that ensures the whole organisation has a strong consumer focus
- have regulatory budgets and staffing set at appropriate levels for the risks associated with the market
- have a culture of transparency and improvement
- have management and governance processes which are capable of scrutinising the performance of the regulator.

In our Update report 2015 we set out our expectation that all regulators would focus on the following two **priority** areas (although we recognised that the extent to which they needed to would vary):

- ensuring that management and governance processes are capable of scrutinising the performance of the regulator and holding it to account
- improving the transparency of all of the regulators' activities, specifically decision-making and how boards hold executive staff to account (this would include board minutes, papers, annual reports and planning documents).

What have we learnt?

72. We have learnt that all of the regulators (except one, the CLSB) have improved how they deliver this standard. Whilst the degree of improvement varies across the regulators, we are encouraged by the general overall progress made.

73. We have highlighted in the CLSB's report our concerns about several aspects of its capability and capacity: the appropriateness of one its corporate objectives which is to "protect and promote the status of costs lawyers"; the insubstantial progress which has been made in developing a consumer focus; our concern as to whether it has a strong enough culture of transparency and improvement, and our concern that its regulatory staffing and budget may not be set at an appropriate level given the areas where progress is needed. We have set out in its individual report where we consider action to remedy these concerns is necessary.

74. We comment below on the performance of the regulators against each of the key requirements for delivery of this standard: having a culture of consumer focus; staffing and budget; having a culture of improvement and governance and scrutiny.

Culture of consumer focus

75. We have found that the majority of the regulators' leaders have placed a greater emphasis on developing a culture of consumer focus. In turn, we have seen those regulators undertake, or plan to undertake, more work to understand consumers' needs and how they use legal services. We have also seen those regulators take greater account of consumers in their activities and decisions. We welcome this different approach. We set out below some examples of the regulators operationalising their consumer focus. Regulation is undertaken in the consumer and wider public interests, it is therefore vital that the needs of consumers are understood.

Embedding a consumer focus

The **BSB** has undertaken a vast amount of activities to introduce a consumer focus to its work. This includes: using the LSCP to train its Board members and staff on how to take account of consumer interests in their work, developing tools to help staff gather and take account of evidence on consumers, and the appointment of Board, and staff level, consumer champions.

The **FO** previously had a stance of considering that gathering information on consumers was disproportionate and of limited value given that consumers generally use notarial services infrequently and on a 'one-off' basis. It has now committed to undertake proportionate and cost-effective activities to understand consumers. This includes: improving the data it collects from the regulated community, participating in the joint regulators' work on understanding consumer needs and obtaining feedback directly from consumers using an electronic survey which will be distributed by notaries.

The **SRA** has considered each area of its work to identify how it can improve its consumer focus, from reviewing all of its corporate communications to ensure that the tone of voice it uses is appropriate, to responding to those consumers who report misconduct.

Staffing and budgets

76. We consider that regulatory budgets and staffing must be set at a proportionate level for risks associated with the market, rather than simply the level of practising fees that regulators believe the regulated community are willing to pay. We have not generally identified any concerns with the regulators' budgets and staffing. We have seen several of the regulators carry out reviews of their capability and capacity. They have then made changes to the structure of the organisation and the recruitment, training and management of staff. It is too soon to tell if these will enhance their ability to meet the regulatory objectives but in principle, the changes appear sensible. Given the current emphasis on cost and efficiency savings it is encouraging that in some cases we have seen the regulators do more without the need to increase the practising certificate fee. For example, we have seen the FO introduce a proactive supervision regime whilst keeping its fee constant. We

will encourage the regulators to continue to consider how they can meet their legal obligations and duties without the need to raise their fees.

Culture of improvement

77. We have generally seen the regulators demonstrate that they have a culture of improvement. This is welcomed as regulation is not static: new approaches to regulation develop, new risks emerge, how consumers use services change and regulatory responsibilities can grow. We have set out in earlier sections of the report examples of improvements that the regulators have made. We therefore focus in the box below on examples of where the regulators have learnt from their own processes. We consider that it is key that regulators take the opportunity to learn from their own work as it provides a rich source of evidence of where improvements can be made.

Learning from their work

The **BSB** has used learning from how it has approached supervision, and information it had already collected on providers, to develop a more targeted and risk-based approach to the supervision of pre-qualification education and training. In the past, every provider has been visited annually, or the task divided equally over two years, with no differentiation in the approach taken to any visit. Now it has an adequate base of comparative evidence it plans to direct its focus on those which are considered to be higher risk.

The **BSB, CILEx Regulation** and the **SRA** have mechanisms in place to learn from their enforcement casework in terms of quality, timeliness and customer service. Tools they use include: an internal quality assurance team, an independent observer, customer feedback surveys and 'deep dive' reviews by an oversight committee. The outcomes are then used to improve performance.

The **ICAEW** has established processes in place (which it has begun to use for legal services regulation) to learn from its regulated community's experience of its practice assurance regime. It actively seeks to engage with the community and learn how its practice assurance regime can improve. For example, it issues a firm feedback questionnaire at the end of each practice assurance visit to test whether its approach has been effective, proportionate and has added value.

During 2015 **IPReg** worked to transition registered bodies with external ownership to licensed ABS status. This work provided it with valuable information which it has used to develop its assurance protocol.

Governance and scrutiny

78. We have generally found that the regulators have adequate governance arrangements in place which allow for scrutiny of performance. In our Update report 2015 we noted our concern with one particular regulator's governance arrangements – the BSB. We said that it should simplify and better focus its

arrangements. We are pleased that the BSB has begun to address our concern and has identified changes it will make such as reducing the number of policy committees it has, the executive assuming greater responsibility for operational decisions and policy development, and removing any policy development responsibilities from decision-making committees. We consider that these changes should assist the BSB in making decisions more effectively and efficiently without the possibility of the regulated community having a disproportionate voice.

79. On that last point, we note that the Government is planning to consult on making the legal services regulators independent from their representative arms. We welcome this plan. Amongst other things we consider that the lack of independence between regulators and representative bodies:

    - is fostering complex governance arrangements to manage relationships between regulatory and representative functions which do not achieve full independence of regulation and which distract senior management attention on both sides from regulatory and representative matters respectively

    - risks undermining the credibility of regulation in that the public is likely to perceive that the profession is policing itself (and therefore inferentially to be 'protecting their own')

    - creates scope for professional bodies to delay reforms which would benefit competition and consumers, generating regulatory uncertainty and deterring investment

    - hampers the transparency of the cost of regulation as a result of some of the regulators sharing resources and costs with their representative arms and income from the practising certificate fees being used for non-regulatory permitted purposes

    - risks confusing other parts of government as to which body is responsible for wider regulatory functions.

80. We look forward to sharing our views with the Government on this matter.

81. The final point to make on governance is that there is a greater demand for those working in the public interest to be accountable for their work, decisions and costs. It is therefore important that the regulators are transparent. Whilst the regulators have become increasingly transparent about their activities, performance and decision-making, there is still scope for improvement.[9]

[9] We will be reporting separately on our views about how the regulators should be transparent in regards to their costs so we make no comment on this matter here.

Learning Points

We set out below our expectation about what should generally be published by regulators. We suggest that the regulators consider publishing the following documentation, where they do not already do so:

- Board/Council papers – these should provide sufficient detail of the subject matter and the reason for the matter being presented to the Board/Council.
- Board/Council minutes – these should provide sufficient detail to understand what was discussed, why a decision was taken and the decision.
- Performance data – this should set out how the regulator is performing across its key workstreams, including where improvement is needed and the reasons for this.
- Business plans – this should set out what activities are planned and why these have been prioritised.

Acknowledging that the regulators are vastly different in scale, in terms of their regulated communities and the consumers of the services concerned, and the risks they manage, we do not propose any particular approach to presenting and publishing such data.

4. Conclusions

82. Overall we consider that substantive progress has been made by the regulators since our first regulatory standards exercise in 2012/13. Whilst there are variations in how the regulators carry out their functions, we consider that there is now a more outcomes-focused approach to regulation, that the regulators have risk assessment and risk-based approaches to supervision in place (although they vary in degrees of sophistication) and there has been positive change in their performance against the capability and capacity standard. The regulators have also maintained, and in some cases, improved their performance against the enforcement standard.

83. Another area of progress is that, with the exception of CLSB, we consider the regulators are better able to judge how they are performing against the standards. The grades they have awarded themselves are more aligned with our view than they have been in the past. We think this is an indication that the regulators have an improved understanding of their strengths and weaknesses.

84. Whilst progress has been made, there is still scope for improvement. We have highlighted in this report common areas of difficulty across the regulators and identified case studies which the regulators may be able to use and adapt for their own work. We have also addressed individual regulators' areas for improvement in their respective reports. We will be following up on these areas with the regulators by working with them to develop action plans. We intend to publish the action plans in mid-2016.

85. As part of our own improvement we will be considering whether our current approach to regulatory standards provides us with the right level of assurance about how the regulators perform. In carrying this out we will seek feedback from the regulators and to learn from other sectors.

Annex A - The approved regulators/legal services regulators

Profession	Approved regulator	Regulatory body	Reserved Activities	Licensing Authority
Barristers	General Council of the Bar	Bar Standards Board	The exercise of a right of audience The conduct of litigation Reserved instrument activities Probate activities The administration of oaths	NO[10]
Legal Executives	Chartered Institute of Legal Executives	CILEX Regulation	The exercise of a right of audience The administration of oaths The conduct of litigation Probate activities Reserved instrument activities	NO
Costs Lawyers	Association of Costs Lawyers	Cost Lawyers Standards Board	The exercise of a right of audience The conduct of litigation The administration of oaths	NO
Licensed Conveyancers	Council for Licensed Conveyancers		Reserved instrument activities Probate activities The administration of oaths	YES
Chartered Accountants	Institute of Chartered Accountants in England and Wales (ICAEW)**		Probate activities	YES
Patent Attorneys	Chartered Institute of Patent Attorneys	Intellectual Property Regulation Board	The exercise of a right of audience The conduct of litigation Reserved instrument activities The administration of oaths	YES
Trade Mark Attorneys	Institute of Trademark Attorneys			
Notaries	Master of Faculties		Reserved instrument activities Probate activities The administration of oaths Notarial activities	NO
Solicitors	Law Society	Solicitors Regulation Authority	The exercise of a right of audience The conduct of litigation Reserved instrument activities Probate activities The administration of oaths	YES

[10] The BSB's application to become a licensing authority has been granted but the designation order has yet to be laid.

Annex B - Glossary of terms

Term	Definition
ABS	Alternative Business Structures. Section 72 of the Legal Services Act 2007 (the Act) sets out that an ABS is a firm where a non-lawyer is a manager of the firm, or has an ownership-type interest in the firm. A firm may also be an ABS where another body is a manager of the firm, or has an ownership-type interest in the firm, and at least 10 per cent of that body is controlled by non-lawyers. A non-lawyer is a person who is not authorised under the Legal Services Act 2007 to carry out reserved legal activities.
Annual regulatory return	A regulator may request specific information from their regulated community on an annual basis to inform their regulatory work.
AR or approved regulator	A body which is designated as an approved regulator by Parts 1 or 2 of schedule 4 to the Act. Some of the regulators are also licensing authorities (see separate definition) which means that they can license ABS that provide reserved legal activities.
Board/Council	A Board or Council of a legal services regulator is the governing body accountable and responsible for the performance of the regulator.
BSB	Bar Standards Board. The independent regulatory arm of the General Council of the Bar (Bar Council), which is the approved regulator according to the Act. The BSB regulates barristers called to the Bar in England and Wales and non-ABS entities. On 29 March 2016, the LSB granted the BSB's licensing authority application, subject to parliamentary approval of the application's accompanying statutory orders.
BTAS	Bar Tribunals and Adjudication Service. This is the body responsible for administering the BSB's disciplinary tribunals including interim suspension order hearings.
CILEx Regulation	The independent regulatory arm of the Chartered Institute of Legal Executives (CILEx). It regulates chartered legal executives, other CILEx members and non-members with

	practice rights in the legal sector (including associate prosecutors). Formerly known as ILEX Professional Standards Board.
Civil standard of proof	This standard is based on the balance of probability. In using this standard the decision-maker must consider the evidence presented and be satisfied that the occurrence of the event was, on a balance of probabilities, more likely than not.
CLC	Council for Licensed Conveyancers. The approved regulator under the Act for licensed conveyancers, licensed conveyancing practices and probate practitioners working throughout England and Wales. It has no representative function. It may also regulate probate practitioners.
CLSB	Costs Lawyer Standards Board. The independent regulatory body of costs lawyers who hold a practising certificate to practise in England and Wales. The Association of Costs Lawyers is the approved regulator under the Act.
Consultation	The process of collecting feedback and opinion on a policy proposal.
Consumer - i.e. clients and those potential consumers	Section 207(1)(a) of the Act defines consumers as persons who use, have used or are or may be contemplating using any services which consist of or include a legal activity. The person providing those services may or may not be authorised to conduct a reserved legal activity.
CPD	Continuing Professional Development. The process of tracking and documenting the skills, knowledge and experience that a person may gain both formally and informally as they work, beyond any initial training.
Criminal standard of proof	Beyond reasonable doubt is the criminal standard of proof. In using this standard the decision-maker must consider the evidence presented and be satisfied that the occurrence of the event occurred beyond reasonable doubt.
Entities	A firm or practice authorised by a regulator to conduct reserved legal activities. This may also include sole practitioners.
First principles approach	A first principles approach in legal services regulation is an approach that first considers whether there is a risk to the regulatory objectives that demands regulatory intervention. If so, costs and benefits of possible options should be

	assessed and the least restrictive way of resolving the issue adopted.
FTT	First-tier Tribunal. It is a body which hears appeals against decisions of some of the legal services regulators and a number of other bodies.
ICAEW	Institute of Chartered Accountants in England and Wales. The regulator and professional membership body for the accountancy profession in England and Wales. There is no separate regulatory body and all decisions relating to legal activities are delegated to the independently chaired Probate Committee.
IPReg	Intellectual Property Regulation Board. The independent regulatory body for individual Trade Mark and Patent Attorneys and entities (ABS and non-ABS). It is a joint Regulation Board set up by the Chartered Institute of Patent Attorneys (CIPA) and the Institute of Trade Mark Attorneys (ITMA), which are approved regulators under the Act.
LA or **Licensing Authority**	An AR which is designated as a licensing authority to license firms as ABS.
LSB	The Legal Services Board is the independent body responsible in accordance with the terms of the Act for overseeing the regulation of lawyers in England and Wales.
Legal services regulator (or the regulator)	The independent regulatory arms of each approved regulator who are responsible for the day-to-day regulation of the regulated community specific to their area of the legal services sector.
MoF	The Master of the Faculties is the regulator of the profession of notaries in England and Wales, and the Faculty Office (FO) (led by the Registrar) assists the Master in his functions.
Regulated community	Collective term for those regulated by the approved regulators. Each approved regulator is responsible for regulating a specific group of individuals and/or entities who are authorised under the Act to conduct one or more reserved legal activities.

Regulatory Objectives	The LSB and the approved regulators have a duty to promote eight regulatory objectives set out in section 1 of the Act: • protecting and promoting the public interest • supporting the constitutional principle of the rule of law • improving access to justice • protecting and promoting the interests of consumers • promoting competition in the provision of services in the legal sector • encouraging an independent, strong, diverse and effective legal profession • increasing public understanding of citizens legal rights and duties • promoting and maintaining adherence to the professional principles of independence and integrity; proper standards of work; observing the best interests of the client; complying with their duty to the court to act with independence in the interests of justice; and maintaining client confidentiality.
2012/13 Regulatory Standards Report	In December 2011, the LSB asked the legal services regulators to assess themselves against the regulatory standards and to assess their capacity and capability. The LSB published reports into these self-assessments during 2012 and 2013.
Reserved legal activities	Section 12 of the Act sets out the six specific legal services activities that only those who are authorised (or those who are exempt) can carry on. These are called “reserved legal activities” and their scope is set out in Schedule 2 to the Act. Lawyers carrying on these activities are regulated by the approved regulators in the legal services sector, working under the oversight of the LSB. The six reserved legal activities are: the exercise of a right of audience, the conduct of litigation, reserved instrument activities, probate activities, notarial activities and the administration of oaths.
SDT	Solicitors Disciplinary Tribunal is constituted as a Statutory Tribunal under Section 46 of The Solicitors Act 1974. The body which adjudicates upon alleged breaches of the rules and regulations applicable to solicitors and their firms. It also

	adjudicates upon the alleged misconduct of registered foreign lawyers and persons employed by solicitors.
SRA	Solicitors Regulation Authority is the independent regulatory arm of The Law Society, which is an approved regulator under the Act. The SRA regulates solicitors and entities (ABS and non-ABS) in England and Wales. It also regulates non-lawyers, who can either be a manger or employee of a law firm they regulate and other types of lawyers such as Registered Foreign Lawyers (RFLs) and Registered European Lawyers (RELs).
Update Report 2015	In April 2014, the legal services regulators were required to report to the LSB on the progress made since the 2012/13 Regulatory Standards Reports were completed, and the LSB received these updated self-assessments during October and November 2014. In February 2015, an update report was published by the LSB.

Annex C – Stakeholder feedback

86. As part of this exercise, we wrote to a wide range of organisations who we considered had an interest in how the regulators performed against the regulatory standards. We invited them to share their views with us on the regulators' performance in relation to the standards. We explained that we would use the information provided to challenge the regulators' evidence and ensure that we had a more rounded view of the regulators' performance. Below is a list of the stakeholders whose feedback we took into account:

- Advice Services Alliance
- Arden Partners
- Association of Costs Lawyers
- Association of Costs Lawyers Training
- Association of Law Teachers
- Bar Council
- Birmingham Law Society
- Bristol Law Society
- Cambridgeshire & District Law Society
- CILEX
- Chartered Institute of Patent Attorneys
- Council of Mortgage Lenders
- Dorset and Somerset Law Society
- Institute of Legal Finance and Management
- IP Federation
- Institute of Trade Mark Attorneys
- Judiciary
- Kingston Smith
- Land Registry
- Leeds Law Society
- Legal Aid Agency
- Legal Ombudsman
- Legal Practice Management Association
- Legal Services Consumer Panel
- Notaries Society
- Office of the Immigration Services Commissioner
- Patent Examination Board
- Society of Legal Scholars
- Solicitors Disciplinary Tribunal
- The Law Society
- The Society of Scrivener Notaries
- Three individual members of the ICAEW legal services regulated community