

Regulatory sanctions and appeals processes

An assessment of the current arrangements

March 2014

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 ABS market

Government departments

Contents

1.	Executive summary	4
2.	Introduction.....	6
3.	Best practice in sanctions and appeals	8
4.	Current arrangements	15
5.	Comparison of regulators' arrangements	24
6.	Assessment.....	28
7.	Next steps	33
8.	Glossary of terms	34
	Annex A - About the Legal Services Board	36

1. Executive summary

- 1.1. This document explores in more detail the issues concerning sanctions and appeals that we set out in our blueprint for reforming legal services regulation in September 2013.¹
- 1.2. The purpose of this document is to set out the current regulatory framework for the administration of sanctions and appeals for those regulated by approved regulators. It analyses the risks that the current framework creates for consumers as well as regulated individuals and entities. We have looked at the sanctioning and appeal approaches of regulators of other regulated sectors. However, we have not conducted a detailed analysis of the performance (such as the time taken to consider cases) of each legal regulator's sanctions and appeal framework. Nor have we examined the substance of individual cases. This document identifies a number of suggestions for improvement. Some of these suggestions are issues that the LSB can take forward and we explain how we will do so. For the issues that are outside our powers, we hope that this document will influence those who have the ability to bring about simplification of the current system.
- 1.3. This assessment paper identifies four features of best practice in regulatory sanctions and appeals regimes. These are:
 - Transparency
 - The consistent use of the civil standard of proof
 - Consistency of powers and sanctions
 - Fair and effective appeal arrangements.
- 1.4. The current arrangements adopted by the legal regulators are complex and in a number of ways do not meet best practice. Much of this complexity is driven by the underlying statutes for the legal regulators. Including the Legal Services Act 2007 (the Act), ten pieces of primary legislation² govern the sanctions and appeals arrangements of the legal regulators.
- 1.5. The regulators differ in their levels of transparency and the clarity of the information they make available about their enforcement approaches. There is also a tendency not to disclose lesser administrative penalties. There are differences in the standard of proof used across the sanctions and appeals frameworks (and even within the sanctions and appeals framework for solicitors). There are 14 different appeal bodies depending on the regulator and the sanction imposed (7 different bodies for the consideration of appeals of the most serious penalties) and a number of regulators do not operate a wholly independent appeal body.

¹ LSB (September 2013), *Blueprint for reforming legal services regulation*, http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/A_blueprint_for_reforming_legal_services_regulation_final_09092013.pdf

² Primary legislation includes: The Solicitors Act 1974, the Legal Services Act 2007, the Senior Courts Act 1981, the Crime and Courts Act 2013, the Administration of Justice Act 1985, the Copyright, Designs and Patent Act 1988, the Trade Marks Act 1994, the Public Notaries Act 1843, Court and Legal Services Act 1990 and the Ecclesiastical Licences Act 1533

- 1.6. The regulators also have large differences in the sanctions available to them, particularly in relation to financial penalties, and whether those sanctions can be imposed by the regulators' executive or by a disciplinary tribunal or panel. However, we were unable to determine whether there was any inconsistency in the sanctions imposed by the different regulators because this would have involved extensive review of individual cases.
- 1.7. Our blueprint identified that the current system is inconsistent and that there is a need to rationalise powers, particularly for enforcement and appeals. Because each of the seven regulators has different sanctioning powers and appeal routes, this is an issue that is likely to result in both consumer detriment and higher costs for firms. We also identified that structural simplification was likely to lead to economies of scale and greater consistency of decisions through rationalisation of the current sanctions and appeals arrangements. The use of the First Tier Tribunal as the single body for all appeals against regulatory decisions and a consistent approach that uses the civil standard of proof for all enforcement decisions would reduce cost, improve consistency, better protect the public and reduce the risks of regulatory arbitrage. This document sets out why we consider those issues to be important. The main issues we consider require further work are:
- improved clarity and transparency of sanctions and appeal arrangements and of the decisions taken
 - the Solicitors Disciplinary Tribunal (SDT) and Bar Standards Board (BSB) / Bar Tribunals and Adjudication Service (BTAS) to change from criminal to civil standard of proof for all cases
 - all appeals from regulatory decisions (whether taken by regulators or tribunals) to be heard by the First Tier Tribunal – to ensure consistency of sanctions in an increasingly diverse, multi-disciplinary market
 - financial penalty powers for non-ABS firms to be increased to the level of those for ABS
- 1.8. However, because the Act did not give regulators the powers they need to introduce changes to all aspects of their sanctions and appeals frameworks, in many cases, one or more statutory instruments are needed to bring about the required changes (in some cases primary legislation may be the only route to achieve change). This means that many of this document's findings and recommendations can only be resolved by Government action or judicial decisions that set precedent.
- 1.9. But some of the recommendations can be acted on and the next steps for the LSB will be to use the regulatory standards programme to ensure that the regulators are delivering the required level of transparency of sanctions and appeals arrangements. The LSB will continue to advocate that the civil standard of proof should be used throughout legal services regulation and that the First Tier Tribunal should be the body that hears all appeals against regulatory decisions.

2. Introduction

Why does this issue matter?

- 2.1. It is essential that consumers are protected from lawyers and others working in or owning law firms whose actions or conduct mean that they pose a risk to those consumers or to the wider regulatory objectives. In addition to taking action against individuals, regulators must also be able to take effective action against entities that fail to ensure appropriate levels of compliance. The mechanisms for doing this need to be effective and consistent across the legal market(s) so that one “brand” of law is not seen as being weaker than others (for example because a regulator is slower to deal with investigations or has less effective powers).
- 2.2. Professions, since their very inception, have had mechanisms to ostracise and punish those that transgress professional norms. Over time, these professional norms have been codified into detailed codes of conduct, principles and rules that professionals must adhere to. Although each individual regulator’s system may have some elements that are consistent with the requirements of the Legal Services Act 2007 (the Act), they tend to have been built up over many decades and are often based on historical practices of individual regulators rather than the requirements of the Act, regulatory objectives and the better regulation principles.
- 2.3. This has resulted in a jumble of different, title-based powers, processes, sanctions and bodies that appears inappropriate in a liberalising market, a key feature of which is the ability for different types of lawyer, and for lawyers and non-lawyers, to run law businesses together. Although the paramount requirement of any sanctions framework should be consumer protection, some features of the current systems may serve to protect lawyers rather than consumers. An example of this is the use by some bodies of the criminal standard of proof to decide whether a sanction should be imposed.
- 2.4. The legal service market has now been liberalised – non-lawyer management and the ownership of firms that provide legal services is permitted and some businesses are diversifying to offer consumers non-legal services as well. In addition, we have recommended that the ICAEW is designated as an approved regulator and a licensing authority. If the Lord Chancellor agrees with our recommendation, the ICAEW would be the first non-legal regulator to enter the regulatory framework. However, as the LSB’s submission to the recent call for evidence by the Ministry of Justice³ shows, the regulatory framework remains complex and fragmented and the variety of sanctions and appeals processes is one manifestation of that complexity.
- 2.5. Our four primary reasons for producing this document are to:

³ LSB (September 2013), *Blueprint for reforming legal services regulation*, http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/A_blueprint_for_reforming_legal_services_regulation_final_09092013.pdf

- assess the risk to consumers of inconsistent decisions arising from diverse arrangements
 - ascertain the risk of arbitrage between different regulators and between ABS/non-ABS who seek to be regulated by approved regulators or licensing authorities with apparently less robust enforcement processes
 - identify best practice in the area of regulatory sanctions and appeals and assess whether they are being met by existing processes
 - establish to what extent the approved regulators and licensing authorities have the appropriate powers to deliver compliance and enforcement through their sanctions and appeals frameworks.
- 2.6. The LSB has undertaken a high level evaluation of current regulatory systems to:
- understand the extent to which the better regulation principles, the Macrory principles and the former Administrative Justice and Tribunals Council's (AJTC) criteria for administrative justice are being met in a consistent way across all approved regulators and licensing authorities
 - ascertain whether approved regulators and licensing authorities have consistent powers of sanctions and appeals to deliver effective compliance and enforcement, particularly consideration of whether decisions should be made using either the standard of proof of the balance of probabilities (civil) or of beyond reasonable doubt (criminal)
 - assess whether approved regulators' and licensing authorities' powers to impose a range of penalties is coherent across the regulatory framework.
- 2.7. The LSB has not conducted detailed analysis of sanctioning decisions or appeals taken by the legal regulators. It has also not undertaken a detailed performance analysis of the current arrangements. Nor have we examined the substance of individual cases. The performance of different regulators has been covered in the LSB's reports into the approved regulators' and licensing authorities' regulatory standards self-assessments.⁴

⁴ The regulatory standards reports can be found here:
http://www.legalservicesboard.org.uk/Projects/developing_regulatory_standards/index.htm

3. Best practice in sanctions and appeals

- 3.1. This section considers what features would represent best practice in the sanctions and appeals processes for legal services regulators. We did this to be able to assess the effectiveness of the present arrangements and understand the kinds of risks that might be inherent in them. The main documents we reviewed to help identify best practice are:
- the better regulation principles⁵
 - the Macrory principles and characteristics⁶
 - the Administrative Justice and Tribunals Council (AJTC) Principles for Administrative Justice⁷
 - the Regulators' Code (July 2013)⁸
 - the OECD Best Practice Principles for Improving Regulatory Enforcement and Inspection.⁹
- 3.2. From these reports we identified what we consider to be four overarching best practice features against which to gauge current arrangements for legal services:
- transparency
 - the consistent use of the civil standard of proof
 - consistency of powers and sanctions
 - fair and effective appeal arrangements.

Feature 1: Transparency

- 3.3. Transparency is one of the better regulation principles and approved regulators are required (by section 28 of the Act) to have regard to the principle that their regulatory activities are transparent. The Macrory report defined six penalties principles when designing sanction frameworks for regulatory compliance and seven characteristics. The first characteristic states that regulators should publish an enforcement policy; the third is to justify their choice of enforcement actions year on year to stakeholders, ministers and Parliament; the fifth is to enforce in a transparent manner; and the sixth is to be transparent in the way in which they apply and determine

⁵ The principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed.

⁶ Macrory (November 2006), Regulatory Justice: Making Sanctions Effective, <http://www.berr.gov.uk/files/file44593.pdf>

⁷ Administrative Justice and Tribunals Council (November 2010), *Principles for Administrative Justice*, http://ajtc.justice.gov.uk/docs/principles_web.pdf

⁸ Better Regulation Deliver Office (July 2013), *Regulators Code*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/262915/13-1016-regulators-code.pdf

⁹ OECD (2013), *Public consultation on best practice principles for improving regulatory enforcement and inspections*, <http://www.oecd.org/gov/regulatory-policy/Best%20practice%20for%20improving%20Inspections%20and%20enforcement.docx>

administrative penalties. So of the seven characteristics four of them have a direct link to transparency.¹⁰

- 3.4. Macrory considered that transparency was necessary to inform the public and those regulated of their rights, their responsibilities and of enforcement activity. Macrory argued that transparency was necessary to ensure that businesses know what consequences they could face for failure to comply with regulatory requirements.
- 3.5. The AJTC principles include the need to keep people fully informed and state that public services bodies should help the public so they are able to take part effectively in a transparent service. It also considers that all organisations which make administrative or judicial decisions should be able to demonstrate transparency in making decisions and in dealing with appeals.¹¹
- 3.6. The Act requires approved regulators and licensing authorities to act in a manner compatible with the regulatory objectives. This includes the requirement to protect and promote the public interest and to support the constitutional principle of the rule of law. When the LSB set out its interpretation of the regulatory objectives we considered that a commitment to transparency is particularly important in relation to promoting the public interest.¹²
- 3.7. The International Bar Association in 2005 passed a resolution on the rule of law. This stated that, amongst other things: “*The Rule of Law is the foundation of a civilised society. It establishes a transparent process accessible and equal to all.*”¹³ A further commentary was published in October 2009. In this document the IBA expanded on the issue of transparency and stated that: “*Confidence in the system of governance in any society cannot be maintained unless the process is open and transparent*”.¹⁴ In his book “The Rule of Law”, Tom Bingham quotes the Secretary General of the United Nations approvingly when he said that the rule of law requires procedural and legal transparency.¹⁵
- 3.8. Based on this, we consider that the public must have confidence that regulators will act on instances of poor conduct and the regulated community needs to be reassured that cases are being dealt with fairly and consistently. To achieve these things requires transparency. The ability for consumers, and the regulatory community, to have access to information about arrangements concerning decisions on sanctions and appeals is as important as the efficacy of the arrangements themselves. So to help build and maintain confidence in the regulatory enforcement framework of the legal sector regulators need to be transparent about:

¹⁰ Page 35, Macrory (November 2006), Regulatory Justice: Making Sanctions Effective, <http://www.berr.gov.uk/files/file44593.pdf>

¹¹ Page 15, Administrative Justice and Tribunals Council (November 2010), *Principles for Administrative Justice*, http://ajtc.justice.gov.uk/docs/principles_web.pdf

¹² Legal Services Board (2010), *The Regulatory Objectives*

¹³ International Bar Association (September 2005), *Rule of Law Resolution*.

<http://www.ibanet.org/Document/Default.aspx?DocumentUid=A19DE354-A0D7-4B17-A7FF-F6948081CD85>

¹⁴ International Bar Association (October 2005), *Commentary on the IBA Council 'Rule of Law' resolution of September 2005*. <http://www.ibanet.org/Document/Default.aspx?DocumentUid=A89CFFB1-BD4A-445C-8CAB-553AF21BD7A7>

¹⁵ Page 111, Bingham (2010), *The Rule of Law*, Penguin 2011 edition.

- the processes by which they reach decisions whether to impose sanctions
- the reasons for imposing sanctions (or not)
- revealing how decisions are made and publishing the decisions themselves.

3.9. Therefore:

- Regulators' enforcement policies must be published, easy to locate on websites and should be consistent with regulatory best practice. It is important to note that merely being transparent about an overly complex process will not meet the requirements of best practice.
- Information should be easily accessible and disclosed to key stakeholders and the public about when, why and against whom, enforcement action has been taken.
- This transparency should apply to all enforcement actions and sanctions - including lesser formal administrative penalties, enforcement, and other notices.
- All regulators should publish their approach to assessing what level of financial penalty to impose. This does not have to be a specific methodology for calculating penalties, but should be an indication of what type of factors will be taken into account, including mitigating and aggravating factors.

3.10. If regulators use external adjudicators and/or tribunals, the requirement for transparency also applies to them.

Feature 2: Standard of proof

- 3.11. In law there are two standards of proof: criminal and civil. The criminal standard requires that a case must be proved beyond reasonable doubt (i.e. that someone is sure that an event occurred). The civil standard requires that a case must be proved on the balance of probabilities (i.e. that it is more likely than not that something happened).
- 3.12. Macrory considers that the civil standard of proof should be used for fixed and variable monetary penalties and to appeals against those penalties. He notes that the civil standard of proof does have adequate safeguards to protect the rights of the accused.¹⁶ However, in his enforcement pyramid he recognises that there is a role for criminal law and the court system (decided using the criminal standard of proof).
- 3.13. In other regulated professions the civil standard of proof is increasingly used. This is particularly the case for health and social care professionals. The Law Commission took the view that for the fitness to practise adjudications involving health and social care professionals (paragraph 9.65 of its consultation):

¹⁶ Page 47, Macrory (November 2006), Regulatory Justice: Making Sanctions Effective, <http://www.berr.gov.uk/files/file44593.pdf>

“... there are strong public protection arguments for adopting the civil standard [of proof]. The criminal standard [of proof] implies that someone who is more likely than not to be a danger to the public should be allowed to continue practising, just so long as the panel is not sure that he or she is a danger to the public. It seems to us that professional regulation is quite different from the criminal context, where the state is required to make sure that someone has committed a crime before taking the extreme and punitive step of imprisoning him or her. Public protection is, of course, an element of criminal justice, but primarily at the sentencing stage, not in terms of findings of guilt.”¹⁷

- 3.14. The Law Commission view was expressed in the context of health and social care professionals. However, it is clear that the argument could easily apply to legal professionals as well. For instance a barrister or solicitor that is more likely than not to be incompetent may be a risk to the liberty of their clients. Similarly it cannot be right that a professional who probably stole client funds is allowed to continue practising just because the regulator is not sure beyond reasonable doubt that they stole client funds.
- 3.15. We also note that the organisation that considers complaints against judges, the Judicial Conduct Investigations Office, uses the civil standard of proof when it considers allegations against judicial office holders' personal conduct. This is confirmed in its most recent rules regarding judicial conduct and it has been the case since the inception of the office and (from 2006) for its predecessor body the Office for Judicial Complaints.
- 3.16. We have heard it argued that, because the sanction for very serious allegations could be disbarment or striking off (with the obvious implications for someone's livelihood), a higher standard of proof is necessary. Our view is that this approach disproportionately favours protection of the lawyer over protection of the consumer. In addition, it fails to recognise that other professions and other workers face significant consequences (including losing their livelihood) based on the civil standard of proof. We consider that an appeal route is a more targeted and proportionate safeguard.
- 3.17. Therefore:
 - We consider that the standard of proof should be consistent across the legal services sector. A consistent standard will avoid the risk of individuals with malign intent 'forum shopping' for a regulator in which poor conduct is harder to prove. It will also maintain confidence across the sector as individuals will be treated consistently for the similar allegations of misconduct.
 - The consistent standard of proof should be the civil standard rather than the criminal standard. We consider that use of the civil standard will

¹⁷ Page 185, Law Commission, Scottish Law Commission and Northern Ireland Law Commission (March 2012), *Regulation of health care professional, regulation of social care professionals in England: A joint consultation paper*. http://lawcommission.justice.gov.uk/docs/cp202_regulation_of_healthcare_professionals_consultation.pdf

minimise the risk to consumers of regulated persons who probably have seriously breached conduct rules continuing to practise.

Feature 3: Consistency of powers and sanctions

- 3.18. One of the potential adverse impacts on consumers of differences in regulators' powers and sanctions is regulatory arbitrage (a similar issue to that in the criminal or civil standard of proof discussion). This is because firms and individuals may be motivated to be regulated by bodies that appear to have less robust powers and sanctions. This risk could be amplified as more approved regulators and licensing authorities are designated and there is increased competition between regulators, who may want to attract firms and individuals to their regulatory frameworks.
- 3.19. A further problem is that if a regulator has insufficient powers and sanctions it is unlikely to incentivise behavioural change in those who are tempted to breach regulators' requirements.
- 3.20. The Macrory report advocated the consistent application of the penalties principles across all regulators. He considered that the regulated community benefits from a consistent approach to sanctioning across all regulators. He advocated, and Government accepted the recommendation, to level up powers of regulators where necessary for regulators that were compliant with the better regulation principles and Macrory principles and characteristics. While all the Macrory principles are relevant to the consistency of powers, the following are specifically relevant:
- Sanctions should change the behaviour of the individual or entity to move them back to compliance and deter future non-compliance.
 - The sanction should aim to eliminate any financial gain or benefit from non-compliance and, where possible, restore the harm caused to individual consumers and/or the public interest.
 - The sanction should be responsive and consider what is appropriate for the particular offender and the regulatory issue. The regulator should use its discretion and base its decision on what sort of sanction will bring a firm into compliance.
- 3.21. The Macrory review considered the work of 56 national regulators and 468 local authorities. It seems logical that in a legal market with increased competition between the different professions that consistency of powers and sanctions is necessary. For instance a consumer could contract with a solicitor's firm, a licensed conveyancer firm or a notary to conduct a residential conveyancing transaction. Similarly, an IPReg regulated firm, an SRA regulated firm or a barrister could litigate directly for a consumer in an intellectual property matter. It makes little sense that in both those cases the same misconduct by a legal professional is punished in a different way due to a lack of the appropriate power or dramatically different sanctions.

- 3.22. The International Bar Association considers that a rational and proportionate approach to punishment is a fundamental principle of the rule of law.¹⁸ We do not consider that it is rational that an individual could potentially adopt a business model or choose a regulator on the basis of a lower level of penalty powers or a lower propensity to impose a penalty. This is particularly the case where the same or substantially similar services are being provided or those that involve similar conduct issues.
- 3.23. Based on this we consider that;
- The legal regulators should have sufficient financial penalty powers to be able to eliminate any financial gain or benefit from non-compliance and, where possible, restore the harm caused to individual consumers and/or the public interest.
 - It should not be possible for firms to game the system by choosing a legal regulator without sufficient sanctioning powers or regulators.
 - The legal regulators should have a consistent approach to the way they apply sanctions, i.e. a similar sanction for a similar offence regardless of regulator.

Feature 4: Fair and effective appeal arrangements

- 3.24. Under Article 6(1) of the European Convention on Human Rights:

‘...in the determination of his civil rights and obligations..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...’.

- 3.25. The AJTC principles state that an administratively just system should enable people to challenge decisions and seek redress using procedures that are independent, open and appropriate for the matter involved.
- 3.26. The Macrory review made it clear that as administrative sanctions should not be pursued through the criminal courts then neither should the appeal arrangements. He recommended that the appeal arrangements should be to a new regulatory tribunal. The report states that *“it is for a regulator and sponsoring department to determine what the best appeal arrangements would be for its particular area of regulation.... However, I would encourage all regulators who have an administrative sanctioning scheme to consider using the Regulatory Tribunal because it can be designed to be flexible to address regulatory issues in more than one particular regulatory field.”*¹⁹ The tribunal would work on the civil standard of proof.

¹⁸ International Bar Association (September 2005), *Rule of Law resolution*, <http://www.ibanet.org/Document/Default.aspx?DocumentUid=A19DE354-A0D7-4B17-A7FF-F6948081CD85>.

¹⁹ Page 55, Macrory (November 2006), *Regulatory Justice: Making Sanctions Effective*, <http://www.berr.gov.uk/files/file44593.pdf>

- 3.27. We have published guidance²⁰ to licensing authorities about the types of decisions that must be appealable to an independent body because they may amount to the determination of a person's civil rights, which includes the right to practise one's profession.²¹ We consider that this principle also extends to many decisions taken by regulators in their approved regulator capacity.
- 3.28. We consider it is important for the regulated community to feel confident that they have a fair right of appeal; but consumers must also be confident that appeal arrangements are effective and consistent so that decisions that are challenged are adjudicated in a transparent and coherent way. This is in accordance with protecting and promoting the interests of consumers as well as upholding an independent and strong legal profession.
- 3.29. Therefore:
- We consider that the right to appeal the regulatory sanctions included in our licensing authority guidance is a fundamental right and decisions should be able to be challenged.
 - The operation of multiple appeal routes risks inconsistency of decisions and inefficiency.
 - Appeal arrangements must be independent from the body or persons who made the original decision.
 - The appeals process and decision itself must be open and transparent as well as affordable and quick.

²⁰ LSB (December 2010), Alternative business structures: appeals against decisions of licensing authorities, http://www.legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/supplementary_guidance_on_licensing_rules.pdf








²¹ See for example *Bakker v Austria* (2004) 39 EHRR 548

4. Current arrangements

- 4.1. The first section of this work sets out our understanding of the current arrangements in place for the legal regulators. We have conducted legal research of their development and the statutes and precedents underpinning their arrangements. We have also reviewed the regulatory arrangements put in place by the regulators and the regulatory processes those regulators adopt.
- 4.2. Each regulator's section includes a summary table of each of the regulator's arrangements for sanctions and appeals and the basis for those arrangements.²² These summaries have been reviewed by the respective regulators for accuracy. There also some commentary on the key features of each regulator's arrangements.

²² Larger versions of the summary tables have been published alongside this report and are available on the LSB website.

The Solicitors Regulation Authority

SOLICITORS REGULATION AUTHORITY – NON-ABS																																																																			
USED WHEN:	Enforcement action taken if there is serious non-compliance with SRA principles or a risk exists to the public that cannot be mitigated by either the SRA or an individual																																																																		
OVER WHO:	Individuals (including solicitors (S), RELs, RFLs, former solicitors (FS), managers (M), employees (E) employees of sole practitioners (ESP)) and recognised bodies (RB)																																																																		
WHAT POWERS:	- The Solicitors Act 1974, The Administration of Justice Act 1974, The Courts and Legal Services Act 1990 - Part II of the Solicitors Act 1974 (as amended) established the Solicitors Disciplinary Tribunal (SDT) - The SDT's powers are recognised, modified and extended under the LSA, particularly in Part 8																																																																		
DECISION MAKER	SANCTIONS/PENALTIES/COSTS		APPEALS																																																																
SRA staff with delegated authority or... Adjudication (single) (civil)	 <u>Regulatory Settlement Agreement (including):</u> - Agreed public statements - Schemes for correction, improvement and restitution - Removal from the roll by consent	- Removal from roll by consent - Practising controls - Costs	NONE <i>(SDT must consent to withdrawal if proceedings started)</i>																																																																
	 - Written rebuke and publication - Penalty to £2,000 (consulting to raise to £10K, 50k or 100k) - Costs from solicitors, RELs and recognised bodies		 1: Adjudication (panel) 2: SDT 3: High Court																																																																
	 - Conditions (S, REL, RFL) - Conditions (RB) - suspend / revoke authorisation (RB)		 1: Adjudication (panel) 2: High Court																																																																
	 Referral to the SDT		NONE																																																																
SDT (non-ABS) (criminal)		<table><tr><td>S</td><td>REL</td><td>RB</td><td>M</td><td>E</td><td>RFL</td><td>ESP</td></tr><tr><td>- Strike off (S) restore/prohibit (FS)</td><td></td><td></td><td></td><td></td><td></td><td></td></tr><tr><td>- Suspension (indef/specified)</td><td></td><td></td><td></td><td></td><td></td><td></td></tr><tr><td>- Termination of suspension</td><td></td><td></td><td></td><td></td><td></td><td></td></tr><tr><td>- Revoke sole endorsement</td><td></td><td></td><td></td><td></td><td></td><td></td></tr><tr><td>- Unlimited penalty (incl FS)</td><td></td><td></td><td></td><td></td><td></td><td></td></tr><tr><td>- Criminal/ legal aid exclusion</td><td></td><td></td><td></td><td></td><td></td><td></td></tr><tr><td>- Revoke recognition</td><td></td><td></td><td></td><td></td><td></td><td></td></tr><tr><td>- Reasonable costs</td><td></td><td></td><td></td><td></td><td></td><td></td></tr></table>	S	REL	RB	M	E	RFL	ESP	- Strike off (S) restore/prohibit (FS)							- Suspension (indef/specified)							- Termination of suspension							- Revoke sole endorsement							- Unlimited penalty (incl FS)							- Criminal/ legal aid exclusion							- Revoke recognition							- Reasonable costs								 1: Master of the Rolls 2: High Court (admin)
	S	REL	RB	M	E	RFL	ESP																																																												
	- Strike off (S) restore/prohibit (FS)																																																																		
	- Suspension (indef/specified)																																																																		
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	- Unlimited penalty (incl FS)																																																																		
	- Criminal/ legal aid exclusion																																																																		
	- Revoke recognition																																																																		
	- Reasonable costs																																																																		
	The SDT also frequently issues reprimands & severe reprimands and orders practising controls (Though, these acts are not based on express statutory powers)																																																																		

SOLICITORS REGULATION AUTHORITY - ABS			
USED WHEN:	Enforcement action taken if there is serious non-compliance with SRA principles or a risk exists to the public that cannot be mitigated by either the SRA or an individual		
OVER WHO:	Licensed bodies, HOLPs, HOFAs, managers, employees, solicitors, European lawyers (REL), foreign lawyers (RFL) and former solicitors (FS)		
WHAT POWERS:	<ul style="list-style-type: none"> -The Legal Services Act 2007, The Solicitors Act 1974, The Administration of Justice Act 1974, The Courts and Legal Services Act 1990 - Part II of the Solicitors Act 1974 (as amended) established the Solicitors Disciplinary Tribunal (SDT) - The SDT's powers are recognised, modified and extended under the LSA, particularly in Part 8 		
DECISION MAKER	SANCTIONS/PENALTIES/COSTS		APPEALS
SRA staff with delegated authority or... Adjudication (single) (civil)	<u>Regulatory Settlement Agreement (including):</u> - Agreed public statements - Schemes for correction, improvement & restitution - Practising controls - Removal from the roll by consent - Costs		NONE
	-Penalty to £50m / publication – ABS individual -Penalty to £250m / publication – ABS entities		1: Adjudication (panel) 2: SDT 3: High Court (points of law)
	-Impose conditions on solicitors, RELs and RFLs		1: Adjudication (panel) 2: High Court
	- Impose conditions on a licensed body - Suspend / revoke authorisation - Disqualify from <u>acting</u> as a HOLP or HOFA - Disqualify from <u>being</u> a manager or employee		1: Adjudication (panel) 2: SDT

- 4.3. As the summary tables show the SRA has two different sanctions and appeal arrangements for the firms and individuals it regulates. One for ABS and those working for an ABS and one for recognised bodies (traditional solicitors firms – including sole practitioners), those working for recognised bodies and

individual solicitors. The main reason for the two parallel systems are the statutory powers which govern the regulation of solicitors and ABS, the Solicitors Act 1974 and the Legal Services Act 2007.











- 4.4. The difference is that the SRA may impose all of the sanctioning powers available to it on ABS firms and those working with ABS. This includes penalties of up to £250 million on entities and the power to revoke authorisation of an ABS and disqualify managers and employees. All decisions are made according to the civil standard of proof and appeal arrangements exist for all sanctions with the obvious exception of regulatory settlement agreements. The appeal route includes the statutorily independent Solicitors Disciplinary Tribunal (SDT) and the High Court as well as an SRA-run adjudication panel. The appeal route used is dependent on the sanction imposed.
- 4.5. The situation for traditional solicitors' firms, those working in such firms and other solicitors is more complicated. The SRA can publish written rebukes, impose financial penalties of up to £2000 and revoke/suspend its authorisation of recognised bodies. The SRA uses the civil standard of proof for these regulatory sanctions. However, the SRA cannot impose higher penalties and it cannot disqualify individual solicitors (without the consent of the individual solicitor). Such decisions are taken by the SDT and can be appealed to the High Court. The SDT uses the criminal standard of proof.
- 4.6. The SDT can also consider applications from consumers to bring a case against a solicitor. The SDT can refer such applications back to the SRA for further investigation as well as considering the application itself.

The Bar Standards Board (BSB)

BAR STANDARDS BOARD			
USED WHEN:	The BSB has available both non-disciplinary powers for breaches of the Handbook and disciplinary powers for professional misconduct. It will only refer complaints for disciplinary action where it considers there is a realistic prospect of a finding of professional misconduct being made (or there is a realistic prospect of the disqualification condition being satisfied <i>and</i> it is in the public interest, having regard to the regulatory objectives to pursue disciplinary proceedings)		
OVER WHO:	Sole practitioner, employed, and self-employed barristers and all persons called to the Bar (Relevant Persons, as defined in Part 6 of the BSB Handbook)		
WHAT POWERS:	Disciplinary Tribunal Powers derived from the Senior Courts Act 1981 give High Court judges the power to discipline barristers, which they resolved, in 1986, to exercise through COIC. The appeal function is exercised through High Court under the Crime and Courts Act 2013.		
DECISION MAKER	SANCTIONS/PENALTIES/COSTS		APPEALS
Professional Conduct Dept or... Professional Conduct Committee (civil)	<p><u>Non-disciplinary sanctions (no further action (NFA) decisions):</u> - Advice</p> <p><u>Non-disciplinary administrative sanctions available for all breaches of the Handbook:</u> - Written warning - Fixed penalty fine - administrative fine to £1,000</p>		BTAS 3 person appeal panel (£100 payable to BSB) (civil)
Professional Conduct Committee (criminal)	<p><u>Determination by consent:</u> - Reprimand (BSB) - Advice order - CPD order - Fine to £50,000 - Reprimand/advice from nominated person</p> <p><u>Referral to BTAS 3 or 5 person panel</u></p>		NONE
Disciplinary Tribunal BTAS (Criminal): - 3 person panel - 5 person panel (dishonesty and/or deception)	<p><u>3 person panel:</u> - Reprimand (Tribunal/nominee) - Advice order (Tribunal/nominee) - CPD order - Conditions on practising certificate - Prohibited from accepting public access instructions - Exclusion from Legal Aid representation - Suspension to 12 months (with or without conditions) - Disqualification to 12 months - Fine to £50,000 and costs both ways - Referral to 5 person panel for sentencing</p>	<p><u>5 person panel:</u> <i>(in addition to 3 person panel powers):</i> - Disbar - Suspension for an unlimited period (with or without conditions) - Disqualification for more than 12 months</p>	High Court under the Crime and Courts Act 2013 (criminal)
<u>ON APPEAL:</u> High Court under the Crime and Court Act 2013 (criminal)	<p>- Dismiss appeals - Allow in part of whole</p> <p>- Confirm / vary orders - Order re-hearing</p>		NONE

- 4.7. The disciplinary powers for barristers are presently derived from the Senior Courts Act 1981 and the powers reside with High Court judges. In 1986 this power was delegated to the Councils of the Inns of Court (COIC). Recently COIC has set up the Bar Tribunals and Adjudication Service (BTAS) which acts as the disciplinary tribunal for barristers. The BSB acts as prosecutor in the cases of professional misconduct it brings against barristers at BTAS Tribunals.
- 4.8. The BSB, either with its executive or the Professional Conduct Committee, is empowered to use sanctions against barristers for minor breaches of its Handbook, including penalties of up to £1,000 and written warnings. The BSB uses the civil standard of proof when considering these breaches, which are referred to as “administrative sanctions”, even though a breach of the handbook occurred. There is no requirement to publish “administrative sanctions”.
- 4.9. The Professional Conduct Committee (but not the BSB executive) can also impose disciplinary sanctions in agreement with barristers. These are known as determinations by consent and include a maximum penalty of £50,000. The determination by consent process is used in cases of professional misconduct; the BSB uses the criminal standard of proof in such cases.
- 4.10. BTAS uses the criminal standard of proof in both its three and five person panels, which hear cases relating to dishonesty and/or deception. An independent appeal route exists to the High Court for findings and penalties imposed by BTAS Tribunals.

The Council for Licensed Conveyancers (CLC)

COUNCIL FOR LICENSED CONVEYANCERS				
USED WHEN:	The CLC invokes its enforcement policy when its Code of Conduct is not upheld			
OVER WHO:	Licensed conveyancers, recognised bodies, licensed (ABS) bodies			
WHAT POWERS:	<ul style="list-style-type: none">- Part II of the Administration of Justice Act 1985- Legal Services Act 2007 for alternative business structures- Section 69 Order for amendment to appeals process (first draft with the Ministry of Justice)			
DECISION MAKERS	SANCTIONS/PENALTIES/COSTS			APPEALS
Authorised officers, LPIs & directors (civil)		- Penalty to £1,000	- Reasonable costs	 Adjudication Panel
		- Referral to Adjudication Panel		 High Court (civil)
As Approved Regulator (non-ABS)				
Adjudication Panel (civil)		<u>Licensed conveyancers:</u> <ul style="list-style-type: none">- Revoke licence- disqualification (perm/specific)- Suspension- Condition to licence- Reprimand order- Penalty to £50m	<u>Recognised body:</u> <ul style="list-style-type: none">- Revoke recognition- Reprimand order- Condition to recognition- Penalty to £250m- Appropriate costs	<u>Manager/employee of recognised body:</u> <ul style="list-style-type: none">- Order CLC to take steps- Referral to other regulator- Penalty to £50m- Appropriate costs 
		High Court (civil)		
As Licensing Authority (ABS)				
Adjudication officers (civil)		<u>Licensed body:</u> <ul style="list-style-type: none">- Reprimand body- Revoke body's licence- Suspend body's licence- Conditions direction- Intervene	<u>Licensed body owner:</u> <ul style="list-style-type: none">- Conditions on material interest- Object to interest & apply to High Court to divest interest	 Adjudication Panel (civil)
		<u>HoLP or HoFA:</u> <ul style="list-style-type: none">- Require CLC to take steps- Withdraw approval for role- Disqualify from holding a licensed role	<u>Manager/employee of ABS:</u> <ul style="list-style-type: none">- Require CLC to take steps- Referral to other regulator- Disqualify from holding a licensed body role	
Adjudication Panel (civil)		<ul style="list-style-type: none">- Penalties to £50m for licensed body owners, HoLPs, HoFAs, managers & employees- Penalties to £250m for licensed bodies		 First Tier Tribunal (civil)

- 4.11. Like the SRA, the CLC is a licensing authority and so because of different statutory powers operates two sanctions and appeals process; one for decisions made as a licensing authority under the Act and one for those made as an approved regulator under the Administration of Justice Act 1985. However, despite the different underlying statutes the possible sanctions are similar. For instance the top level of penalty is the same whether the offence involves an ABS or recognised body.
- 4.12. However the appeal route is different. An ABS subject to a disciplinary adjudication can appeal to the First Tier Tribunal but a recognised body can only appeal to the High Court. The CLC is trying to unify the appeal process and have all appeals going to the First Tier Tribunal.
- 4.13. The civil standard of proof is used throughout.

The Intellectual Property Regulation Board (IPReg)

INTELLECTUAL PROPERTY REGULATION BOARD		
USED WHEN:	IPReg reviews complaints to decide if there are proportionate, prima facie cases to answer A complaint about an attorney or firm must relate to a breach of IPReg's Code of Conduct or Litigators' Code Special consideration is given to attorneys' complaints about other attorneys	
OVER WHO:	- Patent attorneys - Trade mark attorneys	- ABS - Entities
WHAT POWERS:	- s.275A Copyright Designs and Patents Act 1988 and s.83A Trade Marks Act 1994 (as amended) do not specify any sanctions or appeals mechanism, though they do give the person keeping the register power to make regulations governing conduct and discipline - Section 69 order for ABS powers (seeking approval)	
DECISION MAKERS	SANCTIONS/PENALTIES/COSTS	APPEALS
Complaints Review Committee (Sift Panel) (civil)	<u>Summary procedure:</u> - Notice - Warning	- Reprimand - Part or full cost
	- Referral to the Disciplinary Board	NONE
Disciplinary Board (civil)	- Public notice - Warning - Penalty to £5,000 - Part or full costs	- Reprimand - Suspension/removal - Cancelled certificate - CDP order
	Recommend ITMA/CIPA suspension/expulsion Recommend recognition, authorisation & withdrawal for: - UK Intellectual Property Office - European Patent Office - Office for Harmonisation in the International Market - Recommend ITMA/CIPA suspension/expulsion	Considered by an independent adjudicator
<u>ON INTERNAL APPEAL:</u> Independent Adjudicator (civil)	- Affirm decision - Vary decision - Vary costs	(Proposed external appeal) First Tier Tribunal (civil)








- 4.14. IPReg's sanction and appeal system is relatively straightforward. A review committee can issue minor administrative sanctions and refer cases to a disciplinary board. The disciplinary board has more significant sanctions and is able to issue financial penalties of up to £5,000 and suspend/revoke authorisation of authorised persons. Finally an independent adjudicator considers appeals of the decisions made by the disciplinary board.
- 4.15. This independent adjudication process is administered by IPReg. In order to be able to offer a process with greater independence IPReg is seeking the ability to use the First Tier Tribunal. All the processes use the civil standard of proof.
- 4.16. The LSB has recently recommended, and the Lord Chancellor has agreed, that IPReg is designated as a licensing authority. This will give IPReg higher penalty powers for ABS and provide ABS with the ability to appeal decisions made by the disciplinary board to the First Tier Tribunal.

ILEX Professional Standards (IPS)

IPS		
USED WHEN:	IPS investigates conduct complaints and refers allegations to its Professional Conduct Panel, which assesses whether its outcomes based Code has been breached	
OVER WHO:	Individual Chartered Legal Executives, Associate Prosecutors (Currently seeking entity rights and individual rights for CILEx practitioners)	
WHAT POWERS:	<ul style="list-style-type: none"> - The Legal Services Act 2007 - The Institute's Royal Charter - Section 69 Order for entity enforcement powers (seeking approval) 	
DECISION MAKERS	SANCTIONS/PENALTIES/COSTS	APPEALS
IPS manager	<ul style="list-style-type: none"> - Reject case where IPS has no jurisdiction - Referral to Disciplinary Tribunal 	Professional Conduct Panel
		NONE
	<ul style="list-style-type: none"> - Determination by consent - no costs (agreed by IPS manager, signed-off by Conduct Panel) 	NONE
Professional Conduct Panel (civil)	<ul style="list-style-type: none"> - Suspension during hearing (12 months max) <u>Conditions on employment or conduct:</u> - Practising conditions - Reprimands - Warnings <u>Future conduct:</u> - Undertaking agreement conditions 	Appeals Panel (civil)
	<ul style="list-style-type: none"> - Referral to Disciplinary Tribunal 	NONE
Disciplinary Tribunal (civil)	<ul style="list-style-type: none"> <u>Conditions on employment or conduct:</u> - Practising conditions - Reprimand - Membership exclusion (fixed or indefinite period – Can reapply after fixed period has lapsed) - Fines to £3,000 (policy being developed) - Order costs <u>New powers (seeking approval):</u> - Pre hearing interim orders 	Appeals Panel (civil)
<u>ON APPEAL:</u> Appeals Panel (civil)	<ul style="list-style-type: none"> - Affirm decision - Vary decision 	NONE

- 4.17. IPS's sanctions and appeals process is similar to IPReg's. It operates a professional conduct panel that can impose minor administrative sanctions or refer the issue to a disciplinary tribunal. The disciplinary tribunal can suspend or disqualify authorised persons and impose penalties of up to £3000. Like IPReg, IPS also administers an appeals panel. The appeal panel is independent but not separate in the way that the High Court is separate from BTAS or the First Tier Tribunal is separate from the CLC.
- 4.18. A feature of IPS's sanctions and appeals framework is that apart from the Act there is no other primary legislation underpinning its powers. IPS uses the civil standard for all of its processes.

Costs Lawyer Standards Board

COSTS LAWYER STANDARDS BOARD		
USED WHEN:	The CLSB investigates complaints where it believes there are reasonable grounds that its rules and code have not been complied with by a costs lawyer	
OVER WHO:	Individual costs lawyers Currently not seeking entity rights, awaiting outcome of call for evidence on legal regulation	
WHAT POWERS:	The Association of Law Costs Draftsmen Order 2006 was revoked and replaced on 01 January 2010 by Legal Services Act (Commencement No 6, Transitory, Transitional and Savings Provision) Order 2009	
DECISION MAKERS	SANCTIONS/PENALTIES/COSTS	APPEALS
<u>Level One:</u> CLSB investigation	 <u>Minor disciplinary findings:</u> - Warning letter - Undertaking - Costs fixed at £250	 Conduct Committee
	 Referral to Conduct Committee	 Conduct Appeal Committee
<u>Level Two:</u> Conduct Committee (civil)	 - Warning letter - Undertaking - Suspension to 2 years - Permanent removal from register - Penalty to £2,000 - Costs fixed at £1,000	 Conduct Appeal Committee (civil) <i>(no further appeals to Level Three from Level One warning letter or undertaking)</i>
<u>Level Three:</u> Conduct Appeal Committee (civil)	 - Dismiss, uphold, vary sanction/costs - Suspension, unlimited - Permanent removal from register - Revise penalty to £4,000 - Costs fixed at £1,500	NONE

- 4.19. The CLSB also has a three level process that is similar to both IPReg and IPS. A first level can impose minor disciplinary sanctions and a second level can impose more significant penalties, including removal of rights and a penalty of up to £2,000. It operates on the civil standard of proof. The CLSB's appeals process is administered by the CLSB.
- 4.20. The CLSB's sanction and appeals framework applies only to individual costs lawyers and not entities. Another feature of the CLSB's sanctions and appeal framework is that apart from the Act there is no other primary legislation underpinning its powers.

The Master of the Faculties

MASTER OF THE FACULTIES			
USED WHEN:	For the protection of the public when service complaints are received about notarial conduct		
OVER WHO:	Individual notaries -currently not considering to apply to regulate entities		
WHAT POWERS:	The Ecclesiastical Act 1533, the Public Notaries Act 1801, section 4 of the Public Notaries Act 1843 and section 57(4)(c) of the Courts and Legal Services Act 1990 grant the Master of Faculties broad powers to make rules about the practice, conduct and discipline of public notaries. It is also an AR under the LSA		
DECISION MAKERS	SANCTIONS/PENALTIES/COSTS		APPEALS
Registrar of the Court	➡ Referral to the Company of Scriveners: When there is a case for notarial misconduct		NONE
	➡ Appointment of Nominated Notary: When there is a case for non-scrivener misconduct		NONE
	➡ Interim Order to suspend, restrict, limit or impose conditions of practice: Evidence of gross misconduct	➡	Court of Faculties
Court of Faculties (Commissary & 2 assessors) (civil)	Notarial misconduct:		Judicial review of the Commissary decision
	➡ - Struck-off register - Suspension (time/conditions) - Conditions on practising certificate - CPD order	➡ - Admonishment - Order costs both ways - Penalty to £10,000 - Indemnify clients with fund	
Court of Faculties Review	To review Orders for striking-off, suspension, or conditions:		NONE
	➡ - Restore notary to the Roll - Immediate/future lifting of suspension	- Remove/vary conditions - Impose new conditions - Dismiss application	
Master of Faculties	➡ Reject application for admission or readmission as a public notary	➡	Chancellor of the High Court
Chancellor of the High Court	➡ Notaries can challenge the Master if they are refused a licence "without just and reasonable cause... to any faculty to practise"		NONE

- 4.21. The Faculty Office's statutory powers are some of the oldest in the legal sector, derived from the Ecclesiastical Licences Act 1533, the Public Notaries Acts of 1801 and 1843, as well as the Court and Legal Services Act 1990.
- 4.22. The registrar, effectively an appointee of the Master of the Faculties, operates the first stage. The registrar is able to impose interim suspension or conditions of practice. But if a matter requires further investigation or sanction the registrar appoints a notary or refers the issue to the Worshipful Company of Scriveners. It is then that notary's (or the Worshipful Company's) responsibility to investigate the issue and prosecute the case in front of the Court of Faculties. The Court of Faculties has the power to issue a number of sanctions including a penalty of up to £10,000 and to strike notaries off the register.
- 4.23. The Faculty Office does not operate an appeal process. Instead those wishing to appeal can either apply for readmission (in the case of suspension) or to remove conditions. The final appeal is to the Chancellor of the High Court. Alternatively they can seek judicial review of the Court of Faculties' decision. However, it is not clear whether notaries can appeal against financial penalties without pursuing judicial review.
- 4.24. The Master of the Faculties' sanctions and appeals framework uses the civil standard of proof.

5. Comparison of regulators' arrangements

Statutory basis

- 5.1. The seven regulators operate a complex variety of sanctions and appeals mechanisms; these are very often rooted in the historical development of each professional branch of the law. While each system has the same broad goal of creating disincentives for practitioners and/or entities to breach codes and rules, the processes to agree to use enforcement measures (and indeed the sanctions themselves) are very different. The regulators do not get their powers from the same sources: some use statutory powers, some have a royal charter and others do not have any specific statutory powers beyond those granted by the Act. Those that have statutory powers rely on a combination of the following pieces of primary legislation for those powers:
- The Solicitors Act 1974
 - The Legal Services Act 2007
 - The Senior Courts Act 1981
 - The Crime and Courts Act 2013
 - The Administration of Justice Act 1985
 - The Copyright, Designs and Patent Act 1988
 - The Trade Marks Act 1994
 - The Public Notaries 1843
 - The Court and Legal Services Act 1990
 - The Ecclesiastical Licences Act 1533
- 5.2. There is also a different statutory background depending on what business structure of individual the regulator is regulating. For instance, as an ABS licensing authority, the SRA is able to impose higher financial penalties than it can as an approved regulator. Until recently, that situation also applied to the CLC. However, following consultation and with the LSB's agreement, it changed its regulatory arrangements to equalise its powers. The SRA has asked the MoJ to do the same for it using the power that the Lord Chancellor has,²³ but MoJ did not agree to do so; one reason MoJ gave for its decision was because the SDT has unlimited penalty powers. The SRA has recently consulted on raising the maximum penalty from £2,000 to either £10,000, £50,000 or £100,000. The LSB supported the final option.
- 5.3. Because the SRA can only impose a penalty of £2,000 or a rebuke on traditional business structures and the individuals that work in them, if it considers it is appropriate to impose a higher penalty or if it wants to strike off a solicitor, it must take the case to the SDT which will hear the evidence from both sides and then make a decision. This difference arises because the

²³ Solicitors Act 1974 (as amended) section 44D(10)

powers in relation to ABS firms derive from the Act and those for non-ABS derive from the Solicitors Act 1974 (as amended by the Act). Similarly, when other approved regulators become licensing authorities they will be able to impose sanctions on ABS firms and individuals that work for ABS firms that derive from the Act. However, in order to ensure equal sanctioning powers against non-ABS, it is usually necessary to make an Order under the Act.²⁴

- 5.4. This shows that there is a complex statutory underpinning of sanctions and appeals arrangements across the regulators but also within the regulators.

Regulatory processes

- 5.5. Across the seven approved regulators, we have identified five common stages of sanctions and appeals processes. These are: investigation, adjudication, implementation, appeal and transparency. Below we describe the main characteristics of the regulators' approaches.

Investigation

- 5.6. This includes all the processes that a regulator undertakes to determine whether to seek and impose a sanction on a regulated individual or entity. All of the approved regulators, with the exception of the Master of the Faculties, have published formal processes in place to investigate non-compliance with their codes and rules.
- 5.7. Very often this investigatory stage can either be triggered by a complaint being made, an individual 'blowing the whistle', the failure of a regulated individual or entity to comply with an information requirement or by an irregularity being exposed during a supervisory visit.
- 5.8. All of the regulators approach the process of investigation by gathering the requisite evidence. This evidence is then considered to determine whether there is a case to answer. Following this consideration, a minor sanction may be imposed or alternatively the matter may be referred for prosecution. In the case of the SRA, the CLC and the CLSB, it is the role of executive staff to determine whether there is a case to answer. IPReg's Complaints Review Committee carries out an initial 'first sift' investigation to see if there is a case to answer at the adjudication level (although this committee can impose minor administrative sanctions too). The BSB's Professional Conduct Committee has overall authority to carry out the initial investigation and determine whether there is a case to answer as well as impose sanctions and penalties for low level breaches of its Handbook, known as administrative sanctions. However, the Committee formally authorises the executive to carry out investigations, take decisions and impose the sanctions and penalties. The Faculty Office appoints a notary or refers the matter to the Worshipful Company of Scriveners to carry out the investigation.
- 5.9. Even if a regulator concludes that there is a case to answer, it may decide to resolve the issue without going beyond the investigation stage. It may do this

²⁴ section 69

through enhanced supervision, mutual agreement, the provision of advice or minor sanctions. The regulators can also reach agreements with entities or individuals concerned to resolve issues; for instance, the BSB can impose significant sanctions with the consent of the barrister concerned.

Adjudication and implementation

- 5.10. “Adjudication” is the process by which a decision is reached on what sort of sanction is appropriate (for those decisions that are not taken by the regulator’s staff). We have analysed the hierarchy of where the decision is made, the basis for the decision and the sanctions available to those making a decision. “Implementation” includes consideration of how the sanctions are enforced and the publication policies of the regulators.
- 5.11. All of the approved regulators have an adjudication function that sits outside their executive functions, although where this sits in the regulator’s overall hierarchy of decision making varies. For some, the adjudication function sits with an independent external tribunal; for others it is a panel run by the regulator.
- 5.12. However for the SRA when acting as a licensing authority, SRA adjudicators can impose significant financial penalties and suspensions. These decisions are taken by employed or self-employed adjudicators or a panel of adjudicators, depending on the allegation. While adjudicators in ABS cases can set financial penalties up to £50m for individuals and £250m for firms, these same adjudicators can only impose a financial penalty of up to £2,000 for individual solicitors employed in non-ABS firms. If a penalty of more than £2,000 is appropriate, the adjudicator must refer the case to the SDT, which has powers to impose unlimited financial penalties.
- 5.13. The CLC is able to impose financial penalties of up to £250 million for entities and £50 million for individuals. It is not required to refer cases to a separate tribunal for adjudication but instead operates a panel.
- 5.14. The BSB is able to impose financial penalties up to £1,000 for low level breaches of its Handbook (which it calls “non-disciplinary” matters) and penalties to a maximum of £50,000 for professional misconduct matters under the Determination by Consent procedure. The latter limit is the same as the financial penalties available to BTAS Tribunals.
- 5.15. The BSB uses the criminal standard of proof when considering professional misconduct cases under the Determination by Consent procedure but the civil standard when imposing sanctions for low level breaches of the Handbook. The SDT uses the criminal standard of proof, while the SRA uses the civil standard. All other regulators use the civil standard of proof.
- 5.16. The adjudication panels and committees of the rest of the approved regulators have a full range of sanctions available to them, ranging from issuing advice to lawyers to disqualification. The bodies are able to impose financial penalties. However, the maximum amount they are able to impose varies (ranging from £2,000 to £10,000). IPReg and IPS are also able to order costs at the adjudication stage, whereas the CLSB has a fixed cost regime.

Appeals

- 5.17. Appeal mechanisms within legal regulation are diverse and multi-layered. There are 13 different bodies conducting appeals across the sector as a whole, and 7 different appeal bodies for the considering appeals against the most serious of penalties. Many of these are appeals to committees appointed by the regulator or internal review by regulators. In terms of external bodies handling appeals this currently includes the SDT, COIC/BTAS, the First Tier Tribunal of the General Regulatory Chamber, the Upper Tribunal and the High Court.
- 5.18. The body to which a regulated person (or former regulated person) may appeal depends on who has imposed the sanction and what business structure the regulated person worked in. It is possible for some to appeal beyond the first instance appeal. For instance if the SRA executive or single adjudicator imposes a financial penalty on an ABS, the ABS may be able to appeal that decision to an adjudication panel, the SDT and finally on points of law to the High Court. At the other end of the spectrum the Faculty Office offers a very limited appeal.

Transparency

- 5.19. As pointed out earlier, the Macrory characteristics place an onus on the need for transparency; transparency is also one of the better regulation principles. Put simply, enforcement decisions should, other than in exceptional circumstances, be put into the public domain. This is an important part of any sanctions and appeals framework.
- 5.20. The SRA publishes decisions regarding written rebukes and financial penalties made by the SRA's executive unless it deems it is not in the public interest to do so.²⁵ The BSB publishes determinations by consent²⁶ but does not publish administrative sanctions imposed by the BSB's executive or the BSB's Professional Conduct Committee. However, if there is good reason, it can disclose information to third parties about complaints.²⁷
- 5.21. In more serious cases where adjudication is made by the SDT and COIC/BTAS, findings and sanctions are all published and are accessible to the public, except when a case has sat in private throughout. BTAS only publishes proven cases. The CLC, IPReg and IPS all state that they will in most circumstances publish the findings of proven cases. The CLSB has the ability to publish but we understand that it has declined to publish any decisions so far. There is not a published enforcement policy for the Master of the Faculties and there are no current or historical disciplinary findings available online.

²⁵ SRA Handbook (Version 8), *Disciplinary Procedure Rules, Part 5 Notification, Publication and Commencement*.
<http://www.sra.org.uk/solicitors/handbook/discproc/part5/content.page>

²⁶ BSB Handbook (1st Edition, January 2014), A5 Determination by consent, rE73,
https://www.barstandardsboard.org.uk/media/1547429/bsb_handbook_26.11.13.pdf

²⁷ BSB Handbook (1st Edition, January 2014), Administrative fines and warnings, rE53,
https://www.barstandardsboard.org.uk/media/1547429/bsb_handbook_26.11.13.pdf for the exceptions see BSB Handbook (1st Edition, January 2014), A8 Confidentiality, rE93

6. Assessment

- 6.1. The LSB's assessment indicates that there is great variation in the extent to which the arrangements reflect the best practice features we have identified. Our assessment, focusing on each best practice feature, is set out below.

Transparency

Regulatory arrangements

- 6.2. The regulatory arrangements of all approved regulators, including those for enforcement, discipline and appeals are in the public domain. The SRA's website is organised based on findings from its user groups. However, the sheer number of web pages can make it difficult for those navigating the site to piece together a complete picture of regulatory arrangements, both from the consumer and legal professional's perspective. The BSB's website in contrast currently provides very high level information for both consumers and practitioners, based on rules and some related practical guidance. However, the BSB has acknowledged that the current level of information is too thin and aims to make improvements. The CLC and the Master of the Faculties currently only provide their rules on their websites and little supporting guidance. Both regulators are in the process of refreshing their websites, with an aim to improve information for both consumers and practitioners. IPReg, IPS and the CLSB have clear descriptions of their regulatory arrangements online.

Enforcement action

- 6.3. There is also generally some information disclosed to key stakeholders and the public about when and against whom enforcement action has been taken, although the specific way in which this information is published varies.
- 6.4. Cases under initial investigation are not usually made public and investigations that do not find fault with the authorised person are not usually disclosed. This is understandable in terms of fairness to those individuals or firms that are the subject of investigation without a case being proven or concluded. However, there is a legitimate question about the rights of potential and future clients for those that are under investigation. The current approach of rarely disclosing publicly the identity of lawyers or firms under investigation clearly favours the lawyer over the public. Regulators may wish to reflect on this issue. However, more concerning is that our assessment shows that lesser administrative penalties, such as warnings, are not routinely disclosed by all regulators. The LSB considers that there is a strong case for saying that lesser regulatory administrative decisions should be transparent, particularly in the context of encouraging overall confidence in the system and to be consistent with one of the key Macrory principles that all enforcement decisions should be published.
- 6.5. All regulators should publish their approach to assessing what sanction to impose and how they calculate financial penalties. This does not have to be a specific methodology for calculating penalties, but should be an indication of what type of factors will be taken into account, including mitigating and aggravating factors. However, regulatory arrangements tend to give

maximum values or a spectrum of penalties, with regulators using their discretion to impose up to a maximum amount. Again, this is an area where there could be more openness on the part of regulators, for example, by publishing a schedule or scale of administrative penalties, to reassure consumers and the regulated community that proportionate and appropriate penalties are applied to particular types of breaches.

- 6.6. We conclude that it should be possible for approved regulators to be more transparent and open in publishing information about the sanctions and appeals decisions they make and in exposing the methods for making those decisions (for example, by publishing a schedule of penalties). This would not require new regulatory arrangements or legislation, just a change in practice. The LSB's regulatory standards assessment process for enforcement notes that for a regulator to be performing well it should have published policies and guidelines are written in plain language that enables others to understanding the criteria for deciding to take action.
- 6.7. We plan to undertake a complete assessment exercise against the regulatory standards during 2015/16.²⁸ We will take this opportunity to look at transparency of sanctions and appeal arrangements. During 2014/15, we will also be conducting a review of progress since the first regulatory standards exercise. , Approved regulators and licensing authorities will be able to inform the LSB of any developments in relation to transparency of their enforcement arrangements at this point.

Standard of proof

- 6.8. The CLC, IPS, IPReg and CLSB all use the civil standard of proof for their enforcement and appeals arrangements. The Faculty Office uses the civil standard of proof for its disciplinary arrangements.
- 6.9. The BSB uses the civil standard of proof when it takes decisions on whether there has been a low level breach of its Code, warranting sanctions, which it refers to as "administrative sanctions". The BSB and BTAS use the criminal standard of proof when determining cases of professional misconduct.
- 6.10. The SRA uses the civil standard of proof when it takes decisions about whether there has been a Code breach, whether for an ABS or non-ABS firm. However, cases against non-ABS firms that are adjudicated by the SDT are decided using the criminal standard of proof. Cases against ABS, where the SDT acts as the appellate body are decided using the civil standard. This results two anomalies that we consider work against the consumer interest:
- It is more difficult to make a finding of a Code breach against a non-ABS firm; and
 - for the same Code breach, different standards of proof are used, depending on the ownership structure of the firm.

²⁸ There may be some revision of the existing indicators to reflect developments in best regulatory practice and other observations since the first exercise.

- 6.11. We do not consider that it is acceptable for there to be different standards of proof used by different regulators or by the same regulator for different types of firm; our view is that the civil standard of proof should be used across all legal services regulators. The mismatch between the approach of the SRA and the SDT for instance, carries the risk that firms and individuals subject to SRA decisions could be incentivised to appeal that decision to the SDT because it is likely that the higher standard of proof will be used.²⁹ In addition there is a risk that barristers working in SRA and CLC regulated entities may commit misconduct for which the entity receives a penalty under the civil standard of proof but the barrister does not under the BSB's higher, criminal standard, and they therefore remain free to practise.
- 6.12. Additionally it seems perverse that a barrister or solicitor sitting as a judge may be disciplined by the Judicial Conduct Investigations Office using the civil standard of proof where facts are disputed. However, were a regulator to consider that an additional sanction was appropriate then the facts of the case will be considered by the SDT or BTAS using the criminal standard.
- 6.13. There is case law³⁰ on which the SDT bases its use of the criminal standard of proof. The SDT considers that it is appropriate for it to follow this case law in the absence of a definitive opinion allowing it to do otherwise. However, more recent case law³¹ (albeit in relation to different professions and with different disciplinary panels) shows that even in regulatory matters that could be prosecuted as a criminal offence, the civil standard is appropriate.
- 6.14. The LSB considers that the most appropriate standard of proof is the civil standard and that this should be introduced across all regulators, tribunals and appellate bodies. This may take more time and may involve primary or secondary legislation or precedent-setting decisions. The LSB, through its blueprint programme of work will continue to press for the adoption of the civil standard in its discussions with relevant stakeholders.

Consistency of sanction

- 6.15. While the broad sanction options are the same across most approved regulators and licensing authorities (for example most have the ability to reprimand, issue warnings, place conditions on entities and individuals, impose penalties, suspend and strike off) as the section on current arrangements illustrates, there is variation in financial penalties available across the approved regulators and licensing authorities.

²⁹ This matter was discussed in more detail in the LSB (10 May 2010), *Legal Services Board – Decision Notice issued under Part 3 of Schedule 4 to the Legal Services Act 2007: Solicitors Regulation Authority's application for approval of the Solicitors Regulation Authority's SRA (Disciplinary Procedure) Rules 2010*, http://www.legalservicesboard.org.uk/what_we_do/regulation/pdf/20100511_%20sra_disciplinaryrules_%20decision_notice.pdf

³⁰ See: *A Solicitor* [1993] QB 69 and subsequent cases that have relied on this authority for instance see *Afolabi v SRA* [2012] EWHC 3502 (Admin)

³¹ See for instance *R(Independent Police Complaints Commission) v Assistant Commissioner Hayman* [2008] and *R (A) v Independent Appeal Panel for the London Borough of Sutton* [2009]

- 6.16. In relation to financial penalties, the differentials can be quite substantial, ranging from a few thousand to many millions. Our limited research indicated that there is some variation in the severity of sanctions applied in actual cases, but it was difficult to ascertain without undertaking detailed collection and analysis of the decisions, whether these disparities are down to the circumstances of individual breaches or systemic differentiation in penalty options.
- 6.17. It was also difficult to ascertain from current arrangements (and in the absence of detailed research) whether low penalties encourage large firms to accept the penalty and repeat breaches. We nonetheless consider there is a risk of this. It is important that arrangements should discourage any financial gain or benefit from non-compliance and to minimise the risk from firms gaming the system so that they deliberately do not comply because penalties do not have deterrent weight.
- 6.18. Further research would also need to be undertaken to establish whether sanctions and financial penalties are sufficiently responsive and take into account what is appropriate for the particular offender. There is certainly insufficient evidence as to whether the current system of sanctions in practice can bring all firms consistently into compliance. Overall, we have not perceived that across the approved regulators and the licensing authorities there is a conscious strategy for changing behaviour through penalties.

Fair and effective appeals mechanisms

- 6.19. As with the disciplinary and sanctions processes, there is variation between appeal arrangements. There are 13 different appeals bodies. This effectively means there is no way of ensuring that consistent appeal decisions are made in a fair and open way across all regulators because of the complexity and variations in arrangements.
- 6.20. We took into account the AJTC Principles for Administrative Justice that appeal arrangements must enable people to challenge decisions and seek redress using procedures that are independent, open and appropriate for the matter. We consider that the variations in arrangements mean that some approved regulator appeal arrangements appear to be better at meeting these AJTC principles than others. Nonetheless, generally the appropriate decisions can be challenged and taken to appeal.
- 6.21. In most cases the appeals process is independent from the body or persons who made the original decision. However in some cases it is the regulator that administers the appeal arrangements. This may reduce the appearance of independence.
- 6.22. In conclusion, while appeal arrangements for individual regulators may generally meet best practice principles, the wide variation and complexity of arrangements is not the most cost effective approach and makes it much more difficult to ascertain if consistent, independent and fair decisions are being made.
- 6.23. The LSB would like to see more fundamental re-structuring of sanctions and appeals to achieve economies of scale and greater consistency of decision-making through rationalisation of the current arrangements. This would

include as a minimum the use of the First Tier Tribunal as the single body for all appeals against regulatory decisions.

7. Next steps

- 7.1. This report outlines a number of changes to the sanctions and appeal arrangements for approved regulators and licensing authorities that would help to reduce cost, improve consistency, better protect the public and reduce the risks of regulatory arbitrage. However, the LSB does not have the powers to make all these changes. Therefore, we propose to encourage regulators to make changes where they can, and will continue to try to influence those that have the power to deliver the other changes we consider necessary.
- 7.2. The LSB will use its regulatory standards programme to ensure that the regulators are delivering the required level of transparency of sanctions and appeals arrangements. This will be completed primarily through the regulatory standards self-assessment exercises that will be conducted during 2014/15 and 2015/16. If necessary we may also conduct thematic work on the issues we have identified in this report.
- 7.3. The LSB will continue to advocate the adoption of the recommendations made in our submission to the Ministry of Justice's call for evidence on legal regulation: a blueprint for legal services regulation. This submission made the recommendation that the civil standard of proof should be used consistently across legal regulators and the use of the First Tier Tribunal for all appeals against regulatory decisions.
- 7.4. The LSB occasionally receives representation on these from lawyers and interested members of the public. We will feed these points back to regulators and seeks further information when such information appears to reveal potential systemic issues.

8. Glossary of terms

ABS	Alternative Business Structures. From October 2011, non-legal firms have been able to offer legal services to their customers in a way that is integrated with their existing services. Equally, law firms are now able to develop their portfolios to compete across wider areas compared to previous regulatory restrictions
Approved regulator	A body which is designated as an approved regulator by Parts 1 or 2 of schedule 4, and whose regulatory arrangements are approved for the purposes of the LSA and which may authorise persons to carry on any activity which is a reserved legal activity in respect of which it is a relevant approved regulator
Authorised Person	A person authorised to carry out a reserved legal activity
BME	Black, Minority and Ethnic
BSB	Bar Standards Board – the independent Regulatory Arm of the Bar Council
Consultation	The process of collecting feedback and opinion on a policy proposal
Consumer Panel	The panel of persons established and maintained by the Board in accordance with Section 8 of the LSA to provide independent advice to the LSB about the interests of users of legal services
ILEX Professional Standards Board	Institute of Legal Executives Professional Standards – the independent regulatory arm of the Chartered Institute of Legal Executives
Chartered Institute of Legal Executives	Representative body for Legal Executives
Licensing Authority	An approved regulator which is designated as a licensing authority to license firms as ABS
LSB or the Board	Legal Services Board – the independent body responsible for overseeing the regulation of lawyers in England and Wales
LSA or the Act	Legal Services Act 2007
Regulatory Objectives	<p>There are eight regulatory objectives set out in the Legal Services Act 2007:</p> <ul style="list-style-type: none"> • protecting and promoting the public interest • supporting the constitutional principle of the rule

	<p>of law</p> <ul style="list-style-type: none"> • 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 a citizen's 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 and the duty to the court; and maintaining client confidentiality.
SRA	Solicitors Regulation Authority - Independent regulatory body of the Law Society

Annex A - About the Legal Services Board

The Legal Services Board (LSB) is the independent body responsible for overseeing the regulation of lawyers in England and Wales. We oversee the approved regulators. A number of the approved regulators have established independent regulatory bodies others have not been required to do so. It is the approved regulator or these independent regulatory bodies that directly regulate practising lawyers. In total there are seven organisations directly regulating practising lawyers and they are responsible for regulating around 150,000 Lawyers, nearly 12,000 law firms and over 200 alternative business structures (ABS).

The approved regulators and the LSB are required to act in a manner that is compatible with the regulatory objectives. There are eight regulatory objectives. Although all of the regulatory objectives are relevant to the issue of the imposition of disciplinary sanctions against lawyers and the related appeal arrangements, we consider the most important to be:

- protecting and promoting the public interest
- protecting and promoting the interests of consumers
- supporting the constitutional principle of the rule of law
- promoting and maintaining adherence to the professional principles of independence and integrity; proper standards of work; observing the best interests of the client and the duty to the court; and maintaining client confidentiality.

The regulators and the LSB are required to have regard to the principles by which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. The regulators and the LSB are also required to have regard to best regulatory practice. The requirement to have regard to best regulatory practice implies a continuing evolution of how approved regulators regulate; regulating in a way that is more efficient for those regulated but still protects consumers from detriment.

The Act also gives the LSB a number of responsibilities. These include:

- approving new approved regulators or licensing authorities
- approving the extension of reserved activities regulated by any existing approved regulators or licensing authorities
- approving new and amended regulatory arrangements of approved regulators or licensing authorities.

In addition the Act³² requires that:

- “[t]he Board **must** [emphasis added] assist in the maintenance and development of standards in relation to, (a) the regulation by approved regulators of persons authorised”.

Therefore, we need to be satisfied that approved regulators’ regulatory arraignments are effective and they operate in a way that is consistent with the better regulation principles.

³² Section 4