



**APPLICATION MADE BY ILEX PROFESSIONAL
STANDARDS LTD TO THE LEGAL SERVICES BOARD
TO AMEND REGULATORY ARRANGEMENTS UNDER
SCHEDULE 4, PART 3, PARAGRAPH 20(1)
LEGAL SERVICES ACT 2007**

**APPLICATIONS TO INCREASE THE LEVEL OF FINE
IN ENFORCEMENT PROCEEDINGS**

**SUBMISSION
24 November 2014**

CONTACT DETAILS

Ms Saadia Siddiqui

Investigation Manager

ILEX Professional Standards Ltd

Kempston Manor

Kempston

Bedford

MK42 7AB

Tel: 01234 845768

Email: ssiddiqui@ilexstandards.org.uk

ILEX Professional Standards Ltd company registration number: 6712409

CILEx company registration: RC000850

Introduction

1. This application is submitted by ILEX Professional Standards Ltd (IPS), as the regulatory body for the Chartered Institute of Legal Executives (CILEx), an Approved Regulator under the Legal Services Act. CILEx has approved this application seeking approval by the Legal Services Board for a revised level of fine to be levied against CILEx member, CILEx Practitioner, Approved Manager, and Authorised Entity who are collectively known as Relevant Persons, where disciplinary findings are made against them.
2. The approval IPS seeks is to replace the existing fine level of £3,000 with new fine levels that will be applicable to different categories of Relevant Persons. IPS also seeks approval of guidance to Panellists and decision makers when deciding on the amount of fine to be ordered.
3. This application is duly made under part 3 of schedule 4 of the Act and the rules made under this part by the LSB at paragraphs 20(1) and 23(3) which enables the LSB to approve alterations of Approved Regulators' regulatory arrangements.

IPS new regulatory activities

4. IPS' regulatory remit has been extended to include practice rights in the following areas of legal practice: civil, criminal and family litigation (litigation), immigration, conveyancing and probate. IPS is also awaiting for Parliamentary orders before it commences Entity Authorisation which includes the authorisation for Approved Managers.
5. IPS has received Parliamentary approval for its practice rights in immigration, litigation, probate and conveyancing. This means that IPS now has a new grade of membership which is CILEx Practitioner. Those

who seek immigration practice rights and litigation practice rights must be Chartered Legal Executives; all other CILEx Practitioners will not be required to be a Chartered Legal Executives. These individuals will be able to conduct reserved legal activity and will have greater responsibility and accountability in these areas of legal practice.

6. Authorised Entities will be required to have one or more Approved Managers; of which at least one must be an authorised person and of which one must be a Compliance Manager. The Approved Managers will be responsible for the practice rights delivered by the entity. The Compliance Manger will be responsible for ensuring that all employees and any sub-contractors comply with CILEx and IPS Rules and for practice and accounts management. This is a new regulatory area for IPS.
7. An Approved Manager can be both the authorised person and the Compliance Manager.
8. Where misconduct is alleged IPS will, in the first instance, investigate the entity. Where misconduct is uncovered in regard to a specific individual during the investigation of the entity IPS may investigate them as well; where that person is bound by the CILEx and IPS rules. The supervision of that individual would be investigated during the investigation of the entity.

Suitability of fine level

9. IPS considered whether the current fine level would be adequate in light of IPS' increased remit of regulation arising from its practice rights applications and entity regulation. IPS took the view that it needs to extend its fining powers over its existing and new regulatory community and to increase the level of fine.

10. All members of CILEx are obliged to comply with a Code of Conduct. A copy of the current Code of Conduct (the Code 2010) appears at **Annex 1** to this submission. A copy of the new Code of Conduct that will be in force from 2015 (the Code 2015) appears at **Annex 2** to this submission. The Code 2015 is outcomes focussed and principle based. It is the Code 2015 which will apply to the extended regulatory remit of IPS, in that it will apply to more than the current CILEx member as defined.

11. Where a finding of misconduct is made IPS' range of sanctions include fines. The current fine level for all those who are members of CILEx is a maximum of three thousand pounds (£3,000). Authority for fines is provided for within the current Investigation, Disciplinary and Appeals Rules, 4 January 2010 (IDAR 2010) at Rule 46 (6) (b) (i). A copy of the IDAR 2010 appears at **Annex 3** to this submission. The Investigation, Disciplinary and Appeals Rules have been revised and approved by the LSB and will come into force around January 2015 (IDAR 2015). Rule 30 (5) (b) (i) of the IDAR 2015 provides the authority to fine Relevant Persons. A copy of the IDAR 2015 appears at **Annex 4** to this submission.

12. The proposed fine level has been categorised as follows:
 - Up to £100,000 for CILEx members.
 - Up to £50 million for CILEx Practitioners.
 - Up to £50 million for Approved Managers.
 - 0.5% of annual domestic turnover, up to 5% of annual domestic turnover or up to a maximum of £250 million whichever is greater.

13. The new fine level has been approved by the IPS' Board and CILEx Council.

Current arrangements for fines

14. The current grades of membership to whom fines are applicable are Student, Affiliate, Associate, Graduate, Fellow and Associate Prosecutor. Under the Legal Services Act 2007, Fellows and Associate Prosecutors are authorised persons within the meaning of S18 the Act.
15. The range of fine is limited to up to £3,000. Going forward IPS will regulate, individuals with increased practice rights and entities providing services direct to the public as well as those who provide services under supervision of authorised persons. These individuals who have gained authorisation may also be supervising other employees.
16. There are three stages at which a fine can be imposed on a CILEx member these are as follows:
 - The first stage is after a determination by consent which is where the CILEx member accepts their misconduct and agrees to a sanction. One of these sanctions is a fine.
 - The second stage is after a finding of misconduct by the Disciplinary Tribunal.
 - The third stage is after an Appeal Panel hearing where there is the power to vary the finding of the Disciplinary Tribunal in a successful appeal.
17. In deciding what level of fine to impose on a CILEx member where allegations have been proved, the Tribunal and Appeal Panel are guided by a number of general considerations.
18. These considerations are within the existing guidance called the Fitness to Practise Procedures Manual. An extract of which has been reproduced below:

- the nature and seriousness of the breach,
- the duration of the breach,
- whether there were any aggravating or mitigating factors,
- the impact of the conduct on the client or complainant,
- whether the member was reckless or dishonest,
- whether the member admitted the breach,
- insight or remorse shown by the member,
- steps taken by the member to rectify the breach,
- the personal circumstances of the member,
- mitigation advanced by the member,
- references as to the conduct of the member,
- the member's prior conduct.

19. The existing guidance also provides for more specific considerations when deciding on whether to impose a fine as the sanction, some of which are the same as the general considerations above. This guidance is as follows:

Mitigating Factors

- the member may continue as a member of the profession
- there was no personal gain to the member
- there was no financial impropriety
- there was no dishonesty or recklessness
- there was no abuse of trust
- the member has shown some insight
- the member has shown remorse.

Aggravating Factors

- the member should not be able to continue as a member of the profession
- the member made a personal gain by the misconduct

- there was financial impropriety
- there was dishonesty or recklessness
- there was abuse of trust
- the member has not shown insight
- the member has not shown remorse.

The reasons for and nature of the proposed changes to the fines arrangements

20. A fine is a financial penalty imposed on a CILEx member in order to act as a deterrent and to encourage a positive change in behaviours to improve best practice. In order to maintain the effectiveness of fines, an increase in the fine level will better reflect the change in the regulatory remit of IPS. The new remit will include, as already mentioned, entity regulation, regulation of managers within entities and practitioners authorised to conduct reserved legal activities.
21. Given the diversity of IPS' regulated community we will look at guidance when deciding the level of fine, including the means and ability of that individual to pay. The current CILEx membership is such that it attracts school leavers, part-time workers and persons that have had previous careers amongst others. CILEx members come from an array of backgrounds and are diverse in terms of their age, ethnicity and experience. Therefore it is essential that IPS applies a consistent approach to the level of fine it can impose.
22. IPS has developed a fines policy (the Policy) that takes into account IPS regulatory objectives and the increased scope of its regulation in light of practice rights approval and forthcoming entity regulation. A copy of the Policy appears at **Annex 5**.

23. The Policy details the categories of fines developed by IPS to deal with the different types of Relevant Person. The new level of fines proposed are:
- Up to £100,000 for CILEx members.
 - Up to £50 million for CILEx Practitioners.
 - Up to £50 million for Approved Managers.
 - 0.5% of annual domestic turnover, up to 5% of annual domestic turnover or up to a maximum of £250 million whichever is greater.
24. IPS developed three areas of consideration that decision makers may take into account in reaching their decisions as to the level of fine to be imposed. These are 'Seriousness', 'Adjustments', and 'Proportionality'. The reason for doing so is to provide some guidance to decision makers and transparency to its regulated community about the level of fine that may be ordered against them in misconduct cases.
25. During the development stage of the Policy, IPS considered the following: the purpose of fines as a sanction, outcomes focussed regulation, what other approved Regulators' fining powers are and what the impact might be on the IPS regulated community and the public.
26. It is submitted that the proposed categories of fine and the determining factors will provide the consistent approach to fines that regulation requires. This is particularly important given findings made in Equality and Diversity reports relating to the enforcement activities of Approved Regulators.
27. The existing fine level does not take into account the future increased level of risk and responsibility that Relevant Persons will have towards the public, when they obtain new practice rights and when they run

their own entities. For example in conveyancing transactions there are substantial sums of money that are at risk and £3,000 in the opinion of IPS would not be a deterrent in situations such as these.

28. It is for this reason the existing fine level and considerations are inadequate to deal with the increased regulatory ambit of IPS.
29. The nature of the changes, IPS is proposing are as follows:
 - To introduce a greater range of fining limit to accommodate the varied make up of those Relevant Persons that IPS will regulate in the future.
 - To create consistency for IPS decision makers by the introduction of additional guidance.
 - To introduce comparable levels of fines to other regulators where possible.
30. Each of the changes is set out in detail below and identifies the current arrangements, the proposed new arrangements, the reasoning for the change and supporting evidence where applicable.

Introduce a greater range of fine limit

31. The fine limit has been categorised to accommodate the different types of Relevant Person that IPS will regulate. It has been set out this way to create clarity about the amount of fine that can be levied according to the type of Relevant Person, against whom a finding is made and their level of responsibility.
32. The fine for individual CILEx members has been increased from £3,000 to, up to £100,000. This level of fine will apply to CILEx members who do not have practice rights. They will be persons who conduct reserved legal activities under supervision or work in the unreserved sector such

as will writers. The increase in fines for this sector of IPS regulated community was necessary to reflect the work that CILEx members undertake where clients may be particularly vulnerable. An increase in the fine level will ensure that there is an adequate deterrent. It will bring consistency between legal services regulators. It will also demonstrate to the public and consumers that IPS has considered the risks that its regulated community may pose to their interests and that it is able to protect them adequately.

33. The fine level of up to £50 million for CILEx Practitioner and Approved Managers is a new fine level for a new group of regulated individuals. The level of fine reflects their level of responsibility in the roles that they will undertake.
34. IPS has introduced fines against entities for the first time. The fine levels will be 0.5% of annual domestic turnover, up to 5% of annual domestic turnover or up to a maximum of £250 million whichever is greater. The level of fine is intended to enable IPS to have suitable powers for all sizes of entity including large practices. The fine is expressed as a maximum level to enable IPS disciplinary panels to make appropriate orders according to the size of the Authorised Entity.

Create consistency for IPS decision makers

35. Under the current rules, an IPS Investigation Manager can by way of a determination by consent agree with a CILEx member a sanction including level of fine, where a CILEx member has fully accepted their misconduct. Where misconduct is not admitted cases must be referred to the Professional Conduct Panel (PCP) who may then refer the matter to Tribunal for a full hearing. This procedure will be retained.

36. In order to maintain consistency between decisions made by the Investigation Manager (approved by the PCP) and the Tribunal the determining factors provide for a systematic approach to fine levels and the considerations to take into account.

To introduce comparable levels of fines to other regulators where possible

37. In the course of the development of the outcomes, IPS evaluated the approach taken by other legal services regulators along with regulators of other non-legal sectors in reaching its views on the amount of fine to levy. It also considered established fining levels and fines applied by the courts of England and Wales. IPS has set levels similar to some of these establishments, in particular the CLC who have balanced their fine level between that of the SRA and the SDT.
38. IPS considered the fine levels of the Bar Standards Board (BSB) up to £15,000, the Solicitors Regulatory Authority (SRA) up to £2,000 (although up to £10,000 by the SRA has been consulted upon), The Solicitors Disciplinary Tribunal (SDT) has unlimited fine levels, the Council for Licensed Conveyancers (CLC) up to £250 million categorised by status of the licensed conveyancer and the Intellectual Property Regulation Board (IPREG) up to £5,000.

Consultation

39. The revised policy has involved consultation with stakeholders which was open for 10 weeks closing on 22 April 2014.
40. During the consultation, consultees were asked to provide comment on the different levels of fines and guidance.

41. IPS has consulted key stakeholders on its proposed fines policy which include: CILEx members, Approved Regulators, consumer groups and representative bodies. IPS wrote directly to the Approved Regulators and to consumer groups. CILEx members were informed of the consultation by uploading it to the IPS website on 10 February 2014; to allow members to respond to it. There was also an article about the consultation in legal futures on 12 February 2014.
42. IPS specifically consulted CILEx who at their Council meeting supported the proposals and at subsequent Council meetings approved the Policy and the fine levels. IPS received two responses.
43. The responses to the consultation have been analysed and considered by IPS. A copy of the consultation responses and IPS comments upon responses appear at **Annex 6**.
44. During the consultation process IPS asked the question as to whether respondents agreed to the determining factors. Overall the responses were positive. There was some attention drawn to whether turnover was a suitable means to assess an Authorised Body's financial status but IPS considers this will easily be addressed when applying the determining factors on personal circumstances and their ability to pay.
45. The consultation provided general support for an increase in the fine levels and the approach to the determining factors. Some helpful comments were provided which IPS has used to redevelop and improve the Policy. These suggestions were that positive consideration be given to the removal of benefit and gain by a Relevant Person. This has therefore been added to the proportionality determining factors These have been approved by IPS board and CILEx board.

46. There was some concern over whether the fines policy in regard to the upper limit for Authorised Bodies would discourage market entry, innovation and choice. However IPS considers these levels are appropriate to ensure that if things go wrong it has the suitable powers to deal with them. It is no different to the risk of civil and criminal proceedings occurring which does not discourage innovation and choice.
47. There was some misunderstanding by the Legal Services Consumer Panel who appeared not to fully appreciate the breadth of the CILEx membership and why for instance Students might face a fine. The reason Students may face a fine is because under the CILEx route to qualification most students will be working within a legal practice while studying. Therefore the level of risk will be the same or similar to other CILEx members.

Transitional arrangements

48. IPS is aware that where misconduct occurred under the Code 2010 there may be some confusion as to which fine level is to be applied. It is proposed that the fine level imposed will be the level which is in force at January 2015, unless notice of the misconduct investigation took place under the IDAR 2010. The transitional arrangements are outlined in the IDAR 2015 at Rule 42. They enable IPS to conclude cases that are already before decision making panels under the 2010 Rules through that procedure as opposed to moving the proceedings to the new rules

Equality Impact Assessment

49. During the consultation process, no consultee raised the possibility that the fines policy may have a discriminatory effect on BAME Relevant Persons.

50. The impact of the fines policy on BAME will be kept under review. IPS' policy on the collection and use of equality and diversity data requires it to analyse data each year to assess any adverse impact on any protected group under the Equality Act 2010.

THE LEGAL SERVICES ACT 2007

The Regulatory Objectives

51. The Legal Services Act 2007 sets out eight objectives, which it is the duty of approved regulators to promote. CILEx is an approved regulator under the Legal Services Act 2007. IPS' application for the changes to the fine level supports the regulatory objectives set out under the Legal Services Act 2007.

52. This section identifies how the regulatory objectives have been met.

Protecting and promoting the public interest and the interests of consumers

53. The IPS proposed increase in the sanction fine level has been developed to protect and promote the interests of consumers of legal services and the public interest.
54. The public interest will be protected by the actual increase in fine level which will reassure them that if things go wrong IPS has adequate powers to address that wrong doing.
55. The Policy has been developed to ensure there is transparency and consistency in decision making. The Policy states clearly the level of fine and the factors that will be considered when deciding on the amount of fine to be ordered.

56. The Policy also takes into account the wider regulatory sector and it brings consistency between regulators.

Supporting the constitutional rule of law

57. The Policy has been drawn up to support the principles of the Code 2015. The Code 2015 is outcomes focussed and states that membership and regulated practice carries privileges and responsibilities. The Code 2015 requires members to uphold 9 principles. Principle one requires members to uphold the rule of law and impartial administration of justice. As part of IPS' commitment to this regulatory objective one of the considerations in developing the Policy was for it to act as a deterrent to individuals or entities knowingly or recklessly breaching the Code 2015.

Improving access to justice

58. The Policy does not directly impact on this objective.

Promoting competition in the provision of services provided by Authorised Persons

59. IPS has considered whether increasing the fine level will have a negative impact on competition, however we consider that it will encourage best practice amongst Relevant Persons and compliance with the Code 2015.

Encouraging an independent, strong, diverse and effective legal profession

60. CILEx is the most accessible route into the legal profession which is truly open to all, whatever their background. This flexibility allows for the

widest possible access to qualification as a lawyer. Over 74% CILEx members are female, 85% come from families where neither parent went to university and 12% are from Black, Asian and minority ethnic backgrounds. The social and economic backgrounds of CILEx Practitioners increase the likelihood of consumers seeking legal advice and assistance from practitioners with similar backgrounds.

61. The fines policy is designed to take into account proportionality of sanction through consideration of circumstances on a case by case basis and an Relevant Persons ability to pay.

Increasing public understanding of the citizen's legal rights and duties

62. Making the public aware of the fine level will reassure them that IPS has the necessary powers available to it to deal with misconduct. It will also help to bring some consistency in sanctions across the approved regulators so that consumers can expect outcomes that are similar regardless of legal service provider or regulator.

Promoting and maintaining adherence to the professional principles

63. The proposed increase in the fine level for CILEx members and Relevant Persons going forward are considered by IPS to have a neutral effect on these regulatory objectives.

BETTER REGULATION PRINCIPLES

64. IPS' proposed scheme is consistent with the better regulation principles.

Proportionate

65. The proposed fine levels demonstrate a proportionate approach to how fines will be levied. In developing categories for the regulated community that fines will be levied at IPS recognises that not all Relevant Persons will have the same legal responsibilities. In providing clear determining factors IPS has ensured that a consistent approach will be taken with the added advantage of flexibility. Practically it will allow the Disciplinary Tribunal to consider that similar facts of a case may, due to personal circumstances or the effect on a consumer, result in different fine levels.

Accountable

66. The fines policy will be applied within a framework of Rules under the IDAR. These Rules ensure that decision making is made by either an independent Tribunal made up of two lay panel members and one professional panel member and where decisions must be by a majority. Where a determination by consent is entered into this is done with the agreement of the Relevant Person. No one person has responsibility for deciding the level of fine. Where a fine is ordered by the Tribunal there is a right of appeal available to all Relevant Persons

Consistent

67. The new fines policy brings increased consistency in decision making by focusing specifically on level of fine between the categories of Relevant Persons IPS regulates.

Transparent

68. IPS has taken a transparent approach to the fine levels. The public, consumers and the regulated community will be clear as to what they can expect should things go wrong.

69. The fine policy and sanction guidance will be clearly stated in the IDAR handbook and will be available on IPS' website. Consumers and the public will be certain of the level of fine applicable and to which type of Relevant Person it will apply. It will also be clear to the IPS regulated community.
70. IPS has also consulted on the changes as outlined in the section headed consultations.

Targeted

71. IPS has developed a fines policy that has been targeted at the change in regulatory remit of IPS and ensuring that IPS has sufficient deterrent powers to protect the interests of the public and legal consumers

Impact on other regulators

72. IPS consulted the approved regulators as defined by the Legal Services Act 2007, on the proposed changes. Only one regulator responded, and they supported the proposals.
73. IPS therefore concludes that the impact on other regulators is negligible.

Conclusion

74. In conclusion the changes that IPS is proposing are as follows:
 - To introduce a greater range of fining limit to accommodate the varied make up of those Relevant Persons that IPS will regulate in the future.
 - To create consistency for IPS decision makers by the introduction of additional guidance.

- To introduce comparable levels of fines to other regulators where possible.

Next Steps for implementation

75. IPS will implement the changes once it becomes an entity regulator.

Annexes

Annex 1: Code of Conduct 2010

Annex 2: Code of Conduct 2015

Annex 3: The Investigation, Disciplinary and Appeals Rules 2010

Annex 4: The Investigation, Disciplinary and Appeals Rules 2015

Annex 5: Proposed Fines Policy 2015

Annex 6: IPS fines consultation analysis