

<b>To:</b>	Legal Services Board	
<b>Date of Meeting:</b>	17 July 2018	<b>Item:</b> Paper (18) 35

<b>Title:</b>	Disciplinary and enforcement processes	
<b>Workstream:</b>	Promoting the public interest, through ensuring independent, effective and proportionate regulation	
<b>Author / Introduced by:</b>	Chris Nichols, Head of Regulatory Performance Tom Peplow, Regulatory Policy Manager	
<b>Status:</b>	Protect	

<b>Summary:</b>
<p>The paper provides an overview of the enforcement landscape in the legal sector. Highlighting the commonalities and differences between the regulators' approaches, and the key enforcement issues the LSB may need to address over the next year. These are:</p> <ul style="list-style-type: none"> <li>a) changes to the standard of proof in enforcement processes in the solicitor and barrister professions</li> <li>b) [REDACTED]</li> <li>c) [REDACTED]</li> <li>d) delivery of the expected outcomes under the enforcement standard in the new regulatory performance framework, including enforcement work in response to the CMA Market Study.</li> </ul>

<b>Recommendations:</b>
The Board is invited to <b>note</b> the contents of this paper.

<b>Risks and mitigations</b>	
<b>Financial:</b>	N/A
<b>Legal:</b>	N/A
<b>Reputational:</b>	The impact of ineffective enforcement functions on consumer and public confidence in the legal sector requires the LSB to be alert to the potential risks highlighted in the paper.
<b>Resource:</b>	The paper is for information however should action be required sufficient resource will be allocated to it.

Consultation	Yes	No	Who / why?
<b>Board Members:</b>		√	
<b>Consumer Panel:</b>		√	

<b>Others:</b>	
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<b>Freedom of Information Act 2000 (Fol)</b>		
<b>Para ref</b>	<b>Fol exemption and summary</b>	<b>Expires</b>
Summary box: bullets B and C Para 5 – last sentence Para 9, last sentence Para 12 Para 15 last sentence Para 16(b) last sentence Para 18 Para 20 - last 2 sentences Para 32 Para 41 bullets b) and c)	S36 Free and frank advice <u>or</u> intended to promote a free and frank exchange of views for the purposes of deliberation by the Board	N/A
Para 34 – second sentence Para's 36-38 Para 27 and footnote 7	Section 22: information intended for future publication	

## LEGAL SERVICES BOARD

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### Disciplinary and enforcement processes

#### Introduction

1. As the key tool to deliver compliance with regulatory arrangements and penalise non-compliance, effective enforcement functions are vital to consumer and public confidence in regulated legal services. Legitimate and effective enforcement procedures also give regulators and members of the profession confidence that the decisions reached are fair, proportionate, and legal.

#### Legal services regulation enforcement landscape

2. The charts attached at **Annex A** illustrate the enforcement processes in each of the legal services professions (reference is also provided on the charts to the appropriate regulations). These indicate common approaches and stages. However, they also show slight differences amongst regulators' processes and decision making. Key themes are highlighted below.

##### *Investigation*

3. Regulators' enforcement processes all start with an investigation stage which can either be triggered by:
  - a. a complaint being made
  - b. self-reporting of non-compliance or an individual 'blowing the whistle'
  - c. the failure of a regulated individual or entity to comply with an information requirement
  - d. an irregularity being exposed during a supervisory visit.
4. The evidence gathered is considered to determine whether there is a case to answer. Following this consideration, the issue may be resolved through enhanced supervision, mutual agreement, the provision of advice, or a minor sanction; alternatively, the matter may be referred for prosecution.

##### *Standard of proof*

5. The March 2014 LSB report on regulatory sanctions and appeals processes identified consistent use of the civil standard as best practice.<sup>1</sup> Since then the LSB's stated policy position has been that the civil standard should be introduced across all regulators, disciplinary tribunals and any appellate bodies. This is reflected in the revised regulatory performance framework.

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<sup>1</sup> Regulatory sanctions and appeals processes - March 2014  
[http://www.legalservicesboard.org.uk/projects/thematic\\_review/pdf/20140306\\_LSB\\_Assessment\\_Of\\_Current\\_Arrangements\\_For\\_Sanctions\\_And\\_Appeals.pdf](http://www.legalservicesboard.org.uk/projects/thematic_review/pdf/20140306_LSB_Assessment_Of_Current_Arrangements_For_Sanctions_And_Appeals.pdf)

- [REDACTED]
6. The solicitor, barrister and veterinary professions are now the only significant branches of professional regulation in England and Wales where the criminal standard is still applied. There are however developments planned in the legal sector.
  7. In November 2017, the Bar Standards Board (BSB) confirmed that, subject to approval from the LSB, it would apply the civil standard to alleged breaches of its Code occurring after 31 March 2019. We expect to receive this rule change application later in 2018.
  8. The BSB's standard of proof consultation response document sets out the issues it has considered.<sup>2</sup> It provides a good indication of the likely justification for the change that the BSB will submit in its application. This is that it would be in the public interest to change the standard of proof, and that the issues and concerns raised in its consultation do not provide a sufficiently strong basis or justification for the BSB, as a public interest regulator, to retain the criminal standard.
  9. The Solicitors Disciplinary Tribunal (SDT) applies the criminal standard to matters determined before it. However, on 16 July it is due to publish a consultation on the standard of proof as part of the planned review of its scheme rules taking place in summer 2018. [REDACTED]
  10. The Solicitors Regulation Authority (SRA) already applies the civil standard to disciplinary and regulatory findings made internally. It has also made clear its support for the consistent use of the civil standard for all solicitor disciplinary matters, whether heard by the SRA or the SDT.
  11. The changes discussed above will require LSB approval. Sufficient justification for the changes, as well as the applicant's consideration of any intended or unintended consequences of them, will need to be provided in any rule change applications.

12. [REDACTED]

#### *Adjudication*

13. All of the regulators have their own adjudication functions which sit outside their executive functions, although where these sit in the regulators' overall hierarchies of decision making varies. For the BSB and the SRA their

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<sup>2</sup> Standard of Proof Consultation – BSB Response  
[https://www.barstandardsboard.org.uk/media/1923922/standard\\_of\\_proof\\_consultation\\_-\\_bsb\\_response\\_-\\_final.pdf](https://www.barstandardsboard.org.uk/media/1923922/standard_of_proof_consultation_-_bsb_response_-_final.pdf)

adjudication functions sit with independent external tribunals. For the other regulators the function sits with bodies run by the regulators. A table setting out the relevant bodies for each regulator and the scale of enforcement activity that they undertake is provided in **Annex B**.

14. The adjudication bodies' hearings are public unless parties successfully apply for them to be heard in private. They also all have a full range of sanctions available to them, ranging from issuing advice to disqualification. They are also able to impose financial penalties.
15. In the past, there have been suggestions that the smaller regulators should pool together to use a single tribunal. Nothing has come of this though and there are no indications of this being pursued at present. [REDACTED]

[REDACTED]

#### Solicitors Disciplinary Tribunal

16. The LSB has specific statutory responsibilities with respect to the SDT:
  - a) Approval of the SDT budget – this is a matter reserved to the Board, which it considers each October. A tripartite MoU (LSB/The Law Society/Ministry of Justice) sets out the process for setting and approving the budget; this is due to be reviewed in 2019.
  - b) Approval of changes to scheme rules – this is delegated by the Board to the Chief Executive and treated in the same way as applications submitted by approved regulators for changes to their regulatory arrangements. As noted above, the SDT is due to consult on changes to its scheme rules, including on standard of proof. [REDACTED]
17. In addition, the SDT voluntarily produces a KPI report for the LSB each year - the executive relays key performance information to the Board via the CEOs update.

18. [REDACTED]

#### *SRA internal fining powers*

19. The SRA's internal fining powers remain hugely disproportionate between non-ABS and ABS - currently £2000 for solicitors or non-ABS<sup>3</sup>, compared to £50m for an individual in an ABS or £250m for an ABS. Positively, other licensing authorities have significant fining powers whether a case involves an ABS or non-ABS firm.

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<sup>3</sup> If the SRA consider that a greater fine is appropriate a referral must be made to the SDT which has unlimited fining powers.

20. In 2014 the SRA consulted on increasing its internal fining powers and the LSB submitted a response supporting an increase to a commensurate level.<sup>4</sup> The consultation closed with mixed support.<sup>5</sup> [REDACTED]

### *Appeals*

21. Appeal mechanisms within legal regulation are diverse and multi-layered. There are a number of different bodies conducting appeals across the sector, with several different bodies for 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, BTAS, the First Tier Tribunal of the General Regulatory Chamber, the Upper Tribunal and the High Court.<sup>6</sup>
22. 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 Alternative Business Structure (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 process.

### *Legal Ombudsman role*

23. If in the course of investigating a service complaint the Legal Ombudsman has cause to be concerned about disciplinary or other issues that go beyond service issues, it has established channels for raising these issues with the relevant regulatory body. Similarly, the regulators have processes in place for referral to the Legal Ombudsman of any service complaints they become aware of.

### *Transparency*

24. Maintaining consumer and public confidence in regulated legal services requires not only that regulators have effective enforcement functions but that they are seen to be effective.
25. Part of the regulators' response to the CMA market study is to make disciplinary information more accessible to the public to inform consumer choice. The BSB already demonstrates good practice by integrating disciplinary sanctions within its professional register and it is hoped that other regulators will follow suit. The SRA, for example, has said it will include disciplinary sanctions in the digital register it plans to launch in mid-2019.

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<sup>4</sup> LSB response to the SRA on its consultation paper on increasing its financial penalty powers for non-ABS firms

[http://www.legalservicesboard.org.uk/what\\_we\\_do/responses\\_to\\_consultations/pdf/20140206\\_LSB\\_Response\\_To\\_SRA\\_Consultation\\_On\\_Financial\\_Penalty\\_For\\_Non\\_ABS.pdf](http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/20140206_LSB_Response_To_SRA_Consultation_On_Financial_Penalty_For_Non_ABS.pdf)

<sup>5</sup> SRA response to its consultation on increasing the SRA's internal fining powers

<https://www.sra.org.uk/sra/consultations/internal-fining-powers.page>

<sup>6</sup> The General Regulatory Chamber of the First-tier Tribunal and the Upper Tribunal were created in 2008 as part of a programme, set out in the Tribunals, Courts and Enforcement Act 2007, to rationalise the tribunal system. They are administered by Her Majesty's Courts and Tribunals Service.

26. In the longer-term, the regulators are exploring the feasibility of creating a single digital register, accessible via the Legal Choices website, where information on all regulated individuals and firms across the professions will be available to consumers in one place.

#### *Collaborative working*

27. [REDACTED]

28. While the collaborative working exercise resulted in the introduction of MoUs and operational protocols to effectively support the sharing of information between regulators' enforcement functions, thinking on the bigger picture issues has largely not been taken any further.<sup>7</sup> Should there be appetite for institutional reform, work relating to EU exit is likely to impede this in any case, at least in the short-term.

#### **Regulatory performance**

29. In the revised regulatory performance framework we assess the regulators' performance under five function based standards covering the core regulatory functions carried out by the regulators.<sup>8</sup> One of the five standards is enforcement. This is an area given considerably more attention in the revised framework than the previous one.

30. We now list the following six outcomes that we expect the regulators to achieve under their enforcement functions. Alongside these expected outcomes we also provide examples of evidence that indicates delivery of the outcomes.<sup>9</sup>

<b>E1:</b> The regulator has an accessible and clear process so that concerns can be raised about an authorised person which sets out who a person can complain to, the process that will be used and the possible outcomes.
<b>E2:</b> The regulator ensures that all complaints are reviewed on receipt and serious cases are prioritised and, where appropriate, referred to an interim orders panel.
<b>E3:</b> The enforcement process and any associated appeals process is: consistent; independent; risk-based; evidence-based; documented; transparent; proportionate; and focused on consumer protection, maintaining professional principles and protecting the public interest.
<b>E4:</b> The enforcement and any associated appeals process is timely taking into account the complexity and type of case, and the conduct of both sides.

<sup>7</sup> [REDACTED]

<sup>8</sup> Regulatory performance assessment process  
[http://www.legalservicesboard.org.uk/Projects/developing\\_regulatory\\_standards/Regulatory\\_Standards\\_Action\\_Plans\\_2015\\_16.htm](http://www.legalservicesboard.org.uk/Projects/developing_regulatory_standards/Regulatory_Standards_Action_Plans_2015_16.htm)

<sup>9</sup> LSB Regulatory performance assessment standards  
[http://www.legalservicesboard.org.uk/news\\_publications/LSB\\_news/PDF/2017/Regulatory\\_Performance\\_Standards\\_December\\_2017\\_\(final\).pdf](http://www.legalservicesboard.org.uk/news_publications/LSB_news/PDF/2017/Regulatory_Performance_Standards_December_2017_(final).pdf)

**E5:** During the process, and at each key decision stage, the regulator keeps those involved and any others affected by the case (for example in cases of dual regulation, the regulator, the provider of information and those under investigation) informed of progress, unless it is not appropriate to do so.

**E6:** The regulator clearly explains the reasons for its decisions to take or not to take things forward at each stage of the process.

*Current assessment of the regulators enforcement functions*

31. Our work implementing the revised framework has included an initial assessment of the regulators' performance against the expected outcomes under all of the standards, including the expected outcomes under the enforcement standard.

32. [REDACTED]

33. The revised regulatory performance framework which supports greater ongoing targeted monitoring than took place under the previous framework will be used to monitor performance. Where we do not have sufficient assurance of how a regulator is addressing failure to deliver an expected outcome, we will consider what would be the most appropriate regulatory approach to tackle this, for example, an agreed action plan.

**Enforcement review**

34. We are also currently completing an in-depth review of the 'end to end' (from initial complaint to imposition of sanction) enforcement processes of the BSB and the SRA. [REDACTED]

[REDACTED] The findings from the enforcement review will instead feed into our work implementing the revised regulatory performance framework.

35. The initial stage of the review, engagement with the BSB and the Bar Tribunal and Adjudication Service, has been completed. The final stage, engagement with the SRA and the Solicitors Disciplinary Tribunal Service, is currently underway.

*Initial findings*

36. [REDACTED]

37. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

38. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

#### *Output*

39. The final report will provide increased clarity on the BSB and the SRA's enforcement processes, as well as significant intelligence for our future work with all of the regulators on their enforcement functions. The Board will have an opportunity to comment on the final report before publication later this year. The published report will be used to highlight best practice identified in the BSB and the SRA's processes, as well as any best practice that we identify from wider research on the enforcement processes of other regulators' both inside and outside the legal sector.

#### **LSB enforcement policy**

40. Although, as an oversight regulator, our work is different from the frontline regulators' work directly with regulated professionals. For reference, some information on the LSB's Statement of Policy on Enforcement is provided below.<sup>10</sup>

- a. The LSB can launch an investigation if it decides one or more conditions specified in the Act are satisfied, for example, an approved regulator has failed to comply with the LSB's internal governance rules.
- b. The evidence the LSB will rely on is likely to come from many different sources including approved regulators, other stakeholders, market research and its regulatory performance work.
- c. The LSB will always take into account the desirability of resolving matters informally, and consider whether, in the circumstances of the case, it would be appropriate to do so.
- d. The LSB will also only exercise its enforcement powers if in its judgement an approved regulator's act or omission is unreasonable
- e. Reports of investigations and communications regarding formal or informal enforcement action will always be published, save for exceptional circumstances.

#### **Key issues**

41. The key enforcement issues which are likely to need to be addressed over the next year or so are:

- a. changes to the standard of proof in enforcement processes in the solicitor and barrister professions

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<sup>10</sup> LSB Statement of Policy on Enforcement – April 2018  
[http://www.legalservicesboard.org.uk/what\\_we\\_do/regulation/reg\\_pol.htm](http://www.legalservicesboard.org.uk/what_we_do/regulation/reg_pol.htm)

- b. [REDACTED]
- c. [REDACTED]
- d. delivery of the expected outcomes under the enforcement standard in the new regulatory performance framework, including enforcement work in response to the CMA Market Study.

**Recommendation**

38. The Board is invited to discuss and note the contents of the paper.