

Compliance and Enforcement: Statement of Policy

*Decision document on compliance and
enforcement strategy and Statement of Policy on
enforcement powers*

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1. Executive Summary

- 1.1. The Legal Services Board (the “**LSB**”) was created by the Legal Services Act 2007 (the “**Act**”) and is responsible for overseeing legal regulators, (referred to as the Approved Regulators in the Act) in England and Wales. The LSB’s mandate is to ensure that regulation in the legal services sector is carried out in the public interest and that the interests of consumers are placed at the heart of the system.
- 1.2. The Act gives the LSB and the Approved Regulators the same Regulatory Objectives and a requirement to have regard to the Better Regulation Principles.
- 1.3. The Act requires the LSB to make a Statement of Policy about how it will use the enforcement powers that the Act gives it. We are also required to set the maximum financial penalty that we can impose on an Approved Regulator.
- 1.4. In August 2009 we consulted about what should be in our Statement of Policy, at what level we should set the maximum financial penalty and the content of our enforcement rules generally; the consultation closed in October. This Document sets out our Statement of Policy and explains how we have considered the main points raised in response to the consultation and the changes we consider it appropriate to make in the light of those responses.
- 1.5. Our starting point throughout is that we expect to work in partnership with the Approved Regulators to achieve the Regulatory Objectives. Given that those objectives are shared between us, we expect questions of statutory enforcement to arise only rarely.
- 1.6. When such questions do arise, our priority will be to ensure that corrective action is taken rapidly to return the Approved Regulator concerned to compliance. Our first approach is therefore likely to be to seek to reach agreement informally on the necessary action and to monitor its implementation closely.
- 1.7. However, the Act envisages that there may be circumstances when a wider range of sanctions are necessary to ensure proper protection of the public and to minimise risk to the Regulatory Objectives. The Statement of Policy in Section 2 of this Document therefore sets out how we would use our powers in a proportionate way to ensure that Approved Regulators discharge their obligations.

2. Section 49(1) of the Legal Services Act 2009: Statement of Policy

- 2.1 This Statement of Policy sets out the way in which the LSB will exercise the enforcement functions given to it by the Act. It also explains the approach we are likely to take to enforcement and how we will conduct our investigations, including how we will gather evidence and information in order to inform our decisions.
- 2.2 As an oversight regulator the LSB's focus will be on the activities of the Approved Regulators¹. We will be concerned particularly with the outcome that Approved Regulators' activities have on consumers and those who are regulated.
- 2.3 The LSB must make certain rules about aspects of its enforcement functions. These are included as Annexes to this Document and are cross-referenced in the relevant Sections. Where the Act allows the making of oral and/or written representations in relation to the LSB's enforcement functions, the rules applying to them are at Annex 1.

Background

- 2.4 The Act provides the LSB with a range of enforcement tools that it can use when it identifies that:
- an act or omission by an Approved Regulator has had or is likely to have an adverse impact on one or more of the Regulatory Objectives;
 - an Approved Regulator has not complied with any requirement under the Act (including a direction by the LSB) or any other enactment;
 - an Approved Regulator has failed to ensure its regulatory functions are not prejudiced by its representative functions;
 - an Approved Regulator has failed to ensure that decisions relating to the exercise of its regulatory functions are, so far as reasonably practicable,

¹ For the avoidance of doubt, other than cancellation of designation as an Approved Regulator, this Statement of Policy will also apply to the way in which the LSB will, in due course, exercise its enforcement powers against Approved Regulators in their capacity as Licensing Authorities for Alternative Business Structures. The LSB is consulting separately on its Statement of Policy on the cancellation of designation as a Licensing Authority.

taken independently from decisions relating to the exercise of its representative functions; and/or

- an Approved Regulator has failed to comply with practising fee or internal governance rules.

2.5 The Act says that the LSB must make a Statement of Policy about the exercise of its enforcement powers of:

- performance targets and monitoring;
- directions;
- public censure;
- financial penalties;
- intervention directions; and
- cancellation of designation as an Approved Regulator.

2.6 An overview of these enforcement powers in diagrammatic form is set out at Annex 7.

2.7 The Act also obliges the LSB to make a Statement of Policy about the cancellation of designation of a body as a Licensing Authority. The LSB is consulting separately on this Statement of Policy.

2.8 In preparing this Statement of Policy, the LSB has:

- had regard to the principle that its principal role is the oversight regulator of the Approved Regulators;
- taken into account the desirability of resolving informally matters which arise between the LSB and an Approved Regulator;
- specified how we will comply with the requirement to be proportionate, consistent, targeted only at cases where action is needed, etc; and
- had regard to the principle that it should only exercise its enforcement power if the act or omission of an Approved Regulator was unreasonable.

The LSB's approach to compliance and enforcement action

2.9 The LSB's approach to compliance and enforcement is to seek to achieve an appropriate balance between informal and formal action, based on best practice. We consider that this will enable us to improve regulatory performance by the Approved Regulators so that:

- consumers are more confident in accessing the legal services market and can make better informed decisions about purchases; and
- cultures and systems of quality assurance are embedded throughout the legal services sector to give consumers confidence in the services they purchase.

2.10 We want the public, as consumers and citizens, to be confident that their advisors are proportionately regulated by bodies which, as we set out in our Business Plan for 2009-10:

- keep constantly modernising and updating registration and education requirements to reflect changing social and consumer needs and promote diversity in, and wider access to, the profession;
- maintain and enhance standards of professional conduct in the light of changing circumstances and best practice elsewhere;
- ensure that robust and independent systems of quality assurance are in place;
- themselves monitor and, where necessary, take appropriate enforcement action to ensure that professional standards are put into action at ground level; and
- are accessible and responsive to concerns put to them.

2.11 We also want to ensure that those who provide regulated activities (now and in the future) are confident that their regulators are:

- proportionate and consistent in their decision making, monitoring and enforcement activities;
- well-governed and cost-effective; and
- up to date in their professional thinking and management practice.

Considerations of unreasonableness

- 2.12 This Section of the Policy Statement expands materially on the test for unreasonableness that the LSB will use compared to its consultation document which did not offer an interpretation of the unreasonableness test.
- 2.13 In deciding whether it is appropriate to exercise its formal enforcement powers, the LSB must have regard to the principle that it should only use them if the act or omission of the Approved Regulator was unreasonable. In most circumstances it is unlikely that the LSB would consider an act or omission to be unreasonable merely because we would have acted differently. We will, where appropriate, consider the rationale for the act and omission by the Approved Regulator and encourage a review of the situation if we consider, for example, that all options have not been fully explored or the views of consultees were not properly weighed. That, however, is not the same thing as substituting one view for another.
- 2.14 However, the LSB does not consider that it has to satisfy the public law test of Wednesbury unreasonableness in order to conclude that an act or omission was unreasonable.
- 2.15 For example, the LSB might consider that an act or omission was unreasonable if it was carried out by an Approved Regulator, notwithstanding that the Approved Regulator knew (or could be expected to know) that the act or omission was likely to have an adverse impact on one or more of the Regulatory Objectives. In reaching a conclusion that the act or omission of the Approved Regulator was unreasonable, the LSB would consider all the circumstances of the case which would include reasons and evidence from the Approved Regulator and/or others.

The Enforcement Process

- 2.16 The subsequent sections describe the process that the LSB will in general follow when dealing with enforcement issues. Where required to do so by the Act, the LSB will, in the first instance use its judgement to decide if an act or omission (or a series of them) by an Approved Regulator has breached, or is likely to breach on one or more of the conditions specified . In doing it will take account of the evidence available to it which is likely to come from many different sources including Approved Regulators, other stakeholders and consumer research. As explained in paragraphs 2.25 – 2.33 below, it will then decide whether to seek to resolve the issues informally in the first instance.

- 2.17 In the event that such an attempt at informal resolution fails or is inappropriate in given circumstances, the LSB may then determine that it is satisfied that the conditions set out in the Act have been met for it to exercise its formal enforcement powers. Part of this process will be consideration of whether that the act or omission of the Approved Regulator was unreasonable. It will also consider whether it would be proportionate and consistent to exercise one of the enforcement powers.
- 2.18 In some circumstances, the LSB must satisfy itself that its less onerous enforcement powers will not adequately address the matter before it uses its more onerous enforcement powers. In addition financial penalties can only be used in certain circumstances. However the Act places requirements to only use financial penalties in certain circumstances and to ensure that less onerous enforcement powers will not “adequately address” a matter before using more onerous ones but does not otherwise prohibit the LSB from using combinations of enforcement powers. In the event that we decide to take formal enforcement action, we will consider whether a combined approach is the best means of achieving compliance. In order to ensure the rapid mitigation of risks to consumers and citizens, it may well be appropriate to institute a range of measures at an early stage, rather than progress step-by-step. However, our approach will always be proportionate and we will always explain why we have chosen a particular approach. Where we choose to consider the exercise of two or more enforcement powers together then we will ensure that the process that we follow prior to exercise of the power(s) complies with the requirements specified in the Act for all of the enforcement powers that we are considering.

Monitoring and information gathering

- 2.19 This section does not differ materially from the consultation document.
- 2.20 The LSB expects to gather information about Approved Regulators from a number of different sources, including as part of its day to day work. The LSB will normally consider if data gathered for one purpose (such as practising fee approval or rule change applications) may also be relevant to another purpose (such as assessing compliance with Section 28 or the Regulatory Objectives). A non exhaustive list of examples of the sources include:
- admission of non-compliance by act or omission (e.g. by failing to publish adequate data) by the Approved Regulator by proactive notification to the LSB;
 - information from other Approved Regulators or stakeholders;

- outcomes from the review process that the LSB intends to develop to assess the performance of the Approved Regulators²;
- issues that arise in discussions with Approved Regulators;
- information from the regulated community or other stakeholders;
- identification of issues through research and analysis;
- information from the Office of Legal Complaints (the “**OLC**”); and
- concerns raised by the Consumer Panel.

2.21 The LSB will assess the information available and come to a decision about whether to proceed with informal or formal action. If it needs more information it may use its formal information gathering powers³ to obtain it. Alternatively, if it is appropriate to do so, it will continue to gather information on an informal basis.

2.22 The LSB will always take into account relevant information and evidence that it receives during its consideration of whether or not to pursue an issue, and if it does the type of action that is appropriate. However, in the event that there is insufficient or contradictory information, we will use our judgement as to the best course of action.

2.23 Once the LSB considers it has all the information it needs (or it is practical to obtain), the LSB will decide whether (and if so what) action is appropriate. In doing so, it will take into account some or all of the following:

- the actual or potential adverse impact on one or more of the Regulatory Objectives (which include the Professional Principles)⁴, and the impact of that impact;

² [See the LSB's Business Plan 2009-10 at Section 5D](#)

³ See Section 55 of the Act

⁴ Section 1(3) of the Act states that the Professional Principles are:

- (a) that authorised persons should act with independence and integrity;
- (b) that authorised persons should maintain proper standards of work;
- (c) that authorised persons should act in the best interests of their clients;
- (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice;
- (e) that the affairs of the client should be kept confidential.

- this Statement of Policy;
- its position as an oversight regulator and its duties under the Act;
- best regulatory practice including the requirement that its activities must be proportionate, consistent, transparent, accountable and targeted only at cases in which action is needed;
- whether it considers that the Approved Regulator's act or omission has been unreasonable through being for example:
 - a contravention of a requirement in the Act or other statutes (such as competition law) including a failure to act compatibly with Section 28 of the Act or with the Regulatory Objectives;
 - a failure to have regard to the Better Regulation Principles or other best regulatory practice;
 - an act or omission which has taken place over a long time or which is part of a series of the same or similar actions or which appears to be deliberate or vexatious or which follows a failure to resolve the matter informally in a way that the LSB considers satisfactory;
- the seriousness of the act or omission and the impact (or likely impact) of it on consumers and those being regulated);
- the desired outcome for consumers of taking action and whether that outcome is likely to be significantly beneficial compared to the impact of not taking action;
- the likely impact on those being regulated by the Approved Regulator and the likely impact on the wider provision of legal services;
- whether the resource requirements needed are proportionate to achieving the desired results;
- whether it has previously taken informal or formal action over the same or similar issues; and
- any other matters that it appears appropriate to take into account.

2.24 If the LSB decides that the matter should be pursued it may:

- seek to resolve the matter informally with the Approved Regulator; or
- pursue one or more of the other enforcement powers.

Informal resolution

- 2.25 This Section of the Statement of Policy differs materially from the consultation document and explains in more detail how the LSB will resolve matters informally.
- 2.26 The LSB must, in preparing this Statement of Policy, take into account the desirability of resolving informally matters that arise between the LSB and the Approved Regulators. This Section sets out how we are likely to approach that requirement.
- 2.27 The LSB will always consider whether it is appropriate, in the circumstances of the case, to resolve matters informally and will usually seek to do so before considering more formal intervention.
- 2.28 We recognise the importance of considering whether it is appropriate to resolve matters informally. If an informal approach is successful, it is likely to lead to quicker resolution of the particular issue and impose lower costs on the LSB, Approved Regulators and others. The Act does not require us to come to a view on whether an Approved Regulator's act or omission is unreasonable before deciding to pursue informal resolution. That requirement only applies when we are considering whether to use one of the formal powers.
- 2.29 However, we recognise that an informal approach may not be appropriate in all cases. For example if the impact of the issue is immediate, serious and/or widespread or in other circumstances that the LSB considers are not suitable for informal resolution because, in its judgement, they are not compatible with the delivery of the Regulatory Objectives.
- 2.30 The LSB does not consider that the Act requires it to seek an informal resolution before commencing a formal enforcement process. If the first attempt at informal resolution does not achieve an outcome that, in the LSB's judgement, is appropriate, then the LSB will consider what further action it should take. In doing so, it may seek further information from the Approved Regulator or others or take further informal measures, but is not compelled to do so. The approach adopted will depend on the circumstances of the individual case.
- 2.31 However, if the LSB decides that it is appropriate to take formal enforcement action it will always be open to the Approved Regulator to propose a way to achieve compliance or to present fresh evidence that could not reasonably

have been made available earlier to demonstrate that a breach had not occurred. Making such a proposal does not fetter the LSB's discretion to continue with enforcement action but the Approved Regulator's actions in proposing to achieve resolution are likely to be taken into account by the LSB in deciding whether, and if so what, further action is needed.

- 2.32 In taking account of the desirability of resolving informally matters which arise between the LSB and an Approved Regulator, the LSB will comply with the requirement to ensure that its actions are transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed. In undertaking the informal resolution route, the LSB anticipates that all communications will be made public except in exceptional circumstances. This will assist in ensuring that the LSB is accountable for its activities and that consumers and others understand the reasons for its approach in each particular case. Our approach to informal resolution will be proportionate to the circumstances of the particular case, but, in doing so, we will have regard, where it is relevant to do so, to other experiences of informal enforcement action.
- 2.33 The timescale for resolving matters informally in general will depend on the circumstances of the case. We will ensure that any timescales agreed are proportionate to the circumstances in question and, in particular, are sufficient so as to mitigate any detriment persons affected by the issue may suffer. As a guide, we will normally expect an Approved Regulator to follow the timescales below when dealing with a matter informally:
- acknowledgement of the notification within 4 working days and including in the acknowledgement a time line for assessment of the issue within 20 further working days; and
 - a resolution of the issue or a detailed proposal for remedying the issue being provided within what the LSB considers to be a reasonable time, to be provided to the LSB within the assessment time line.

Performance targets and monitoring (Section 31 of the Act)

- 2.34 This section does not differ materially from the consultation document.
- 2.35 The LSB is likely to use performance targets and monitoring when an investigation by the LSB has identified the need for action to improve performance and raise standards. They are likely to be used when an Approved Regulator is failing or is likely to fail in a specific area with a clear impact (or likely impact) on the Regulatory Objectives. This form of enforcement may be combined with or precede other forms of enforcement.

For example the greater certainty of delivery given by a direction may be necessary to underpin a target.

- 2.36 We will always seek to gain agreement by the Approved Regulator to performance targets and monitoring. However where this is not possible and where merited under the conditions specified in Section 31 we will impose performance targets on an Approved Regulator. Any performance target will need to be transparent – by this we mean its intention is clearly understood and its measurement is not disproportionately costly. It will need to be consistent with any other performance targets we have imposed to the extent that the cases are comparable.
- 2.37 The LSB will always consider the facts of the case as to whether it is appropriate to combine this form of enforcement with other enforcement powers. In general we will take a combined approach where we believe that a more effective route to compliance is needed since this approach is likely to deliver the achievement of the desired outcomes. It would also enable more certain escalation (if appropriate) to more severe forms of enforcement such as a intervention because failure to deliver performance targets would be evidence that the measure had not delivered the required change in performance.

Directions (Section 32 of the Act)

- 2.38 This section does not differ materially from the consultation document.
- 2.39 The LSB is likely to use directions when it wants to ensure that specific actions are carried out by an Approved Regulator in order to rectify an act or omission (including a failure to comply with the Act or with law generally) that has been identified. Directions may be combined with other enforcement tools and may precede other forms of enforcement action. For example, where an Approved Regulator does not deliver the requirements of the direction, it will be open to the LSB to pursue imposing a financial penalty where it is appropriate to do so.
- 2.40 Where it is appropriate to do so, we will consider all the circumstances of the case to judge whether it is appropriate for the Approved Regulator to be directed to spend money on a particular issue in order to, for example, benefit consumers and/or those being regulated.
- 2.41 In seeking to direct an Approved Regulator to spend money or take a particular set of actions we will ensure that that we have acted proportionately. For example, where it is reasonable to do so, we will take into account the other operational costs of an Approved Regulator in a particular year before setting what must be delivered under a direction. We will endeavour to ensure

that any direction we set is clearly understood by the Approved Regulator to ensure that it achieves its aim. In setting a direction we will have regard, where it is relevant to do so, to the experiences of setting directions during other enforcement action. Our use of directions will be based on evidence of regulatory failure and placed the reasons for our actions in the public domain.

Censure (Section 35 of the Act)

- 2.42 This section does not differ materially from the consultation document.
- 2.43 Censure is likely to be used (either on its own or combined with other forms of enforcement) to draw particular attention to the act or omission by the Approved Regulator. The LSB would always take into account, both in using censure and in its general provision of information about enforcement proceedings, the possible perceptions that consumers, potential market entrants and those being regulated would be given, recognising that some forms of publicity may damage confidence in regulation and so lead to less satisfactory outcomes. However, the LSB strongly believes that one of the aims of its compliance powers is to ensure that confidence is maintained in the legal services market. Providing consumers with clear evidence that steps are being taken to address consumer detriment is part of that process.
- 2.44 The aim of the censure statement is to change the behaviour of the Approved Regulator. In general, organisations value their reputation and the censure will identify failures of performance. The LSB believes that used appropriately censure can act as a catalyst for a change in behaviour that leads to improved performance of an Approved Regulator.

Financial Penalties (Section 37 of the Act)

- 2.45 This Section does not differ materially in terms of the LSB's approach to using financial penalties. However, the level of the maximum has change significantly from the original proposal and this is explained in detail at paragraphs 4.32 of Section 4.
- 2.46 The Act allows the LSB to impose a financial penalty when an Approved Regulator fails to comply with: (i) internal governance rules, (ii) a direction by the LSB or (iii) practising fee rules. Financial penalties are likely to be used when, in the LSB's judgement, it is appropriate to impose one to seek to change the unreasonable behaviour of the Approved Regulator by penalising the specific act or omission that has been identified. A further aim is to deter future non-compliance by the Approved Regulator on which the penalty is imposed and on other Approved Regulators. A financial penalty will only be imposed in serious circumstances and the aim will be to set the level such that

it is likely to give consumers and those being regulated confidence that issues which cause them detriment will be dealt with by the regulatory regime.

- 2.47 The LSB believes that it is important that those who pay for the Approved Regulator through their practising fees should be able to influence the Approved Regulator's behaviour, including its approach to compliance. Even if this is not currently possible, it may be that, over time as new Approved Regulators are designated, the threat of those it regulates being able to switch to another Approved Regulator starts to influence Approved Regulator behaviour and its approach to compliance. It is likely, therefore, that the LSB will consider it reasonable in the circumstances that the members of an Approved Regulator may have to pay (at least in part) for their Approved Regulator's failure to comply. If there is more than one Approved Regulator for a reserved legal activity and the authorised person can therefore switch to another Approved Regulator, this approach may also provide an incentive to Approved Regulators to improve their compliance. As explained in paragraph 2.18 above, the LSB may consider that it is appropriate to impose a financial penalty at the same time as using its other enforcement powers.

Maximum financial penalty

- 2.48 The LSB considers that, to act as a credible deterrent, the maximum penalty has to be able to have a significant impact on the Approved Regulator. A high maximum level gives a regulator the flexibility to exercise its discretion and judgement in setting a penalty in a way that enables it to take into account the likely wide variation in the outcomes of investigations that it will encounter.
- 2.49 It is not the objective of the LSB to impose penalties which have the effect of making it impossible for an Approved Regulator to fulfil its regulatory functions. We would therefore regard any attempt by an Approved Regulator to pay a penalty in a way which had such an impact as, of itself, raising issues in relation to compliance with internal governance rules.
- 2.50 If the LSB is investigating a number of breaches by an Approved Regulator as separate investigations (for example one investigation into a breach of directions concerning internal governance rules and a separate investigation into a breach of rules controlling practising fees), it may be appropriate for each investigation to impose a separate penalty, in each case of up to the maximum amount.

Process for setting a penalty

- 2.51 The LSB will be guided by the principles of better regulation when it uses its reasonable discretion and judgement in setting the level of a financial penalty. However, the LSB does not consider that it is appropriate to set out in

advance the exact mechanism by which it will decide on the appropriate level of a penalty since this is likely to vary on a case by case basis and a prescriptive approach is unlikely to be able to be applied in all cases.

- 2.52 The LSB will consider whether there are any aggravating factors when it sets the level of the penalty. Aggravating factors it may consider could include (but not be limited to) the seriousness of the failure, the extent to which it was deliberate or reckless⁵, the impact on consumers and whether the actions have resulted in an actual or potential loss to anyone (for example by preventing them from participating in certain types of business opportunities), the duration of the act or omission and whether there was a lack of co-operation by the Approved Regulator with the LSB's investigation.
- 2.53 The LSB will also consider whether any mitigating factors should reduce the level of penalty. These could include (but not be limited to) whether the failure was accidental in nature or the result of a genuine misunderstanding, the presence of good controls or procedures, and the extent of impact on the Regulatory Objectives, the professional principles and consumers, co-operation by the Approved Regulator with the investigation, whether directions have been issued that require the Approved Regulator to spend money on a particular issue, and whether there were any genuine proposals by the Approved Regulator to resolve the matter during the course of the investigation.
- 2.54 Finally, the LSB will consider whether, in all the circumstances, the amount of the proposed penalty is reasonable, again guided by the principles of better regulation. In doing this, it will take into account the resources of the Approved Regulator. The LSB will also check that the proposed penalty does not exceed the maximum amount.

Intervention Directions (Section 41 of the Act)

- 2.55 This section does not differ materially from the consultation document.
- 2.56 The LSB regards the use of intervention directions (with the related powers to enter premises under warrant and seize documents) as an extreme measure which will only be used in serious circumstances relating to the Approved Regulator's regulatory functions where none of the other enforcement measures are adequate to address the matter. These circumstances are likely to be where there has been a serious and persistent act or omission by the Approved Regulator that has had or is likely to have an adverse impact on

⁵ See Section 49(5) of the Act

one or more of the Regulatory Objectives. Intervention directions may also be used if, for whatever reason, the Approved Regulator faces a risk to its organisational viability which puts in jeopardy the continuing effective discharge of its regulatory functions. It is also likely that the act or omission would be having (or be likely to have) a demonstrable harmful impact on consumers and/or those regulated by the Approved Regulator. It may also be appropriate to use this power if an Approved Regulator became insolvent.

- 2.57 The aim of using intervention directions would be, to the extent necessary, to stop the Approved Regulator from behaving in the harmful manner which has been identified, to obtain any documents that would be necessary for the person who is either tasked with directing the Approved Regulator's behaviour or who would be given the Approved Regulator's former functions to carry them out effectively and to prevent further adverse impact on the Regulatory Objectives.
- 2.58 Before issuing an intervention direction the LSB will have carefully assessed that this is a proportionate response. It will have considered all the circumstances of the case and ensured it had the necessary evidence to demonstrate that issuing an intervention was a reasonable response. In issuing an intervention direction the LSB will have regard, where it is relevant to do so, to the experiences of using intervention directions during other enforcement action it has taken.
- 2.59 An intervention direction can be revoked by the LSB following a request by the Approved Regulator. In considering whether to revoke the intervention direction the LSB will take into account all the relevant information and evidence that it has, including the views of those it must consult (including the Office of Fair Trading and the Consumer Panel).
- 2.60 The rules that the LSB must make on intervention directions are at Annex 3; those concerning revocation of an intervention direction are at Annex 4. The rules about making representations in relation to this power are at Annex 1.

Cancellation of designation as an Approved Regulator (Section 45 of the Act)

- 2.61 This section does not differ materially from the consultation document.
- 2.62 An Approved Regulator's designation can be cancelled in relation to one or more of the reserved legal activities that it regulates. The cancellation can be effected either following a request by the Approved Regulator, or as a result of enforcement action by the LSB. This Statement of Policy only refers to cancellation as a result of enforcement action by the LSB, However the LSB

has, as required by the Act, made rules about the process of cancellation following a request by an Approved Regulator; these are at Annex 5.

- 2.63 As with intervention directions, the LSB regards a decision to recommend cancellation of an Approved Regulator's designation as extremely serious. It will only be used in exceptional circumstances when the LSB is satisfied that none of its other enforcement powers would adequately address the issues,. In using this power, the LSB's aim would be to try to ensure as smooth a transition as possible to the new body taking over regulation of the former Approved Regulator's members. The LSB would also try to ensure appropriate provision of information to the public in order to reassure consumers about those providing legal advice to them.
- 2.64 The LSB's rules about cancellation of designation as a result of enforcement action are at Annex 6. The rules about the way in which representations can be made about a proposed cancellation are at Annex 1.

3. The LSB's Consideration of Responses to its Consultation on its Enforcement Policy Statement

Introduction

3.1 This Section of the Document sets out:

- details of the responses that the LSB received to its consultation on its Enforcement Policy Statement; and
- a statement made in accordance with Section 50(4) of the Act as to the material difference between the Enforcement Policy Statement contained in the original consultation document and the Policy Statement set out in Section 2 of this Document.

3.2 Section 4 sets out details of the responses that the LSB received to its consultation on its Enforcement Rules. **This section does not form part of the LSB's Statement of Policy.**

The LSB's approach to compliance and enforcement

Main issues raised by respondents

3.3 Several respondents agreed with the proposed compliance and enforcement strategy. One respondent said that it was reasonable and fair in its approach. Other respondents did not agree. Some respondents said that the strategy as it was currently drafted suggested that the LSB had prioritised the Regulatory Objectives. One respondent said that this approach amounted to the LSB imposing this view on the Approved Regulators which was inappropriate within the scheme of the Act. Another respondent said that they were not convinced that it was appropriate for the LSB to use its enforcement strategy as a means of imposing particular practices on an Approved Regulator because this set the level at which the LSB could intervene and seek to use its enforcement powers at too low a level. Another respondent said that the LSB had had regard to the fact that it is an oversight regulator in preparing the draft policy statement. One respondent welcomed the recognition of consumer outcomes as the main focus in the delivery of the compliance and enforcement strategy.

3.4 One respondent said that the approach to compliance and enforcement should encourage an open approach where problems could be addressed collaboratively. Another respondent said that it was inappropriate to compare

legal regulators with commercial profit making organisations such as utility companies. Consequently the LSB had not justified the approach to using its enforcement powers. One respondent said that in determining the reasonableness of an Approved Regulator's acts or omissions it was important to view any failure to adhere to the principles of better regulation as a particularly important trigger for enforcement action.

The LSB's response

- 3.5 The full Statement of Policy in Section 2 sets out how the LSB will use its enforcement powers. This includes our approach to resolving matters informally, the maximum financial penalty and how we will apply the test for unreasonableness.

Informal resolution

- 3.6 In preparing its Statement of Policy, the LSB is required by the Act to take account of the desirability of resolving informally matters which arise between the LSB and an Approved Regulator.

Main issues raised by respondents

- 3.7 Most welcomed the requirement to consider the desirability of using an informal route. One respondent said that it should be particularly supported where it was likely to result in a satisfactory outcome for consumers more quickly than the formal process might bring. Some respondents suggested that the LSB needed to place more emphasis on the role of the informal resolution process in its enforcement policy statement. One respondent said that the informal route should always be explored first except where urgent action was needed to "avoid an imminent risk of substantial damage to the regulatory objectives". Several respondents believed that in the event of informal enforcement action the LSB should make a decision whether or not to publish information about the event on a case by case basis. Some respondents expressed concern about the timescales proposed for the informal approach particularly for small organisations. Others said that an informal approach should not be constrained by timescales. There was a wide range of opinions regarding the appropriateness of publishing information about the outcome of the resolution of informal enforcement action. Several agreed that the approach should be always to publish except in certain, exceptional circumstances. Others suggested that confidentiality was an important incentive in gaining informal resolution – especially since the LSB is likely to publish all relevant documentation in other types of enforcement action. Several respondents recognised that there was likely to be benefit from sharing information about informal resolutions.

The LSB's response

- 3.8 We recognise that it may be quicker to resolve a matter informally and consider that it is helpful for the LSB and Approved Regulators to put a timescale around doing so in order to ensure that the informal process is not used to prolong satisfactory resolution of an issue. However we recognise that each matter under consideration is likely to be different and we will need to be flexible in determining the most appropriate timescale for resolving matters informally. It remains the view of the LSB that while it will generally be preferable to use the informal route as a means of resolving enforcement issues, this may not be the most appropriate route in all circumstances, in particular if the issue being considered is immediate, serious and/or widespread or in other circumstances that the LSB considers are not suitable for informal resolution because, in its judgement, they are not compatible with the delivery of the regulatory objectives..
- 3.9 We will always explain why we have taken a particular course of action. Learning from the process of informal resolution should help to inform the LSB's judgement – and others' understanding of our approach – for subsequent cases and we therefore consider that except in cases that we consider to be exceptional we should put all communication in the public domain. This is in line with Freedom of Information principles and also the principles of better regulation since it encourages accountability and transparency.

Monitoring and information gathering

Main issues raised by respondents

- 3.10 One respondent suggested that the information gathered from the sources that the LSB expects to use could be employed for more constructive purposes than those identified in the consultation document. This respondent also suggested that there was a presumption that if more information was needed then the formal route would be adopted when it would be more logical to use other routes. One respondent suggested that there should be more detail about different information strands that the LSB might use and how it might use them. The Consumer Panel welcomed its inclusion in the list of agencies to be included as an information source, as well as other consumer agencies. One respondent suggested that the final policy statement should also refer to the information gathering powers of the Office of Legal Complaints and how they will interact with those of the LSB. One respondent said that the list of matters to be taken into account by the LSB when considering the information it needs, while broad, were not sufficient to take

account of the appearance of new regulatory risks or equality and diversity issues.

LSB's response

- 3.11 We will, where it is appropriate to do so, seek to use informal means of gathering information. However the Act recognises that this may not always be possible or it may be the case that an Approved Regulator refuses to provide information on a voluntary basis. Where we consider it is appropriate to do so, we will use our formal information gathering powers provided by Section 55 of the Act. Creating and maintaining a list of how we will use different forms of information is likely to be an inefficient use of resources since each enforcement event is likely to be very different and information will be used in different ways however we recognise that we need to be clear and open at the time of collecting information about what purposes the information will or might be being put to and whether such use will be confidential or public and attributable or non attributable sourced in order to be fair to the people from whom we are collecting the data. We agree with the statement about the need to ensure that we understand how our own information gathering powers interact with those of OLC including under Section 152(3)(b) of the Act which allows the OLC to disclose restricted information to the LSB for the purpose of enabling it to exercise any of its function and we anticipate that this will be included in the Memorandum of Understanding between us. We consider that the list of what the LSB will need to take account of in considering if it is appropriate to take enforcement action and, if it is, what type of enforcement action to take, covers the issues of equality and diversity (under Regulatory Objective (f) – see Section 1(1)(f) of the Act) and the issue of the appearance of new regulatory risks (as a consequence of our functions as an oversight regulator).

Performance targets and monitoring

Main issues raised by respondents

- 3.12 In general respondents viewed performance targets as one of the most positive enforcement measures available to the LSB. One respondent suggested that the aim should be to arrive at performance targets through consensus and collaboration. Being able to do so would be likely to avoid the need for quicker routes to compliance. Respondents provided advice as to how performance standards should be structured. Ideas included that they should avoid being prescriptive, take account of available resources, be easily measurable, clearly defined and achievable. One respondent raised the wider issue of on-going performance management so that problems could be identified at the earliest opportunity. There were mixed views about whether or

not performance standards should be used in combination with other enforcement tools. One respondent said that it was possible while another said that it should be rare that the LSB needs to use a combination of its enforcement tools.

The LSB's response

- 3.13 We recognise that it would be beneficial if performance targets and monitoring could be agreed between an Approved Regulator and the LSB. However, this may not be possible in all circumstances. Therefore it remains appropriate for the LSB to be able to impose performance targets in cases where agreement cannot be reached and to monitor their implementation. We will ensure that any performance targets have regard to the principles of better regulation.

Directions (Section 32 of the Act)

Main issues raised by respondents

- 3.14 Several respondents suggested that directions formed part of a hierarchy of the LSB enforcement tools. Some respondents expressed concern that the LSB might require an Approved Regulator to spend money in a particular way. One respondent suggested that directing funds to be spent in a particular way was no guarantee that it would be used effectively. Another said that directions should prescribe what needed to be achieved rather than directly requiring money to be spent. Being too prescriptive in setting a direction may act as a barrier to more innovative and efficient solutions. Some concern was expressed about the ability to budget for a direction to spend money mid-year and the impact it might have on existing activities. There was a general view that directions were a more positive enforcement tool for the LSB particularly if it was used as a means of restoring the harm caused to consumers. Some respondents said that it would be most appropriate to use directions in the event that an Approved Regulator unreasonably withheld budget from its regulatory arm. Some respondents expressed the view that the LSB would not be able to issue a direction where there was a difference of policy view between the two organisations, only in the event that the Approved Regulator had acted unreasonably.

The LSB's response

- 3.15 It remains the view of the LSB that, except in relation to financial penalties, the enforcement tools provided to us by the Act do not form a sequential hierarchy, although we recognise that before we use some of the powers we must be satisfied that the matter cannot be adequately addressed using the alternatives. We believe it is appropriate for the LSB to be able to consider

whether or not a combined approach (for example using performance standards with a direction) is the best means of restoring compliance. It may also be appropriate, subject to the restrictions in Section 37 of the Act, in the circumstances of a particular case, to move directly to a financial penalty.

- 3.16 In deciding whether to issue directions, we will consider the circumstances of the case and whether it is appropriate to direct an Approved Regulator to deliver a particular outcome or whether the LSB should specify that a particular amount of money should be spent. We will take into account when setting a direction the circumstances of the case and apply the principles of better regulation in arriving at the most appropriate outcome. We may also take into account the impact any enforcement activity may itself have on the Regulatory Objectives.

Censure (Section 35 of the Act)

Main issues raised by respondents

- 3.17 Most respondents viewed the tool of censure as one to be used only in the most serious circumstances. Respondents recognised the serious impact that carrying out a censure would likely have on an Approved Regulator. Some said that censure could undermine consumer confidence in the Approved Regulator and the legal system as a whole. Some viewed censure as one of the more negative enforcement tools in that in of itself it did not bring change or resolve compliance failures.

The LSB's response

- 3.18 We do not believe, if used appropriately, that the tool of censure will undermine confidence. Rather, we believe that it will give more confidence in the regulatory system that in the event of a compliance failure action is being taken to address the problem.

Financial Penalties (Section 37 of the Act)

Main issues raised by respondents

- 3.19 Several respondents said that the aim of the financial penalty should be to act as a deterrent for the individual Approved Regulator or the regulated community as a whole against future non-compliance. One respondent said that the public sanction from levying the penalty had a greater impact on changing behaviour than the amount of the penalty. Most respondents said that there was limited if any choice currently for approved persons to switch their Approved Regulator. The threat of switching could not then function as an incentive to Approved Regulators to improve compliance. One respondent

suggested that this could be misinterpreted as permission for a representative controlled regulator to improperly influence the regulatory arm's discharge of its duties through control of resources. Another respondent suggested that impact of a high maximum penalty would be to put an Approved Regulator out of business which it said was inappropriate. Two respondents said that the aim of the penalty should be to give consumers confidence in the regime. A respondent said that the aim of the financial penalty should be for it to be used only where it was reasonable.

The LSB's response

- 3.20 It is important for the LSB to have sufficient flexibility in imposing financial penalties to reflect the likely variation in seriousness of an Approved Regulator's behaviour. Setting a high maximum does not necessarily mean that a penalty will always be at or near the maximum; the impact on the Approved Regulator of the penalty would be one factor that the LSB would take into account in using its judgement to decide what level of penalty was appropriate. We recognise that currently there may be no choice available to lawyers in terms of who regulates them. However, the LSB considers that this will not always be the case and over time as new Approved Regulators are designated, it may be that people are able to choose their regulator. One factor in making such a choice might be that the LSB had taken enforcement action against the Approved Regulator. We do not consider that exercising choice in these circumstances would amount to undue influence; it would be a legitimate choice for the approved person to make and the threat of people being able to make that choice should act as an incentive on an Approved Regulator to improve its approach to compliance, thereby reducing the risk of future enforcement action. We agree that the aim of the financial penalty should be to act as a deterrent against future non-compliance by the Approved Regulator on which the penalty has been imposed and other Approved Regulators. We agree that the aim of the penalty should also be to give consumers confidence in the regulatory regime.

Maximum amount of a financial penalty

- 3.21 The Act requires the LSB to set the maximum amount of financial penalty that it can impose on an Approved Regulator.

Main issues raised by respondents

- 3.22 The majority of respondents expressed concern about the level at which it was proposed to set the maximum financial penalty. Several said that the proposed level was disproportionate and would have the effect of leading to bankruptcy were it to be used. Respondents also said that if it were the

intention to cause an Approved Regulator to go out of business then the ability to cancel designation was a more appropriate tool to use. The majority of respondents said that it was inappropriate to draw comparison to the process by which financial penalties were set in utility markets or in competition cases. The majority also said that any comparison with GDP was also inappropriate because each Approved Regulator's contribution was different. Several respondents proposed the adoption of the form used in the setting of financial penalties by the Legal Services Complaints Commissioner (the "LSCC") both in terms of the methodology and the levels of the penalty currently in place. Some respondents said that the level of the penalty should be directly linked to the size of the Approved Regulator. Some respondents expressed concern at the impact the maximum penalty would have on consumers as a consequence of pass through of costs to authorised persons and onto consumers. Another expressed concern about the impact of a high financial penalty on authorised persons and suggested that LSB should look at this in more detail. One respondent said that the window of 21 days for making representations about the penalty was too short.

The LSB's response

- 3.23 We understand the argument that the level of the penalty may, in absolute terms, be less relevant when considered against the reputational damage to the Approved Regulator and the power to cancel an Approved Regulator's designation. However, we consider that the ability to impose a penalty has a deterrent effect and that it would therefore be inappropriate to reduce it to a mere "token" amount. Nevertheless, we recognise the importance of considering whether there is a practical level above which the penalty in practice becomes meaningless because it would either bankrupt the Approved Regulators and/or impose an unjustifiable level of cost on those regulated and, possibly, to consumers. In balancing the options of whether to impose a penalty or cancel an Approved Regulator's designation, we consider that a low level of maximum penalty may in practice make it more likely that the LSB would decide to cancel an Approved Regulator's designation because the LSB would be unable to ensure that the penalty was proportionate to the seriousness of the act or omission.
- 3.24 We do not consider that setting the maximum penalty at the same level as the LSCC's is appropriate. The LSCC regulates one sub-section of the current activities of the Law Society – handling second-tier complaints. We do not therefore believe that it provides an appropriate reference point. It is the LSB's responsibility to oversee regulation of all the regulatory activities of all the Approved Regulators and to ensure that sufficient sanctions and deterrents are in place to deter major systemic regulatory failure and to ensure its rapid

correction if and when it occurs. The areas where this might be apparent include:

- putting in place education and training requirements that have a discriminatory impact;
- poor standards of regulatory enforcement on professional issues which undermine public confidence and so threaten the professional principles and the rule of law;
- underfunding their regulatory activities resulting in performance is significantly degraded;
- breaching the independence rules, thereby subverting public confidence in regulation.

3.25 Therefore, having considered the responses and other options for setting the maximum financial penalty set out above the LSB's preferred option is to set the maximum financial penalty at 5% of all income which the Approved Regulator derives from its "regulatory functions" (as defined in Section 27 of the Act). We believe that this takes account of the views put to us that utility regulation is not a wholly appropriate comparator, whilst still recognising that existing practice also fails to provide the right benchmark, given differing levels of risk.

3.26 In our consultation document, we were concerned that because Approved Regulators set out their accounts in different ways, the concept of total income would be difficult to define. Having considered this further, we believe that the above formulation, which limits the income to that relating to the Approved Regulator's regulatory functions, will allow for a maximum level of fine to be applied consistently notwithstanding the differences in Approved Regulators' accounts.

Process for setting a penalty

Main issues raised by respondents

3.27 Respondents were generally content with the process outlined for setting a financial penalty. Some agreed that it was inappropriate to set out the detail of the mechanism the LSB will use to set the appropriate level of the penalty. One respondent said it endorsed the flexible approach outlined in the consultation which said that each situation would be dealt with on a case by case basis. One respondent said that there should be more detail on how the LSB the examples of various factors may impact on the final amount of the

penalty and said that it would be helpful to have further guidance on how LSB will judge the relevance of factors it will take into account. Another respondent said that the process was appropriate but that there should be an ability to appeal against both the decision to levy a penalty and its amount. One respondent suggested that it would be useful for the LSB to provide guidance as to how it will exercise its reasonable discretion when setting the level of the financial penalty.

The LSB's response

- 3.28 It remains the view of the LSB that it would be inappropriate to set out exhaustive detail of the means by which we will arrive at the setting of a financial penalty. The LSB will use its judgement on the facts of the particular case to decide what is an appropriate level of penalty. Having a formulaic approach to setting a penalty is likely to be unduly restrictive. In determining that the discretion we use is reasonable when setting a penalty we will be guided by the requirements of the Better Regulation Principles, in particular proportionality and transparency. We will always explain how we arrived at the amount of any penalty, including the factors we have taken into account. The grounds for appeal are set out in the Act (section 39(4)); any appeal is made to the High Court.

Intervention Directions (Section 41 of the Act)

Main issues raised by respondents

- 3.29 Most respondents who commented on the use of intervention directions agreed with the approach set out by the LSB in the consultation document. One respondent emphasised that the LSB must only intervene in the event that the Approved Regulator is failing. Two respondents said that LSB needed to provide more detailed policy on how the competency of those approved to take over the operation of an Approved Regulator will be assessed. For example the LSB needed to ensure that no one was appointed with a conflict of interest. In addition they suggested that the competency levels of the Judge or Justice that issues the warrant for entry should also be stipulated.

The LSB's response

- 3.30 It may be appropriate for the LSB to issue an intervention direction where an Approved Regulator is not in danger of failing in terms of financial or organisational viability but because the circumstances are such that its continued operation poses a grave danger to the delivery of the Regulatory Objectives. We do not consider that it will be practical for us to publish generic guidance about who we might appoint to take over the function of an

Approved Regulator. This is because the circumstances in which we are likely to use an intervention direction are likely to be unique to the Approved Regulator concerned and general guidance is unlikely to be helpful. The Rules we propose to make state that the person we appoint might include another Approved Regulator or other competent person, such as a professional adviser (for example an accountancy firm). We would always explain the reason why we considered the person or body to be competent. Consideration of any conflict of interest is likely to be part of our decision-making process.

Cancellation of designation as an Approved Regulator

Main issues raised by respondents

- 3.31 Those who responded to this question on the whole agreed with the aim of LSB policy with regard to the cancellation of designation. One respondent said that cancellation was a bigger threat to the Approved Regulator than financial penalties. Several respondents agreed that cancellation should be only used as a last resort. One respondent said that the important issue for consideration in the event of cancellation was continuity and consumer protection.

The LSB's response

- 3.32 We agree with the views of respondents. We accept that cancellation of designation using our enforcement powers should only be used as a last resort. We agree that it is important that continuity of regulation is maintained and that consumers are protected. The Act (section 46) sets out the transfer arrangements that can be made on cancellation of designation to ensure that each approved person is treated as authorised either by another Approved Regulator or by the LSB.

Section 50(4) Statement

- 3.33 Any material changes to the Policy Statement have been discussed throughout this Document but in summary, and to comply with Section 50(4) of the Act, the material changes between the Policy Statement consulted on and our final Policy Statement are as follows:
- **Unreasonableness:** our final Policy Statement expands materially on the test that the LSB will use compare to its consultation document which did not offer an interpretation of the unreasonableness test. See paragraphs 2.12. - 2.15 of Section 2 for more details.

- **Informal resolution:** our final Policy Statement expands materially from the consultation document and explains in more detail how the LSB will resolve matters informally. See paragraphs 2.25 -2.33 of Section 2 for more details.

4. The LSB's Consideration of Responses to its Consultation of its Enforcement Rules

Introduction

4.1 This Section of the Document sets out:

- details of the responses that the LSB received to its consultation on its Enforcement Rules; and
- a statement made in accordance with Section 205(5) of the Act as to the material difference between the Enforcement Rules contained in the original consultation document and the final Enforcement Rules referred to below and included as Annexes to this Document.

4.2 Section 3 sets out details of the responses that the LSB received to its consultation on its Enforcement Policy Statement. **This section does not form part of the LSB's Statement of Policy.**

Directions Rules

4.3 Section 32 of the Act allows the LSB to impose directions on an Approved Regulator. In determining whether the LSB should impose a direction, the Act provides that the LSB should take account of certain oral and written representations made by the relevant Approved Regulator. In doing this, paragraphs 2(5) and 10(3) of Schedule 7 to the Act explicitly require the LSB to make rule governing the making of such oral and written representations.

4.4 The consultation document included a draft of the rules that the LSB proposed to make to govern the making of oral and written representations and invited representations from consultees about the proposals.

Main issues raised by respondents

4.5 Subject to some minor drafting suggestions, the vast majority of respondents approved of the approach we had taken in drafting these rules.

The LSB's response

4.6 We note that the majority of respondents agree with the approach we have taken with these rules.

- 4.7 The rules have been subject to some amendments to deal with minor drafting points suggested by respondents to the consultation and have also been amended to deal with changes that have been suggested to our rules generally as a result of responses we received to our consultations on rules designating new Approved Regulators and approving rule changes and rules governing the making of representations and the giving of evidence on the scope of the reserved legal activities.
- 4.8 In accordance with Section 205(6) of the Act a final draft of the rules governing the making of oral and written representations is set out at Annex 1. These rules will take effect from 1 January 2010 when the LSB takes up its full powers.

Financial Penalty Rules

- 4.9 As noted in Sections 2 and 3 of this Document, Section 37(4) of the Act provides that the LSB must make rules prescribing the maximum amount of a penalty that be impose under Section 37.
- 4.10 These rules can only be made with the consent of the Lord Chancellor and must be made by way of a statutory instrument.

Main issues raised by respondents

- 4.11 As noted in paragraph 3.22 of Section 3 of this Document, the vast majority of respondents to our consultation did not agree with the policy we suggested for the maximum financial penalty rules.

The LSB's response

- 4.12 As noted in paragraphs 3.23 - 3.26 of Section 3 of this Document, we have considered respondents concerns and have revised our policy for setting the maximum financial penalty. A drafted of the revised statutory instrument in relation to this is set out at Annex 2.
- 4.13 The rules contained within this statutory instrument have been consented to by the Lord Chancellor. The statutory instrument will now go through the parliamentary process with the intention that it will come into force on 1 January 2010 when the LSB takes up its full powers.

Intervention Direction Rules

- 4.14 Section 41 of the Act allows the LSB to impose intervention directions on an Approved Regulator. The Act provides that the LSB must make certain rules in relation to the processes it undertakes in deciding whether to make an intervention direction.

4.15 The rules that the LSB is required to make are as follows:

- Section 41(5) of the Act – The LSB must make rules as to the persons it may nominate for the purposes of exercising the regulatory function of an Approved Regulator pursuant to an intervention direction;
- Section 42(10) of the Act – The LSB must make rules as to the persons a specified person may appoint to apply for a warrant to enter and search premises;
- Paragraphs 2(5), 10(5) and 21(5) of Schedule 8 – The LSB must make rules governing the making of oral and written representations; and
- Paragraph 13(2)(a) of Schedule 8 – The LSB must make rules in relation to the form and manner of an application by an Approved Regulator to revoke an intervention direction.

4.16 The consultation document included drafts of the rules that the LSB proposed to make to govern these areas and invited representations from consultees about the proposals.

Main issues raised by respondents

4.17 Subject to some minor drafting suggestions, the vast majority of respondents approved of the approach we had taken in drafting these rules.

The LSB's response

4.18 We note that the majority of respondents agree with the approach we have taken with these rules.

4.19 The rules have been subject to some amendments to deal with minor drafting points suggested by respondents to this consultation and have also been amended to deal with changes that have been suggested to our rules generally as a result of responses we received to our consultations on rules designating new approved regulators and approving rule changes and rules governing the making of representations and the giving of evidence on the scope of the reserved legal activities.

4.20 In accordance with Section 205(6) of the Act a final draft of the rules in relation to Sections 41(5) and 42(10) of the Act is set out at Annex 3. These rules will take effect from 1 January 2010 when the LSB takes up its full powers.

- 4.21 In relation to the oral and written representation rules required under paragraphs 2(5) and 10(5) of Schedule 8 of the Act, the LSB proposes to use the same rules that it proposes in respect of oral and written representations relating to directions. As referred to above, a draft of these rules is set out at Annex 1.
- 4.22 In accordance with Section 205(6) of the Act a final draft of the rules in relation to applications to revoke an intervention direction is set out at Annex 4. These rules also include the rules that the LSB proposes to make in relation to the making of oral and written representations under paragraph 21(5) of Schedule 8. These rules will take effect from 1 January 2010 when the LSB takes up its full powers.

Cancellation of Designation Rules

- 4.23 Section 45 of the Act provides that the Lord Chancellor may by order cancel a body's designation as an Approved Regulator in accordance with a recommendation by the LSB. The Act provides that the LSB can make such recommendation as part of its enforcement powers (in which case Section 45(5) must be satisfied) or if an Approved Regulator applies to the LSB for its designation to be cancelled. The Act provides that the LSB must make certain rules in relation to the processes it undertakes in deciding whether to make a recommendation to the Lord Chancellor.
- 4.24 The rules that the LSB is required to make are as follows:
- Section 45(3) – The LSB needs to prescribe rules as to the form and manner of an application by an Approved Regulator to cancel a designation. These rules must specify the amount of the “prescribed fee” and must be made with the consent of the Lord Chancellor;
 - Section 48(9) - The LSB must make rules as to the persons it may appoint to apply for a warrant to enter and search premises; and
 - Paragraphs 2(5) and 9(5) of Schedule 9 – The LSB must make rules governing the making of oral and written representations.
- 4.25 The consultation document included drafts of the rules that the LSB proposed to make to govern these areas and invited representations from consultees about the proposals.

Main issues raised by respondents

- 4.26 Subject to some minor drafting suggestions, the vast majority of respondents approved of the approach we had taken in drafting these rules.

The LSB's response

- 4.27 We note that the majority of respondents agree with the approach we have taken with these rules.
- 4.28 The rules have been subject to some amendments to deal with minor drafting points suggested by respondents to this consultation and have also been amended to deal with changes that have been suggested to our rules generally as a result of responses we received to our consultations on rules designating new approved regulators and approving rule changes and rules governing the making of representations and the giving of evidence on the scope of the reserved legal activities. The main amendment to note is the inclusion of the mechanism for calculating the "prescribed fee" for an application. If the application is in respect of the cancellation of some but not all Reserved Legal Activities, the fee is £4,500. If the application is in respect of all Reserved Legal Activities, the fee is £6,000. The fee can be uplifted in certain specified circumstances. This formulation is consistent with that used for the "prescribed fee" in relation to applications to become an Approved Regulator and has been consented to by the Lord Chancellor
- 4.29 In accordance with Section 205(6) of the Act a final draft of the rules in relation to Sections 45(3) to the Act is set out at Annex 5. These rules will take effect from 1 January 2010 when the LSB takes up its full powers.
- 4.30 In accordance with Section 205(6) of the Act a final draft of the rules in relation to Sections 48(9) the Act is set out at Annex 6. These rules will take effect from 1 January 2010 when the LSB takes up its full powers.
- 4.31 In relation to the oral and written representation rules required under paragraphs 2(5) and 9(5) of Schedule 9 of the Act, the LSB proposes to use the same rules that it proposes in respect of oral and written representations relating to directions. As referred to above, a draft of these rules is set out at Annex 1.

Section 205(5) Statement

- 4.32 Any material changes to the Enforcement Rules have been discussed throughout this Document but in summary, and to comply with Section 205(5)

of the Act, the material changes between the draft rules consulted on and our final rules are as follows:

- **Maximum Financial Penalty:** there has been a significant change in the level of the maximum financial penalty (and thus the statutory instrument that relates to this). The consultation document proposed a maximum penalty of the greatest of: (i) an amount equal to £250 per individual that an Approved Regulator regulates; (ii) an amount equal to £5,000 per entity that an Approved Regulatory regulates; or (iii) £10 million. As discussed in this Document, this proposal was not widely supported and so the LSB has amended its proposal for the maximum financial penalty to being an amount equal to 5 per cent. of all income which an Approved Regulator has derived from the exercise of its “regulatory functions” (as defined in Section 27 of the Act) in respect of the most recent accounting period;
- **Prescribed Fee:** as discussed at paragraph 4.28 above, our rules for cancellation of designation applications now include a formulation for the “prescribed fee”. As stated in our consultation document, we have used a formulation that is consistent with the “prescribed fee” for applications to become an Approved Regulator. The level of this fee has been consented to by the Lord Chancellor.

5. Impact Assessments

- 5.1 Two impact assessments are provided with this Document.
- 5.2 The first impact assessment, attached at Annex 7, is based on the Ministry of Justice template for impact assessments and is in respect of the LSB's overall Statement of Policy on enforcement.
- 5.3 The second impact assessment, attached at Annex 8, is in the Ministry of Justice template and is the impact assessment that relates specifically to the statutory instrument for the maximum amount of the financial penalty. This impact assessment, the one that accompanied the statutory instrument when it was laid in Parliament.
- 5.4 **This section does not form part of the LSB's Statement of Policy.**

Annex 1 – Enforcement processes: rules on oral and written representations

A. PREAMBLE

1. These Rules are made by the Board (as defined below) under section 7 of the Act (as defined below) and paragraphs 2(5) and 10(3) of schedule 7, paragraphs 2(5) and 10(5) of schedule 8 and paragraphs 2(5) and 9(5) of schedule 9 to the Act (as defined below).

B. DEFINITIONS

2. Words defined in these Rules have the following meanings:

Act	the Legal Services Act 2007
Approved Regulator	has the meaning given in section 20(2) of the Act
Board	the Legal Services Board
Representing Person	an Approved Regulator or any other person who can make representations to the Board in accordance with section 38(2) and schedules 7 to 9 to the Act

C. WHO DO THESE RULES APPLY TO?

3. These Rules are the rules that the Board has made to govern the making of oral and written representations by a Representing Person in accordance with:
 - a) section 38(2) of the Act (**Financial Penalties**);
 - b) paragraphs 2(5) and 10(3) of schedule 7 to the Act (**Directions**);
 - c) paragraphs 2(5) and 10(5) of schedule 8 to the Act (**Intervention Directions**);
and
 - d) paragraphs 2(5) and 9(5) of schedule 9 to the Act (**Cancellation of Designation as Approved Regulator**).
4. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the

Board will publish a draft of the amended Rules and will invite consultations in accordance with section 205 of the Act.

D. FORM OF REPRESENTATIONS

Written representations

5. Subject to Rules 6 and 8, all representations made to the Board must be in writing and must be submitted to the Board either by email, post or courier to the relevant address shown below:

a) if by email to : contactus@legalservicesboard.org.uk

b) if by post or courier to:

Address: Legal Services Board
 7th Floor Victoria House
 Southampton Row
 London WC1B 4AD

For the attention of: Enforcement Administrator

6. The Representing Person must, unless otherwise agreed with the Board, submit all written representations to the Board using the online tool at www.legalservicesboard.org.uk, once this has been developed.

7. All representations must be received by the Board within the relevant period set out in the Act. Representations out of this time will not be considered unless, exceptionally and at the sole discretion of the Board, they appear to raise matters of substance relevant to the process in question which are not already under consideration.

Oral representations

8. The Board may, at its sole discretion authorise a Representing Person to make oral representations. The Representing Person must bear its own costs in relation to any such representations. On grounds of cost, efficiency, transparency and consistency of treatment between Representing Persons, the Board will not normally accept oral representations unless the particular circumstances of the Representing Person or the complexity of the issue merit an exception to the normal process in individual cases. If the Board grants such an exception, it will publish its reasons for doing so.

9. Should the Board authorise a Representing Person to make oral representations, the representations will take place at a hearing to be held either by telephone, video conference or in person. The Board will give the Representing Person not less than ten business days notice that there will be a hearing. If the hearing is to be held in person, the notice will specify the place and time at which the hearing will be held. If the hearing is to be held by telephone or video conference, the notice will specify the time of the telephone call or video conference and also the arrangements for facilitating the telephone call or video conference.
10. Hearings conducted in person (rather than by telephone or video conference) will normally be open to the public. However, within the period ending four business days prior to the scheduled date of the hearing, the Representing Person may submit to the Board a request, with reasons, that aspects of the hearing be held in private. The Board will consider the reasons given and will then publish the reasons for any decision that it reaches. Where the hearing is held in private, the Board will only admit persons, other than representatives of the Representing Person and the Board, after obtaining the agreement of the Representing Person.
11. The Representing Person must appear at the hearing, either in person, by telephone or by video conference (as the case may be) and may be represented by any persons whom it may appoint for the purpose. The proceeding of the hearing will be recorded on behalf of the Board and will be transcribed onto paper.
12. Where oral representations are made, the Board will prepare a report of those representations which will be based on the transcription of the hearing made in accordance with Rule 11. Before preparing the report, the Board:
 - a) must give the Representing Person a reasonable opportunity to comment on a draft of the report; and
 - b) must have regard to any comments duly made by the Representing Person.
13. Subject to complying with the requirements of the Act, the Board reserves the right to extend processes to take account of the need to transcribe and verify oral submissions and to require the Representing Person to directly pay the transcription provider for the cost of the transcription service.
14. The Board may from time to time adjourn the hearing.

E. FURTHER INFORMATION

15. If you have any questions about the process for making oral or written representations you should contact the Board at:

Address: Legal Services Board
 7th Floor Victoria House
 Southampton Row
 London WC1B 4AD

Email: contactus@legalservicesboard.org.uk

Telephone: 020 7271 0050

Annex 2 – Financial penalties: maximum penalty statutory instrument

STATUTORY INSTRUMENTS

2009 No.

LEGAL SERVICES, ENGLAND AND WALES

The Legal Services Act 2007 (Maximum Penalty for Approved Regulators) Rules 2009

Made - - - - 8th December 2009

Laid before Parliament ***

Coming into force - - 1st January 2010

The Legal Services Board with the consent of the Lord Chancellor makes the following Rules in exercise of the powers conferred by sections 37(4) and 204(2), (3) and (4)(b) of the Legal Services Act 2007^(a).

The Legal Services Board has complied with the consultation requirements in section 205 of that Act.

Citation and commencement

1.—a) These Rules may be cited as the Legal Services Act 2007 (Maximum Penalty for Approved Regulators) Rules 2009.

(1) These Rules come into force on 1st January 2010.

Maximum penalty

2.—b) For the purposes of section 37(3) of the Legal Services Act 2007 (financial penalties), the maximum amount of any financial penalty which the Legal Services Board may impose on an approved regulator is an amount equal to 5 per cent. of all income which the regulator derived from its regulatory functions in respect of its most recent accounting period.

(1) The reference to the approved regulator's most recent accounting period is to the most recent accounting period—

- a) which ended before the imposition of the financial penalty; and
- b) for which the regulator has audited accounts which have been drawn up in accordance with generally accepted accounting practice.

(2) The amount of the income referred to in paragraph (1) is to be determined by reference to the audited accounts referred to in paragraph (2)(b).

^(a) 2007 c.29.

Made by the Legal Services Board at its meeting on 30th November 2009

*Terence Connor
Stephen Green
Rosemary Martin
Bill Moyes
Barbara Saunders OBE
Nicole Smith
Andrew Whittaker
David Wolfe
Chris Kenny*

I consent
Signed by authority of the Lord Chancellor

Date

Name
Parliamentary Under Secretary of State
Ministry of Justice

EXPLANATORY NOTE

(This note is not part of the Rules)

These Rules set out the method to be used in determining the maximum amount of the penalty which the Legal Services Board may impose under section 37(3) of the Legal Services Act 2007 (c. 29) on an approved regulator. Section 37 of that Act provides for the imposition of financial penalties on approved regulators for failure to comply with any requirement imposed on them by or under certain specified provisions of that Act (namely, section 30 (rules relating to the exercise of regulatory functions), section 32 (directions) and section 51 (control of practising fees charged by approved regulators)).

Annex 3 – Intervention directions: Section 41(5) and 42(10) rules

A. PREAMBLE

1. These Rules are made by the Board (as defined below) under sections 41(5) and 42(10) of the Act (as defined below).

B. DEFINITIONS

2. Words defined in these Rules have the following meanings:

Act	the Legal Services Act 2007
Approved Regulator	has the meaning given in section 20(2) of the Act
Board	the Legal Services Board
Intervention Direction	a direction given by the Board to an Approved Regulator in accordance with section 41 of the Act
Specified Person	has the meaning given in section 42(9) of the Act

C. WHO DO THESE RULES APPLY TO?

3. These Rules are the rules that the Board has made in compliance with:
 - a) section 41(5) of the Act in order to specify the persons that the Board may nominate for the purposes of section 41(2)(a) of the Act;
 - b) section 42(10) of the Act in order to specify the persons that a Specified Person may appoint for the purposes of section 42(3) of the Act.
4. The rules that the Board has made in accordance with paragraphs 2(5) and 10(5) of schedule 8 to the Act in relation to Intervention Directions and the making of oral and written representations are in the Board's rules on the making of oral and written representations which can be found at "Enforcement Rules: Rules on Oral and Written Representations".
5. The rules that the Board has made in accordance with paragraph 13(2) of schedule 8 to the Act in relation to the revocation of an Intervention Direction are in the Board's rules on the revocation of Intervention Directions which can be

found at "Intervention Directions: Rules for Applications to Revoke".

6. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with section 205 of the Act.

D. NOMINATIONS FOR THE PURPOSES OF SECTION 41(2)(a)

7. The Board may nominate such person as it considers to be fit and competent to exercise the regulatory function of the Approved Regulator, and this may include another Approved Regulator or other competent person, such as a professional adviser (for example an accountancy firm).

E. APPOINTMENTS FOR THE PURPOSES OF SECTION 42(3)

8. A Specified Person may appoint any person that it considers competent to be able to:
 - a) enter and search the premises of an Approved Regulator;
 - b) take possession of any written or electronic records found on the premises.
9. In considering whether a person is suitable for appointment under Rule 8, the Specified Person must have regard to the extent to which the person has experience of exercising entry and search functions.

F. FURTHER INFORMATION

10. If you have any questions about these Rules you should contact the Board at:

Address: Legal Services Board
 7th Floor Victoria House
 Southampton Row
 London WC1B 4AD

Email: contactus@legalservicesboard.org.uk

Telephone: 020 7271 0050

Annex 4 – Intervention directions: rules for applications to revoke

A. PREAMBLE

1. These Rules are made by the Board (as defined below) under paragraphs 13(2) and 21(5) of part 2 of schedule 8 to the Act (as defined below).

B. DEFINITIONS

2. Words defined in these Rules have the following meanings:

Act	the Legal Services Act 2007
Applicant	an Approved Regulator who submits an Application
Application	an application to revoke an Intervention Direction that is submitted to the Board in accordance with these Rules
Approved Regulator	has the meaning given in section 20(2) of the Act
Board	the Legal Services Board
Consultees	the Mandatory Consultees and any Optional Consultee
Consumer Panel	the panel of persons established and maintained by the Board in accordance with section 8 of the Act
Intervention Direction	a direction given by the Board to an Approved Regulator in accordance with section 41 of the Act
Mandatory Consultees	the Lord Chancellor, the OFT, the Consumer Panel and the Lord Chief Justice
OFT	the Office of Fair Trading
Optional Consultee	any person (other than a Mandatory Consultee) who the Board considers it reasonable to consult regarding an Application
Regulatory Objectives	has the meaning given in section 1 of the Act

Representative Body	a body that represents persons authorised by the Applicant to carry on activities which are Reserved Legal Activities
Reserved Legal Activity	has the meaning given in section 12 of and schedule 2 to the Act

C. WHO DO THESE RULES APPLY TO?

3. These are the Rules that apply if an Approved Regulator wishes to apply to the Board, under part 2 of schedule 8 to the Act, for the Board to revoke an Intervention Direction given to the Approved Regulator.
4. These Rules set out:
 - a) the required content of any Application to the Board and some guidance in relation to that content (**see Section D**);
 - b) the processes and procedures that the Board will undertake in considering the Application (**see Section E**);
 - c) the manner in which the Applicant and any Representative Body can make representations to the Board about an Application (**see Section F**); and
 - d) who an Approved Regulator should contact if it has a question in relation to the Application process (**see Section G**).
5. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with section 205 of the Act.

D. CONTENTS OF APPLICATION

6. An Application must include such information as the Applicant believes necessary to satisfy the Board that:
 - a) all the issues relating to the act or omission which resulted in the imposition of the Intervention Direction have been appropriately dealt with; and
 - b) it is appropriate for the Board to revoke the Intervention Direction in all the circumstances of the case (including in particular the impact of revoking the Intervention Direction on the Regulatory Objectives).

with any further information received) to the Consultees.

14. The Board will specify to the Lord Chancellor, the OFT, the Consumer Panel and any Optional Consultee a time period in which each body must provide their advice on the Application to the Board. The Board intends to request that these bodies provide their advice within a time period which is reasonable, published and variable dependent on the volume and complexity of the Application received.
15. The Lord Chancellor, the OFT, the Consumer Panel and any Optional Consultee will then each consider the Application within the specified time period and will provide their advice to the Board.
16. The Board will then provide the advice it receives from the Lord Chancellor, the OFT, the Consumer Panel and any Optional Consultee to the Lord Chief Justice and will specify to the Lord Chief Justice a time period in which he must provide his advice on the Application to the Board. Again, the time period that the Board will specify will depend on the particular circumstances of the Application.
17. The Lord Chief Justice will then consider the Application and will provide his advice to the Board.
18. In providing their advice to the Board, each Consultee may ask the Applicant (or any other person) to provide them with such additional information as they may require.

Publication of Advice

19. Once the Board has received the advice of the Lord Chief Justice, it will:
 - a) provide a copy of all the advice that has been given by the Consultees to the Applicant;
 - b) publish a copy of all the advice that has been given by the Consultees on its website.

Representations

20. The Applicant and any Representative Body has **28 days** beginning on the day on which a copy of the advice referred to in Rule 19 has been published on the Board's website, or such longer period as the Board may specify in a particular case, to make representations to the Board about the advice. Any representations made by the Applicant or any Representative Body must be made in accordance with Section F of these Rules.

Publication of Representations

21. As soon as practicable after the end of the period within which representations under Rule 20 may be made, subject to Rule 22, the Board will publish on its website, any written representations duly made by the Applicant or any Representative Body (and any reports of oral representations prepared under Rule 34).
22. Prior to the publication of any written representations (and any report of oral representations prepared under Rule 34) the Board will ensure, so far as practicable, that such materials exclude any matter which relates to the private affairs of a particular individual the publication of which, in the opinion of the Board, would or might seriously and prejudicially affect the interests of that individual.

The Board's Decision

23. After considering the Application (and any additional information received under Rule 11), the advice received from the Consultees and any representations by the Applicant or any Representative Body and any other information that the Board considers relevant to the Application, the Board will decide whether to grant the Application.
24. If the Board decides to grant the Application, it will notify the Applicant and will state the time from which the revocation of the Intervention Direction is to take effect.
25. If the Board decides not to grant the Application, the Board will write to the Applicant with the reasons for its decision.
26. The Board will publish on its website a copy of any decision that it gives to the Applicant.

F. FORM OF REPRESENTATIONS

Written representations

27. Subject to Rules 28 and 30, all representations made to the Board must be in writing and must be submitted to the Board either by email, post or courier to the relevant address set out at Rule 8.
28. The Applicant or Representative Body must, unless otherwise agreed with the Board, submit all representations to the Board using the online tool at www.legalservicesboard.org.uk, once this has been developed.

29. All representations must be received by the Board within the period set out in Rule 20. Representations out of this time will not be considered unless, exceptionally and at the sole discretion of the Board, they appear to raise matters of substance relevant to the Application which are not already under consideration.

Oral representations

30. The Board may, at its sole discretion authorise an Applicant or any Representative Body to make oral representations at their own expense. On grounds of cost, efficiency, transparency and consistency of treatment between Applicants and Representative Bodies, the Board will not normally accept oral representations unless the particular circumstances of the Applicant or Representative Body or the complexity of the issues merit an exception to the normal process in individual cases. If the Board grants such an exception, it will publish its reasons for doing so.
31. Should the Board authorise an Applicant or Representative Body to make oral representations, the representations will take place at a hearing to be held either by telephone, video conference or in person. The Board will give the Applicant or Representative Body not less than ten business days notice that there will be a hearing. If the hearing is to be held in person the notice will specify the place and time at which the hearing will be held. If the hearing is to be held by telephone or video conference, the notice will specify the time of the telephone call or video conference and also the arrangements for facilitating the telephone call or video conference.
32. Hearings conducted in person (rather than by telephone or video conference) will normally be open to the public. However, within the period ending four business days prior to the scheduled date of the hearing, the Applicant or Representative Body may submit to the Board a written request, with reasons, that aspects of the hearing be held in private. The Board will consider the reasons given and will then publish the reasons for any decision that it reaches. Where the hearing is held in private, the Board will only admit persons other than representatives of the Applicant or the Representing Body (as relevant) and the Board, after obtaining the agreement of the Applicant of the Representing Body (as relevant).
33. The Applicant or Representative Body must appear at the hearing, either in person or by telephone (as the case may be), and may be represented by any persons whom they may appoint for the purpose. The proceeding of the hearing will be recorded on behalf of the Board and will be transcribed onto paper.
34. Where oral representations are made, the Board will prepare a report of those representations which will be based on the transcription of the hearing made in

accordance with Rule 33. Before preparing the report, the Board:

- a) must give the Applicant or Representative Body a reasonable opportunity to comment on a draft of the report; and
- b) must have regard to any comments duly made by the Applicant or Representative Body.

35. Subject to the requirements of the Act, the Board reserves the right to extend processes to take account of the need to transcribe and verify oral submissions and to require the Applicant or Representative Body to directly pay the transcription provider for the reasonable cost of the transcription service.

36. The Board may from time to time adjourn the hearing.

F. FURTHER INFORMATION

37. If you have any questions about the Application process or the preparation of an Application, you should contact the Board at:

Address:	Legal Services Board 7 th Floor Victoria House Southampton Row London WC1B 4AD
Email:	contactus@legalservicesboard.org.uk
Telephone:	020 7271 0050

Annex 5 – Cancellation of designation: rules for applications to cancel

A. PREAMBLE

1. These Rules are made by the Board (as defined below) under sections 45(3) of the Act (as defined below). In accordance with section 45(4) of the Act (as defined below), the consent of the Lord Chancellor has been given in respect of these Rules.

B. DEFINITIONS

2. Words defined in these Rules have the following meanings:

Act	the Legal Services Act 2007
Affected Authorised Person	an Authorised Person who is regulated by the Applicant in relation to a Reserved Legal Activity which is the subject of an Application
Applicant	a body who submits an Application
Application	an application to cancel a body's designation as an Approved Regulator in relation to one or more Reserved Legal Activity that is submitted to the Board in accordance with these Rules
Approved Regulator	has the meaning given in section 20(2) of the Act
Authorised Person	has the meaning given in section 18 of the Act
Board	the Legal Services Board
Cancellation Notice	the notice published by the Applicant in accordance with Section F of these Rules
Prescribed Fee	the fee that must accompany an Application as described in Section E of these Rules
Reserved Legal Activity	has the meaning given in section 12 of and schedule 2 to the Act

C. WHO DO THESE RULES APPLY TO?

3. These are the Rules that apply if a body wishes to apply to the Board, under section 45(3) of the Act, for the Board to make a recommendation to the Lord Chancellor that an order be made cancelling a body's designation as an Approved Regulator in relation to one or more Reserved Legal Activity.
4. These Rules set out:
 - a) the required content of any Application to the Board (**see Section D**);
 - b) the amount of the Prescribed Fee that must accompany any Application (**see Section E**);
 - c) the Board's requirements in relation to the Applicant's publication of a notice giving details of the Application in accordance with section 45(3)(c) of the Act (**see Section F**);
 - d) the processes and procedures that the Board will undertake in considering the Application (**see Section G**); and
 - e) whom a body should contact if it has a question in relation to the Application process (**see Section H**).
5. The Board reserves the right to amend these Rules from time to time. If the amendments made to the Rules are, in the opinion of the Board, material the Board will publish a draft of the amended Rules and will invite consultations in accordance with section 205 of the Act.

D. CONTENTS OF APPLICATION

6. An Applicant must include the following information in their Application:
 - a) the name, address, telephone number and email address of the person whom the Board should contact in relation to the Application;
 - b) details of the Reserved Legal Activity or Activities to which the Application relates;
 - c) details of why the Applicant is making the Application;
 - d) details of any alternative courses of action, besides cancellation of designation, that have been considered or explored by the Applicant;

- e) details of the Affected Authorised Persons and whether any communication as been had with such persons in relation to the Application;
- f) details of what arrangements the Applicant proposes in relation to:
 - i) the transfer of the regulation of the Affected Authorised Persons to another relevant Approved Regulator and whether that Approved Regulator has consented to such transfer;
 - ii) the transfer of amounts held by the Applicant which represent amounts paid to it by way of practising fees by the Affected Authorised Persons to another relevant Approved Regulator and whether that Approved Regulator has consented to such transfer;
- g) if the Applicant is planning on winding-up all its activities, details of how it proposes to do so in an orderly manner.

E. PRESCRIBED FEE

7. Any Application must be accompanied by the Prescribed Fee set out in Rule 8 below. The Prescribed Fee must be paid by electronic funds transfer to the following bank account:

Bank:	HM Paymaster General
Sort code:	10-14-99
Account No:	10610000
Account Name:	Legal Services Board
Reference:	<i>[Insert Applicant name]</i> / Cancellation Application

8. The Prescribed Fee that must accompany an Application will depend on the type of Application being made. The different levels of the Prescribed Fee are as follows:
- a) if the Application is in respect of the cancellation of some but not all of the Reserved Legal Activities regulated by the Applicant, the Prescribed Fee is £4,500;
 - b) if the Application is respect of the cancellation of all of the Reserved Legal Activities regulated by the Applicant, the Prescribed Fee is £6,000.

9. The amounts specified in Rule 8 are each the average costs that the Board anticipates it will incur in considering these different types of Application. In respect of the Prescribed Fee set out in Rule 8(a) this is based on a day rate of £562 over 8 business days. In respect of the Prescribed Fee set out in Rule 8(b) this is based on day rate of £562 over 11 business days.
10. The Board reserves the right to charge an amount in excess of the amounts set out in Rule 8 in the following circumstances:
 - a) if the Board requests further information from the Applicants in accordance with Rule 16, and the Board's costs in processing this information exceeds the relevant specified in Rule 8. In these circumstances, any such additional costs will be charged at the day rate of £562;
 - b) the nature of the Application means that the Board has to seek external advice and the cost of this advice would mean that the Board's cost in processing the Application would exceed the relevant amount specified in Rule 8.

F. NOTICE REQUIREMENTS

11. On submitting an Application to the Board, an Applicant must publish a Cancellation Notice giving the following information:
 - a) the date on which the Application to the Board was made;
 - b) details of the Reserved Legal Activity or Activities to which the Application relates;
 - c) details of why the Application is being made;
 - d) details of the Affected Authorised Persons;
 - e) details of what arrangements the Applicant proposes in relation to:
 - i) the transfer of the regulation of the Affected Authorised Persons to another relevant Approved Regulator;
 - ii) the transfer of amounts held by the Applicant which represent amounts paid to it by way of practising fees by the Affected Authorised Persons to another relevant Approved Regulator.

12. Any Cancellation Notice given in accordance with Rule 11 must be published:

- a) on the Applicant's website on the same day on which an Application is submitted to the Board; and
- b) in any publication that the Board may specify from time to time within 5 business days of the Application being submitted to the Board.

G. PROCESSES AND PROCEDURE

Sending the Application

13. Subject to Rule 14 below, the Applicant must submit their Application (and, proof of transmission of the Prescribed Fee) either by email, post or courier to the relevant address shown below:

a) If by email to: contactus@legalservicesboard.org.uk

b) If by post or courier to:

Address: Legal Services Board
7th Floor Victoria House
Southampton Row
London WC1B 4AD

For the attention of: Cancellation Administrator

14. The Applicant must, unless otherwise agreed with the Board, submit their Application (and, proof of transmission of the Prescribed Fee) to the Board using the online tool at www.legalservicesboard.org.uk, once this has been developed.

15. On receipt of the Application and the Prescribed Fee, an acknowledgement email will be sent to the Applicant by the Board.

16. The Board will consider the Application and may ask the Applicant for such additional information as the Board may reasonably require.

The Board's Decision

17. After considering the Application (and any additional information received under Rule 16) and after satisfying itself that the requirements of Section G have been complied with, the Board will recommend to the Lord Chancellor that an order be

made to cancel the Applicant's designation as an Approved Regulator in relation to the one or more Reserved Legal Activities set out in the Application.

G. FURTHER INFORMATION

18. If you have any questions about the Application process or the preparation of an Application, you should contact the Board at:

Address:	Legal Services Board 7 th Floor Victoria House Southampton Row London WC1B 4AD
Email:	contactus@legalservicesboard.org.uk
Telephone:	020 7271 0050

Southampton Row
London WC1B 4AD

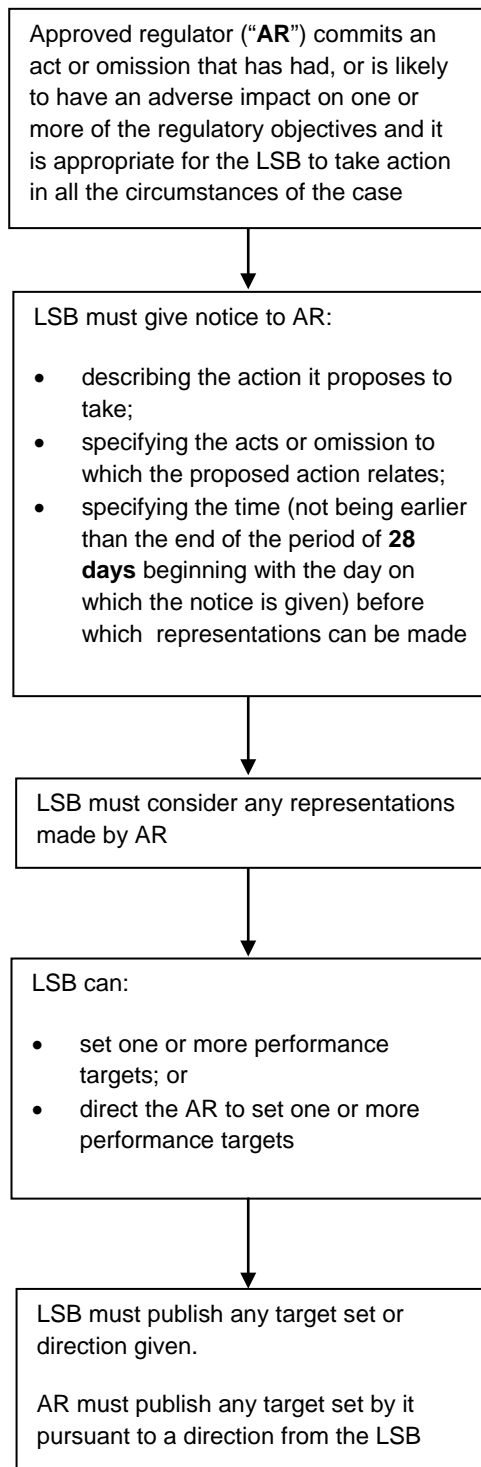
Email: contactus@legalservicesboard.org.uk

Telephone: 020 7271 0050

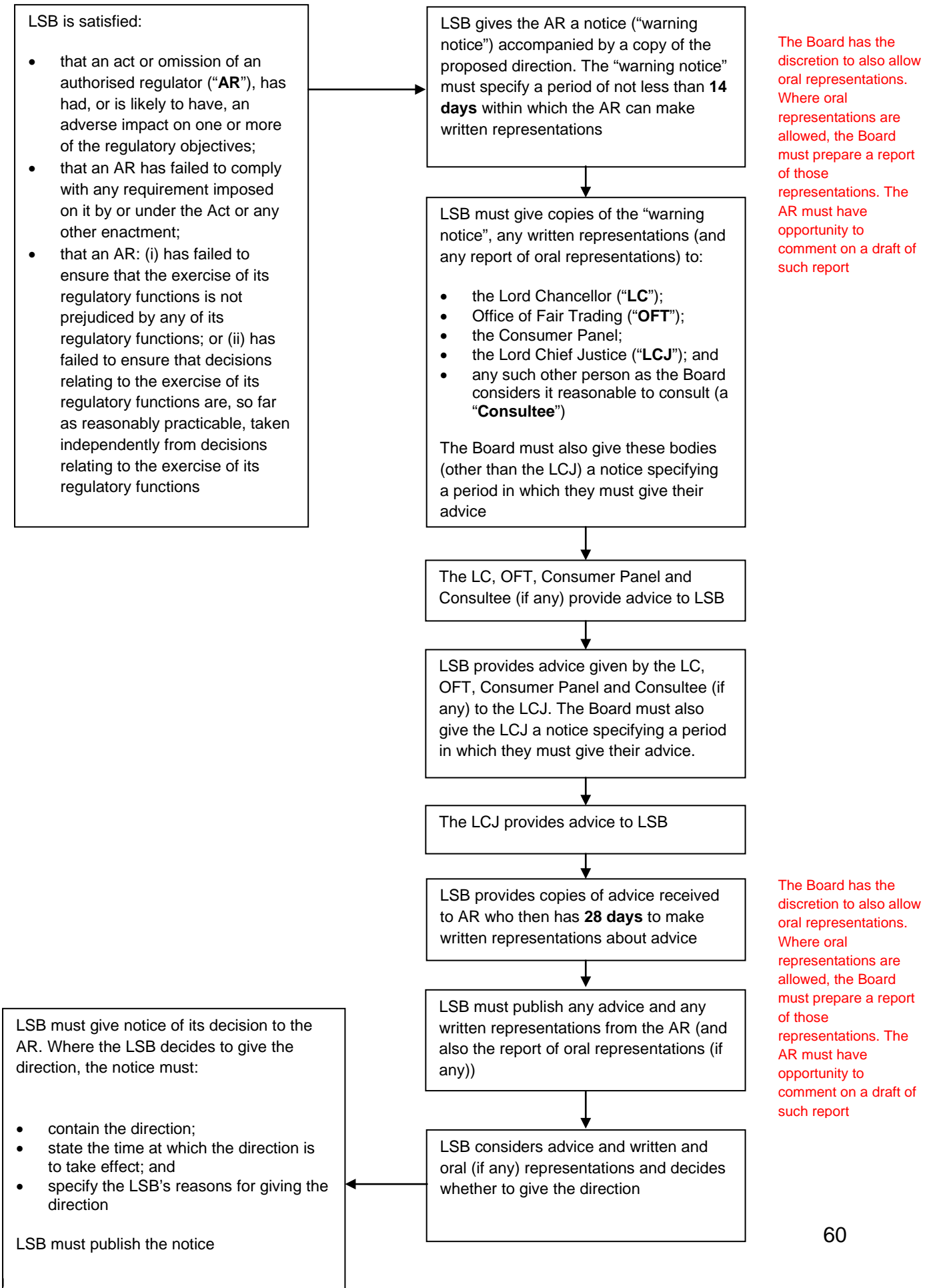
Annex 7 – Enforcement processes

Note: Appeals processes shown are those set out in the Act

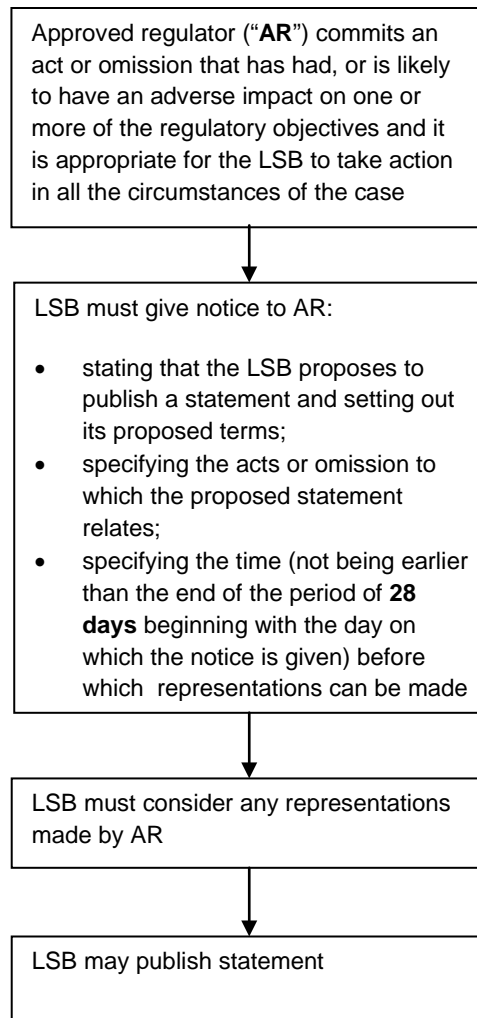
Performance targets and monitoring (Section 31)



Directions (Section 32)



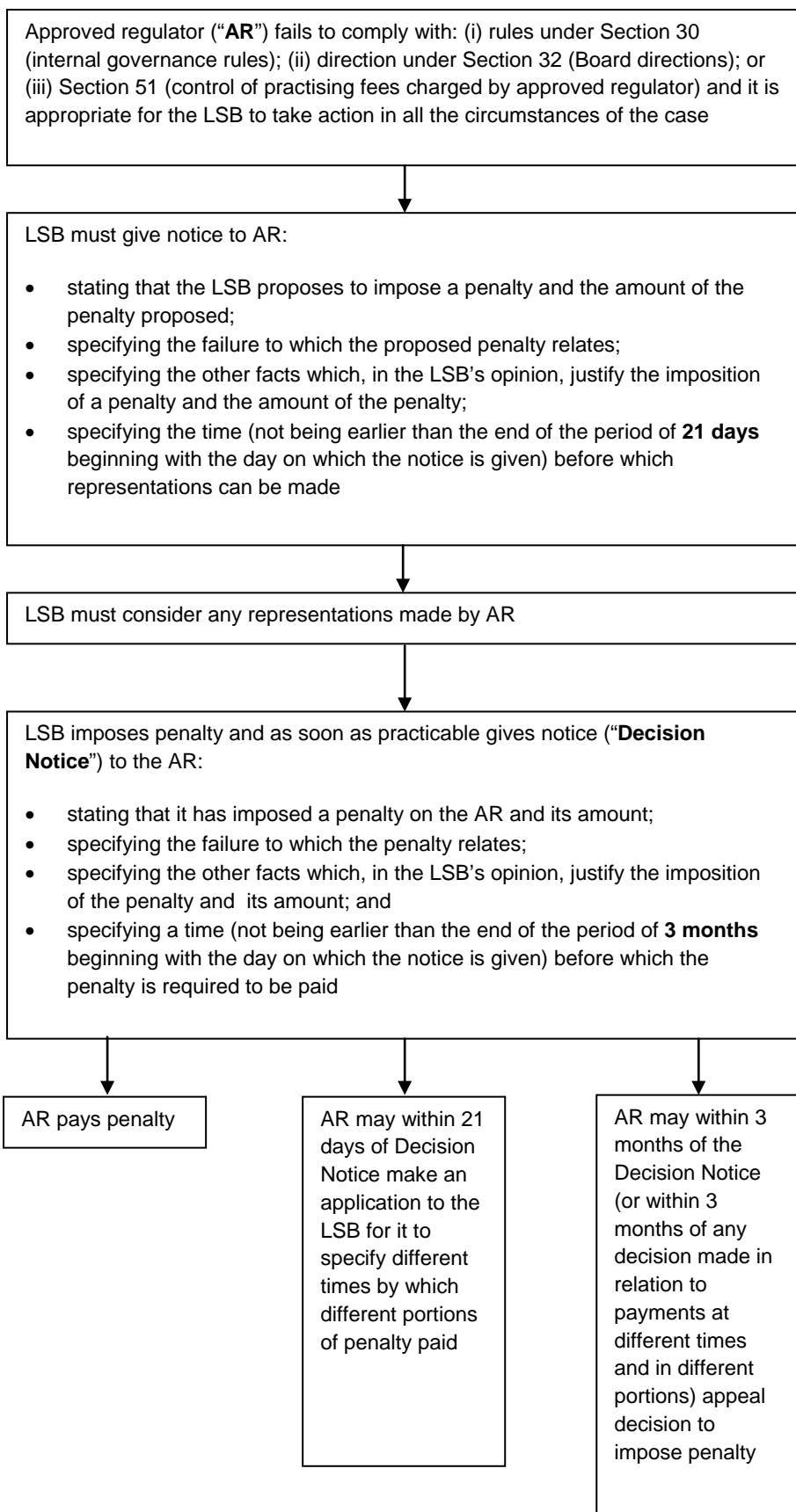
Public censure (Section 35)



If the Board wishes to vary the proposed statement set out in the notice, it must give notice to the AR:

- setting out the variation and the reason for it;
- specifying the time (not being earlier than the end of the period of **28 days** beginning with the day on which the notice is given) before which representations can be made

Financial penalties (Section 37)

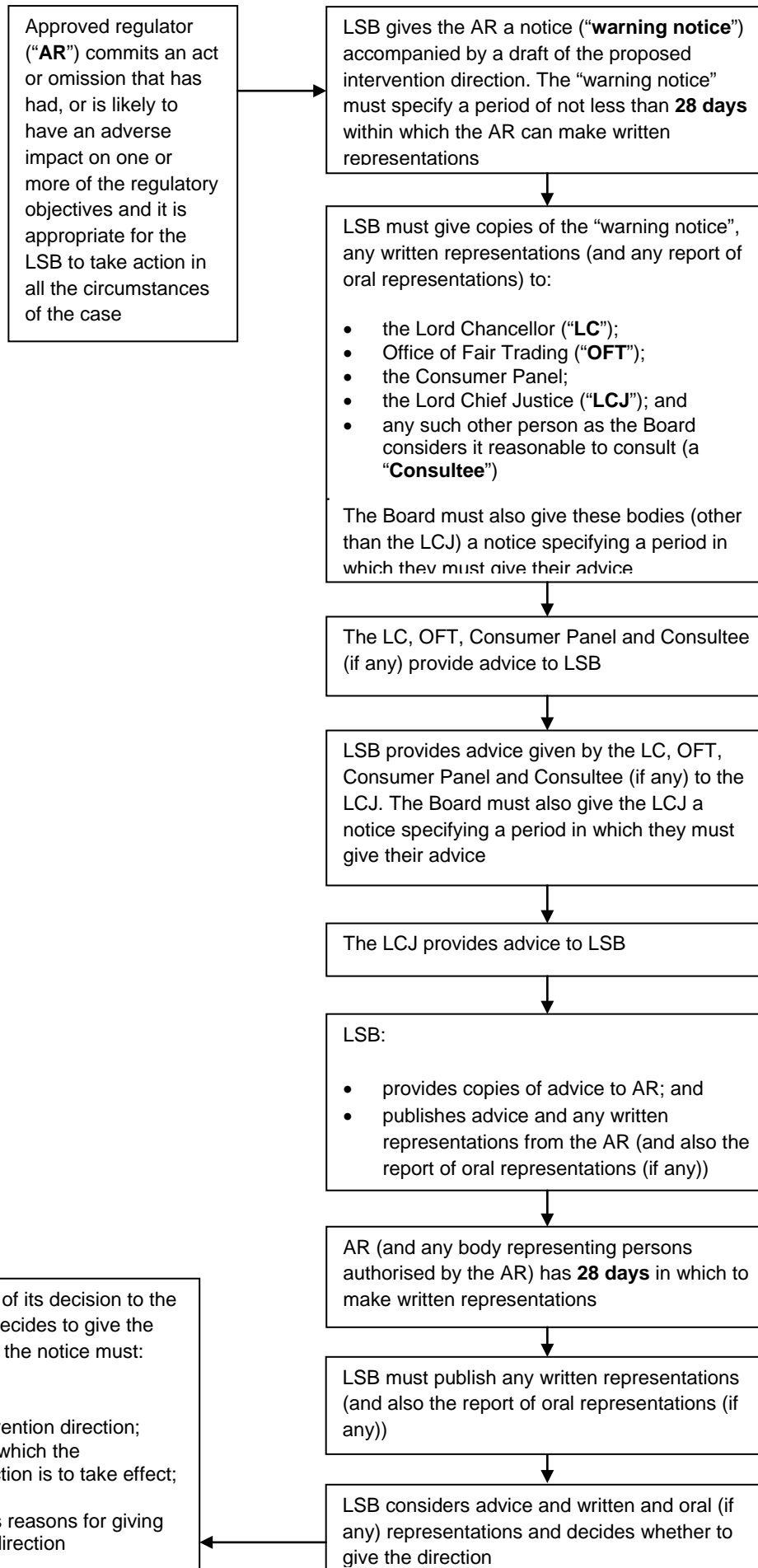


If the Board wishes to vary the amount of the proposed penalty set out in the notice, it must give notice to the AR:

- setting out the variation and the reason for it;
- specifying the time (not being earlier than the end of the period of **21 days** beginning with the day on which the notice is given) before which representations can be made

Intervention directions (Section 41)

The LSB may only give an intervention direction if it is satisfied that the matter cannot be adequately addressed by exercising the LSB's powers to impose performance targets and monitoring, directions, public censure and financial penalties



The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The AR must have opportunity to comment on a draft of such report

The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The person who made oral representations must have opportunity to comment on a draft of such report

Cancellation of designation as approved regulator (Section 45)

The LSB may only give a recommendation if it is satisfied that the matter cannot be adequately addressed by exercising the LSB's powers to impose performance targets and monitoring, directions, public censure, financial penalties and intervention directions

Approved regulator ("AR") commits an act or omission that has had, or is likely to have, an adverse impact on one or more of the regulatory objectives and it is appropriate for the LSB to take action in all the circumstances of the case

LSB gives the AR a notice ("**warning notice**") accompanied by a draft of the proposed recommendation. The "warning notice" must specify a period of not less than **28 days** within which the AR can make written representations

The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The AR must have opportunity to comment on a draft of such report

LSB must give copies of the "warning notice", any written representations (and any report of oral representations) to:

- Office of Fair Trading ("**OFT**");
- the Consumer Panel;
- the Lord Chief Justice ("**LCJ**"); and
- any such other person as the Board considers it reasonable to consult (a "**Consultee**").

The Board must also give these bodies (other than the LCJ) a notice specifying a period in which they must give their advice

The OFT, Consumer Panel and Consultee (if any) provide advice to LSB

LSB provides advice given by the OFT, Consumer Panel and Consultee (if any) to the LCJ. The Board must also give the LCJ a notice specifying a period in which they must give their advice

The LCJ provides advice to LSB

LSB:

- provides copies of advice to AR; and
- publishes advice and any written representations from the AR (and also the report of oral representations (if any))

The Board has the discretion to also allow oral representations. Where oral representations are allowed, the Board must prepare a report of those representations. The person who made oral representations must have opportunity to comment on a draft of such report

AR (and any body representing persons authorised by the AR) has **28 days** in which to make written representations

LSB must publish any written representations (and also the report of oral representations (if any))

LSB considers advice and written and oral (if any) representations and decides whether to give the recommendation

Lord Chancellor makes order to cancel designation

LSB must give notice of its decision to the Lord Chancellor and the AR. Where the LSB decides to make the proposed recommendation, the notice must:

- contain the recommendation; and
- specify the LSB's reasons for giving the recommendation

LSB must publish the notice

Annex 8 – Impact Assessment: Statement of Policy on Enforcement

Introduction

1. The LSB is undertaking an impact assessment on the requirements imposed by it under the Act to make a Statement of Policy about its enforcement powers. The overall impact will depend on the extent of compliance by those the LSB regulates (the Approved Regulators). A separate impact assessment has been published on the LSB's powers to impose financial penalties on Approved Regulators (see Annex 9).

What is the problem under consideration? Why is intervention necessary?

2. The Act requires the LSB to publish a Statement of Policy about the enforcement powers given to it under Sections 31, 32, 35, 41, and 45 of the Act. In addition, the Act requires the LSB to make rules about the exercise of certain enforcement powers. Making the Statement of Policy and associated rules will enable the LSB to carry out enforcement activities to ensure compliance by the Approved Regulators that it oversees with the Regulatory Objectives in the Act. A separate impact assessment has been published for the LSB's powers to impose financial penalties.

What are the policy objectives and the intended effects?

3. The policy objectives and intended effects are that improved regulatory performance will in turn lead to better access and outcomes so that:
 - consumers are more confident in accessing the legal services market and can make better informed decisions about purchases;
 - cultures and systems of quality assurance are embedded throughout the legal services sector to give consumers confidence in the services they purchase.

What policy options have been considered? Please justify any preferred option

4. Do nothing - this is not an option – the LSB must publish this Statement of Policy and make these rules before it acquires its full powers. It is anticipated that this will be on 1 January 2010.
5. Statement of Policy and rules as drafted. The Act gives the LSB its enforcement powers. The LSB considers it reasonable, and the Act requires

the LSB, to make a Statement of Policy as to how it will use these powers if it has to.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

6. In future we may review our compliance and enforcement strategy in the light of our other developing policies and our experience of applying it. This policy may also be the subject of review as part of the LSB's plans to review the performance of the Approved Regulators. However, this will be subject to further consultation in due course. The LSB intends to publish information about both its informal and formal enforcement action. Over time, this should enable a better assessment of the costs and benefits of the policy.

Annual costs

7. One-off (transition): £ negligible.
8. Average annual cost (excluding one-off): £ negligible.

Annual benefits

9. One-off: £ negligible.
10. Average annual benefit: £ negligible.

What is the geographic coverage of the policy/option?

11. England and Wales.

On what date will the policy be implemented?

12. It is anticipated that this will be 1 January 2010 when the LSB takes on its full powers under the Act.

Which organisation will enforce the policy?

13. The LSB.

Does enforcement comply with Hampton principles?

14. Yes.

Will implementation go beyond minimum EU requirements?

15. Yes. EU requirements do not require the regulatory framework set out in the Act.

What is the value of the proposed offsetting measure per year?

16. Nil.

What is the value of changes in greenhouse gas emissions?

17. Nil.

Will the proposal have a significant impact on competition?

18. No.

Annual cost (£-£) per organisation (excluding on-off)

19. The costs of this policy are not expected to add to the overall cost of compliance by Approved Regulators. If a penalty is imposed this may be passed through to those that the Approved Regulator regulates.

20. Micro: n/a Small: n/a Medium: n/a Large: n/a

Are any of these organisations exempt?

21. n/a.

Impact on Admin Burdens Baseline (2005 Prices)

22. Increase of £: approximately nil.

23. Decrease of £: approximately nil (although potential for small decrease).

24. Net Impact £: approximately nil.

Evidence Base

25. We consider that the cost of these changes is significantly below the generally accepted threshold of £5 million costs, below which an impact assessment is not necessary. However, we believe that in setting out how we have considered the various elements of the impact assessment will help us assess their impact on an ongoing basis.

26. Note that the LSB is an oversight regulator. Its enforcement policy is directed at the Approved Regulators that it regulates, not at those (such as solicitors or barristers) that they regulate.

Competition

27. We expect our enforcement strategy and processes to have a positive effect on competition. Compliant Approved Regulators should lead to a regulatory framework which enables providers of legal services to innovate and develop services that better reflect the needs of consumers.

Small Firms Impact Test

28. The LSB will take a proportionate approach to regulating smaller Approved Regulators to ensure the cost of compliance is not too burdensome.

Legal Aid

29. The enforcement policy will support and enhance the delivery of the Regulatory Objectives and as such will support the legal aid market through effective competition; better focus on consumers and proportionate regulation.

Race/Disability/Gender equalities

30. Because the LSB is an oversight regulator there is no direct impact on individuals. However, if the LSB achieves its intended outcomes, there will be a general improvement in the standard of regulation and the approach taken to it which we would expect to have a positive impact generally on the provision of legal services to all consumers, and to provide increased opportunities for all groups of those being regulated.

Human Rights

31. There are specific requirements on the LSB to make rules concerning oral and written representations that can be made about proposed enforcement action. The LSB must consider the representations made. In addition, in some instances, the Act provides for an appeal to the High Court against decisions taken by the LSB.

Rural Proofing

32. The LSB's enforcement policy is not expected to have a specific impact on rural areas.

Sustainability, carbon emissions, environment and health

32. There is no impact expected on sustainability, carbon emissions, environment and health.

Annex 9 – Impact Assessment: Maximum Financial Penalty

Summary: Intervention & Options

Agency: Legal Services Board ("LSB")	Title: Impact Assessment of the statutory instrument (to be made under Section 37(4) of the Legal Services Act) prescribing the maximum amount of a financial penalty that can be imposed on an Approved Regulator	
Stage: Decision	Version: Final	Date : December 2009
Related Publications: <ul style="list-style-type: none"> Section 37 of the Legal Services Act 2007 (the "LSA") Consultation Paper – "Compliance and Enforcement – Statement of Policy. Consultation paper on compliance and enforcement strategy (including maximum financial penalty), draft statutory instrument and rules" Responses to Consultation Paper 		

Available to view or download at: <http://www.legalservicesboard.org.uk>

Contact for enquiries: Lesley Davies

Telephone: 020 7271 0071

What is the problem under consideration? Why is government intervention necessary?

The LSA gives the LSB the power to impose financial penalties on Approved Regulators in certain circumstances. Section 37(4) of the LSA requires the LSB to make rules prescribing the maximum amount of a penalty that can be imposed. This Impact Assessment considers what the maximum penalty should be.

A financial penalty can be imposed where an Approved Regulator has failed to comply with any requirement imposed on an Approved Regulator by: (i) the LSB's internal governance rules (the separation of the regulatory and representative functions) made under Section 30 of the LSA; (ii) directions given by the Board under Section 32 of the LSA (for example for a failure to comply with any requirement of the LSA); and (iii) Section 51 of the LSA (requirements in relation to practising fees) or by any rules that the LSB may make under that section. Each of these requirements is designed to ensure that the legal services market operates in a way which gives consumers confidence in the way that legal services are regulated.

What are the policy objectives and the intended effects?

The policy objective is to comply with the requirements of the LSA and make rules prescribing the maximum amount of a penalty that can be imposed. The intended effects are that improved regulatory performance will encourage compliance by Approved Regulators with legislative and policy requirements which will in turn lead to better outcomes so that:

- consumers are more confident in accessing the legal services market and can make better informed decisions about purchases; and
- cultures and systems of quality assurance are embedded throughout the legal services sector to give consumers confidence in the services they purchase.

To meet these objectives, any maximum amount must provide sufficient deterrent value while remaining proportionate.

What policy options have been considered? Please justify any preferred option.

The LSB focussed on two options. The base case of 'do nothing' is not a viable option in this case because the LSA requires the LSB to make rules prescribing the maximum amount of a penalty. However, the options presented are compared to a hypothetical base case of 'do nothing'.

This Impact Assessment examines two options: (1) the preferred option set out in a previous consultation; and (2) the LSB's preferred option. In short this involves setting the maximum penalty as an amount equal to 5 per cent. of all income generated by an Approved Regulator from the exercise of its "regulatory functions" (as defined in Section 27 of the LSA). This option is preferred because it is considered to set a maximum with significant deterrent value but which remains proportionate.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

This is a new power granted to the LSB. We will review the maximum amount of the penalty in the light of our developing policies on enforcement and compliance and our experience of using the financial penalty as an enforcement tool. Any revisions undertaken will be subject to the full consultation requirements of the LSA and best practice.

Ministerial Sign-off For Final Stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister:

Not applicable

.....Date:

Summary: Analysis & Evidence

Policy Option: 1

Description: Set the maximum penalty as the greatest of: (i) an amount equal to £250 per individual that the Approved Regulator regulates; (ii) an amount equal to £5,000 per entity that the Approved Regulator regulates; or (iii) £10 million.

COSTS	ANNUAL COSTS		<p>Description and scale of key monetised costs by 'main affected groups'</p> <p>The maximum penalty under this option could result in a maximum penalty of around £28 million for the Law Society and £10 million for the Bar Council. Fines would also potentially involve significant reputational damage for Approved Regulators.</p> <p>This is a relatively complicated penalty structure which would impose costs on Approved Regulators, who would be required to provide information on the number of entities and individuals they regulate, in addition to their turnover. The LSB would also face costs monitoring and enforcing this penalty structure.</p>
	One-off (Transition)	Yrs	
	£ Negligible		
	Average Annual Cost (excluding one-off)		
£ Negligible		Total Cost (PV)	£ Negligible
<p>Other key non-monetised costs by 'main affected groups'</p> <p>There will be some cost of compliance for Approved Regulators, given the possibility of a fine increases the risk in which they operate. Given this option in effect provides a lower bound (of £10 million) for the maximum fine, such costs could be significant for, and may impact disproportionately on, smaller Approved Regulators. If regulators chose to pass on penalties in the form of increases in the costs of practicing certificates, the regulated bodies would ultimately bear these costs.</p> <p>Any subsequent appeals of fines would generate costs for all parties and HMCS given appeals would be heard at court. Due to the expected low volume of cases, such costs are not expected to be significant.</p>			

BENEFITS	ANNUAL BENEFITS		<p>Description and scale of key monetised benefits by 'main affected groups'</p> <p>There is no financial incentive for the LSB to impose high penalties: fine income will be paid into the consolidated fund.</p>
	One-off	Yrs	
	£ Negligible		
	Average Annual Benefit (excluding one-off)		
£ Negligible		Total Benefit (PV)	£ Negligible
<p>Other key non-monetised benefits by 'main affected groups'</p> <p>The maximum financial penalty proposed will provide a significant incentive for improved regulatory performance by the Approved Regulators which in turn will give consumers confidence in the services provided. Given the deterrence effect provided, the efficiency of the regulatory system should be improved.</p>			

Key Assumptions/Sensitivities/Risks

Assumptions are:

- the proposed maximum financial penalty will act as a deterrent;
- the circumstances in which the maximum will be used will be exceptional; and
- the level of any financial penalty imposed will always be proportionate to any breach

Price Base Year N/A	Time Period Years N/A	Net Benefit Range (NPV) £ Negligible	NET BENEFIT (NPV Best estimate) £ Negligible
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What is the geographic coverage of the policy/option?	England & Wales			
On what date will the policy be implemented?	January 2010			
Which organisation(s) will enforce the policy?	The LSB			
What is the total annual cost of enforcement for these organisations?	£ NIL			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	Yes.			
What is the value of the proposed offsetting measure per year?	£ NIL			
What is the value of changes in greenhouse gas emissions?	£ NIL			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	N/A	N/A	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)		
Increase	£ Negligible	Decrease	£ Negligible	Net	£ Negligible

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

Summary: Analysis & Evidence

Policy Option: 2

Description: The setting of the maximum amount of penalty as an amount equal to 5 per cent. of all income generated by an Approved Regulator from the exercise of its “regulatory functions” (as defined in Section 27 of the Act)

COSTS	ANNUAL COSTS		<p>Description and scale of key monetised costs by ‘main affected groups’</p> <p>Approved Regulators would face a financial penalty of up to 5% of turnover derived from “regulatory functions” when fined. Fines would also potentially involve significant reputational damage for Approved Regulators.</p> <p>If fined, Approved Regulators will be required to provide information relating to their turnover.</p>
	One-off (Transition)	Yrs	
	£ Negligible		
	Average Annual Cost (excluding one-off)		
	£ Negligible		Total Cost (PV) £ Negligible
<p>Other key non-monetised costs by ‘main affected groups’</p> <p>There will be some cost of compliance for Approved Regulators, given the possibility of a fine increases the risk in which they operate. Approved Regulators all face the same relative costs under this option (based on a potential fine of 5% of their turnover derived from “regulatory functions”). If regulators chose to pass on penalties in the form of increases in the costs of practicing certificates, the regulated bodies would ultimately bear these costs.</p> <p>Any subsequent appeals of fines would generate costs for all parties including HMCS given appeals would be heard at court. Due to the expected low volume of cases, such costs are not expected to be significant.</p>			

BENEFITS	ANNUAL BENEFITS		<p>Description and scale of key monetised benefits by ‘main affected groups’</p> <p>There is no financial incentive for the LSB to impose high penalties: fine income will be paid into the consolidated fund.</p>
	One-off	Yrs	
	£ Negligible		
	Average Annual Benefit (excluding one-off)		
	£ Negligible		Total Benefit (PV) £ Negligible
<p>Other key non-monetised benefits by ‘main affected groups’</p> <p>The maximum financial penalty proposed will provide an incentive for improved regulatory performance by the Approved Regulators which in turn will give consumers confidence in the services provided. Given the deterrence effect provided, the efficiency of the regulatory system should be improved.</p>			

Key Assumptions/Sensitivities/Risks

Assumptions are:

- the proposed maximum financial penalty will act as a deterrent;
- the circumstances in which the maximum will be used will be exceptional; and
- the level of any financial penalty imposed will always be proportionate to any breach

Price Base Year N/A	Time Period Years N/A	Net Benefit Range (NPV) £ Negligible	NET BENEFIT (NPV Best estimate) £ Negligible
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What is the geographic coverage of the policy/option?	England & Wales
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On what date will the policy be implemented?	January 2010			
Which organisation(s) will enforce the policy?	The LSB			
What is the total annual cost of enforcement for these organisations?	£ NIL			
Does enforcement comply with Hampton principles?	Yes			
Will implementation go beyond minimum EU requirements?	Yes.			
What is the value of the proposed offsetting measure per year?	£ NIL			
What is the value of changes in greenhouse gas emissions?	£ NIL			
Will the proposal have a significant impact on competition?	No			
Annual cost (£-£) per organisation (excluding one-off)	Micro	Small	Medium	Large
Are any of these organisations exempt?	N/A	N/A	N/A	N/A

Impact on Admin Burdens Baseline (2005 Prices)			(Increase - Decrease)		
Increase of	£ Negligible	Decrease	£ Negligible	Net	£ Negligible

Key:

Annual costs and benefits: Constant Prices

(Net) Present Value

Introduction and Background

1. The LSB is the organisation created by the LSA and is responsible for overseeing legal regulators, (referred to as the Approved Regulators in the LSA) in England and Wales. The LSB's mandate is to ensure that regulation in the legal services sector is carried out in the public interest; and that the interests of consumers are placed at the heart of the system. The LSA gives the LSB and the Approved Regulators the same Regulatory Objectives¹ and a requirement to have regard to the Better Regulation Principles². Compliance by the LSB and the Approved Regulators with the Regulatory Objectives, other requirements in the LSA and other statutes will help to ensure that this mandate is achieved.
2. The LSA gives the LSB a range of enforcement powers to exercise over Approved Regulators where their acts or omissions threaten the Regulatory Objectives. Its powers include the ability to impose a financial penalty upon Approved Regulators. This was considered to be an important part of a regulator's toolkit and necessary in the interests of the LSB having the greatest possible flexibility to use the most appropriate sanction at any given time. This was debated during the passage of the Legal Services Bill and therefore the merits of this power itself are not considered in this Impact Assessment.
3. Section 37(4) of the LSA requires the LSB to make rules prescribing the maximum amount of a penalty which may be imposed under Section 37. A financial penalty can be imposed where an Approved Regulator has failed to comply with any requirement imposed on an Approved Regulator by: (i) the LSB's internal governance rules (the separation of the regulatory and representative functions) made under Section 30 of the LSA; (ii) directions given by the Board under Section 32 of the LSA (for example for a failure to comply with any requirement of the LSA); and (iii) Section 51 of the LSA (requirements in relation to practising fees) or by any rules that the LSB may make under that section. Each of these requirements in the LSA is designed to ensure that the legal services market operates in a way which gives consumers confidence in the way that legal services are regulated.
4. In summary, the financial penalty will help prevent Approved Regulators from: (i) acting in a way so that their regulatory functions are prejudiced by their representative functions; (ii) using practising certificate fees in an inappropriate manner; and (iii) acting in a way that that is inconsistent with the LSA and in particular the Regulatory Objectives.
5. The rules that the LSB is required to make under Section 37(4) prescribe the maximum amount of a penalty. This is therefore the amount of a penalty that the LSB can impose in a worst case scenario. The LSB is under an overarching duty to act proportionately and this duty will be met each time the LSB seeks to impose a financial penalty. As an

¹ The Regulatory Objectives are

- (a) protecting and promoting the public interest;
- (b) supporting the constitutional principle of the rule of law;
- (c) improving access to justice;
- (d) protecting and promoting the interests of consumers;
- (e) promoting competition in the provision of services such as are provided by authorised persons;
- (f) encouraging an independent, strong, diverse and effective legal profession;
- (g) increasing public understanding of the citizen's legal rights and duties;
- (h) promoting and maintaining adherence to the professional principles.

² The five principles of good regulation are proportionality, accountability, consistency, transparency and targeting as set out in Section 3(3) of the LSA

additional safeguard, the LSA also sets out the grounds on which an Approved Regulator is able to appeal to the High Court against the decision of the LSB to impose a financial penalty.

Scope of the Impact Assessment

6. The scope of this Impact Assessment is limited to the amount of the maximum financial penalty. The decision to give the LSB the power to impose a penalty on the Approved Regulators has previously been discussed in consultation documents, independent reviews, White Papers and parliamentary debates. The LSA requires the LSB to make rule about what the maximum amount of such penalty should be. This Impact Assessment deals solely with what this maximum amount should be.

Scope of the proposals

7. In summary, the proposal is that the maximum amount should be an amount equal to 5 per cent. of all income which the Approved Regulator has derived from the exercise of its “regulatory functions” (as defined in Section 27 of the LSA) in respect of its most recent accounting period.

Stakeholder groups and Organisations in the scope of the proposal

8. The 10 current Approved Regulators and any new Approved Regulators will be subject to the financial penalty provisions. The current Approved Regulators are the Law Society, the Bar Council, the Council for Licensed Conveyancers, the Institute of Legal Executives, the Chartered Institute of Patent Attorneys, the Institute of Trade Mark Attorneys, the Faculty Office, the Association of Law Costs Draftsmen, the Association of Chartered Certified Accountants (“ACCA”) and the Institute of Chartered Accountants of Scotland (“ICAS”).
9. The LSB recognises that it may be possible for an Approved Regulator to choose to pass on the cost of any financial penalty to those it regulates by way of an increase in the cost of a practising certificate. This in turn may result in this cost being passed on to consumers. The extent to which passthrough at both levels occurs will depend on competitive pressures within the relevant markets.
10. The ability for the Approved Regulator to pass on the cost of the financial penalty (irrespective of what the level of the penalty is) is inherent in the structure of the LSA and is not something that the LSB has control over. Ultimately, whether an Approved Regulator will pass on the cost to its regulated community will depend on the nature of the regulated community.
11. Ultimately, the LSB believes that the use of a financial penalty is likely to be a rare event but that if the cost of any financial penalty is passed on in this way, any cost to the consumer is likely to be very small. Table 1 at paragraph 35 below sets out the likely cost to those regulated by an Approved Regulator in the event of the **maximum** penalty being set in accordance with Option 2, the preferred option.

Policy Rationale for Proposals

12. The LSA requires the LSB to make rules prescribing the maximum amount of a penalty which may be imposed under Section 37. The circumstances in which such a penalty can be imposed are set out above.
13. The LSB is mindful that it should set an appropriate maximum that is not too low, (as this may not have sufficient deterrent value) but not too high (as this may impose disproportionate costs on smaller Approved Regulators). The preferred option is one that is considered to provide an appropriate balance between these two concerns, and is considered by the LSB to be the most proportionate given its role as an oversight regulator and the requirements of the LSA.

Economic Rationale

14. The conventional economic approach to Government intervention is based on efficiency or equity arguments. Government intervenes if there is a perceived failure in the way a market operates (“market failures”) or if it would like to correct existing institutional distortions (“government failures”). Government also intervenes for equity (fairness) reasons. In this case, intervention would be justified primarily on efficiency grounds.
15. Intervention by the LSB in the event of non compliance by imposing a financial penalty of sufficient deterrent value is likely to incentivise the Approved Regulator to improve compliance and therefore their overall efficiency and performance. This should improve welfare overall, assuming the compliance costs incurred by the Approved Regulators are outweighed by the value of efficiency gains made to the regulatory system.

Cost Benefit Analysis

16. The Consultation Paper considered a number of options for setting the amount of the maximum financial penalty. One option discussed was whether the maximum amount should be set at an amount equal to 10 per cent. of an Approved Regulator’s income. This formulation is one that is commonly used by economic regulators, especially in the utilities sector. This option was largely discounted in the Consultation Paper (and subsequently by respondents) because it was recognised that the LSB’s relationship with the Approved Regulators is very different to that of an economic regulator. The preferred option that was put forward in the Consultation Paper was Option 1 outlined below.
17. Response to the Consultation Paper suggested that the LSB look at the maximum fining powers given to the Legal Services Complaints Commissioner (the “LSCC”). This power effectively limits the LSCC maximum fine to £1 million by using a formula that states the maximum amount is the lesser of: (i) £1 million; and (ii) 1 per cent. of the bodies total income from all sources³. After consideration, this option was not perused.
18. However, in light of consultation responses, and after further consideration, the LSB has developed a further option, set out as Option 2 below. For the reasons explained in this Impact Assessment, Option 2 is now the preferred option, which will be implemented.

BASE CASE / OPTION 0 (“Do Nothing”)

19. The options that the LSB has focussed on deal with how the LSB will set the maximum amount of a penalty. The LSA requires the LSB to make rules prescribing the maximum amount. Therefore, the do nothing base case is presented as hypothetical only. The two options presented below are compared to this hypothetical base case. There are no costs or benefits associated with the base case.

OPTION 1

Description

20. As set out above, this option was the one proposed in our original Consultation Paper. This proposed setting a maximum penalty of the greatest of:
 - an amount equal to £250 per individual that the Approved Regulator regulates;
 - an amount equal to £5,000 per entity that the Approved Regulator regulates; or
 - £10 million.

³ Legal Complaints Commissioner (Maximum Penalty) Order 2004 (SI 2004/ 2758)

Costs

Financial costs

21. The maximum penalty under this option could result in a maximum penalty of around £28 million⁴ for the Law Society and £10 million⁵ for the Bar Council. This option was not widely supported in our consultation. Respondents believed that the maximum amount was too large and that in some circumstances could potentially bankrupt some of the smaller Approved Regulators.
22. In instances where an Approved Regulator was fined, in addition to the financial costs they would also face reputational damage. This reinforces the financial incentives provided by the penalty itself.

Administrative costs

23. The LSB would incur some ongoing costs in instances when it would have to impose the penalty. These could be significant given the relative complexity of the penalty structure (compared to Option 2). Similarly, if fined Approved Regulators would face costs given they would be required to provide information relating the number of individuals and entities they regulate, in addition to their turnover.
24. An argument could be made that the imposition of a relatively large penalty (such as this option would allow) might lead to a greater number of appeals by Approved Regulators which in turn could lead to greater costs for the judicial system. There is no evidence that such impacts would generate significant costs for HMCS, particularly given it is not envisaged that financial penalties will be used on a regular basis and the LSB does not think that its selection of the appropriate level for the maximum penalty should be affected by this consideration.

Compliance costs

25. Approved Regulators are likely to incur compliance costs to reduce the risk of receiving a penalty; the potential penalty proposed under this option would have significant deterrent value.

Distributional costs

26. Given this option in effect provides a lower bound (of £10 million) for the maximum fine, in relative terms (compared for example to their turnover) the potential fine a small Approved Regulators may face is higher than the fine a large Approved Regulators may face. Any compliance costs borne by Approved Regulators as a result of the penalty could be significant for, and may impact disproportionately on, smaller Approved Regulators.
27. As mentioned above, it is possible that an Approved Regulator may choose to pass on the cost of any financial penalty to those it regulates by way of an increase in the cost of the practising certificate. This in turn may result in this cost being passed on to consumers. This may generate distributional impacts, although the effect of such impacts is uncertain.

⁴ [The consolidated report and financial statements for The Law Society as at 31 December 2008](#) state (at page 5) that there were 112,246 solicitors holding practising certificates as at March 2009. If you multiply this figure by £250 you reach approximately £28 million.

⁵ The number of individuals that the Bar Council currently regulates is approximately 15,000. 15,000 multiplied by £250 equals £3.75 million. This means that the £10 million threshold would apply.

28. If the Approved Regulator chose to pass on the amount of the financial penalty to their regulated community, this in itself would incentivise members of the profession to put pressure on their Approved Regulator to improve their compliance. If a number of financial penalties were passed through by an Approved Regulator this may in itself incentivise members of the professions to switch to an alternative regulator (if one was available). All these factors should ultimately help drive regulatory compliance.

Benefits

Financial benefits

29. Any financial penalty imposed on an Approved Regulator by the LSB is paid into the Consolidate Fund. There is therefore no incentive on the LSB to impose a large penalty other than the penalty should be an incentive to change behaviour.

Efficiency benefits

30. The benefit of this option is that it sets a maximum penalty with significant deterrent value. This should provide benefits for firms and consumers within the regulatory framework covered, given the effectiveness of the regulatory system should be improved. The methodology also allows for the maximum penalty to increase as the Approved Regulators scope of regulatory functions increase.

Net Impact

31. It has not been possible to quantify the costs and benefits set out above, in line with the uncertainties present. However, it is considered that this option would result in a maximum penalty which could ultimately be too large for the smallest Approved Regulators. This conclusion is supported by consultation responses: all but one respondent had serious reservations about this proposal. This option would also impose extra administrative costs on all Approved Regulators, and on the LSB, compared to Option 2. For these reasons, this option is no longer the preferred option.

OPTION 2

Description

32. This option is to frame the maximum penalty as an amount equal to 5 per cent. of all income which the Approved Regulator has derived from the exercise of its “regulatory functions” (as defined in Section 27 of the LSA) in respect of its most recent accounting period.

33. This option will lead to a smaller maximum amount than that proposed under Option 1, particularly for the smallest Approved Regulators. Both options provide a maximum amount that the LSB can impose, but it is noted that in deciding what penalty to impose the LSB would always be under a duty to act proportionately, taking into account the particular circumstances of each case.

Costs

Financial costs

34. From the Approved Regulators’ perspective, this option doesn’t give them a certainty of capping the maximum penalty at a specific amount; rather the potential fee depends on turnover. Any fines would represent a cost to Approved Regulators.

35. An illustration of the cost of this proposal to those Approved Regulators who have publicly available accounts for the year ended 31.12.08 is set out in Table 1 below. This table also sets out the per capita cost to each member of the profession if the Approved Regulator chose to pass the penalty through as an increase in the practising certificate fee.

Table 1: Possible financial implications of Option 2 fee structure

Approved Regulator	Approximate income from “regulatory functions” derived from audited accounts FYE 31.12.08	Proposed maximum on basis of 5% formula	Number of Authorised Persons⁶	Per capita cost if full penalty passed through
The Law Society	£108 million	£5,400,000	108,407	£50.00
The General Council of the Bar	£6,100,000	£305,000	15,030	£20.00
Institute of Legal Executives	£6,500,000	£321,000	7,488	£43.00
Council for Licensed Conveyancers	£1,223,000	£61,000	1,034	£59.00
Institute of Trade Mark Attorneys	£582,000	£ 29,000	844	£35.00

Note: Accounting information for the Master of Faculties, the Chartered Institute of Patent Attorneys and the Association of Law Costs Draftsmen not publicly available. ACCA and ICAS are also excluded because they were not undertaking regulatory functions during the year ending 31.12.08.

36. In instances where an Approved Regulator was fined, in addition to the financial costs they would also face reputational damage. This reinforces the financial incentives provided by the penalty itself.

Administrative costs

37. The LSB would incur some minor ongoing costs in instances when it would have to impose the penalty. Given the proposed structure is simpler than under Option 1, these costs would be lower. Similarly, Approved Regulators would face costs if fined as they would be required to provide turnover information. These costs would also be lower than under Option 1.

38. As with Option 1, an argument could be made that the imposition of a relatively large penalty (such as this option would allow) might lead to a greater number of appeals by Approved Regulators which in turn could lead to greater costs for the judicial system.

⁶ See page 6 of the LSB Business Plan 2009/10
http://www.legalservicesboard.org.uk/news_publications/publications/pdf/business_plan_2009_10.pdf

There is no evidence that such impacts would generate significant costs for HMCS, particularly given it is not envisaged that financial penalties will be used on a regular basis and the LSB does not think that its selection of the appropriate level for the maximum penalty should be affected by this consideration.

Compliance costs

39. A potentially large penalty such as proposed under this option would have significant deterrent value. One result of this may be that Approved Regulators face increased compliance costs to ensure that a financial penalty is not imposed against them. Unlike Option 1, there is no lower bound on the maximum fine: the maximum is proportional to turnover. This means that all Approved Regulators face the same relative risks, and would be expected to bear the same relative costs, regardless of their size.

Distributional costs

40. It is possible that an Approved Regulator may choose to pass on the cost of any financial penalty to those it regulates by way of an increase in the costs of the practising certificate. This in turn may result in this cost being passed on to consumers. The final column of Table 1 illustrates the per capita cost to each member of the profession if the Approved Regulator chose to pass the penalty through as an increase in the practising certificate fee. This would generate distributional impacts on the regulated bodies and their customers, although the effect of such impacts is uncertain.

41. If the Approved Regulator chose to pass on the amount of the financial penalty to their regulated community, this in itself would incentivise members of the profession to put pressure on their Approved Regulator to improve their compliance. If a number of financial penalties were passed through by an Approved Regulator this may in itself incentivise members of the professions to switch to an alternative regulator (if one was available). All these factors should ultimately help drive regulatory compliance.

Benefits

Financial benefits

42. Any financial penalty imposed on an Approved Regulator by the LSB is paid into the Consolidate Fund. There is therefore no financial incentive on the LSB to impose a large penalty, other than the penalty should be an incentive to change behaviour.

Efficiency benefits

43. This option sets a maximum penalty with a significant deterrent value. This should provide benefits for firms and consumers within the regulatory framework covered, given the effectiveness of the regulatory system should be improved. The methodology also allows for the maximum penalty to increase as the Approved Regulators scope of regulatory functions increase.

44. The use of a figure based on a percentage of regulatory income follows the model that is already in use by the LSCC and allows for a maximum which is proportionate to the relative size of the different Approved Regulators.

45. However, the figure of 5 per cent. (rather than the 1 per cent. that the LSCC can impose) is considered appropriate because the roles of the LSB and the LSCC are very different. The LSCC regulates just one sub-section of activities (complaints). It is the LSB's responsibility to oversee the regulation of all regulatory activities of the Approved Regulators and to ensure that sufficient sanctions and deterrents are in place to deter major systemic regulatory failure, and to ensure its rapid correction if and when it occurs. This is an important consideration with the introduction of Alternative Business Structures.

46. The option also recognises that the 10 per cent figure often used by economic regulators is not appropriate for dealing with the scale of activities of the Approved Regulators.

However, the option does recognise that not limiting the penalty to an absolute maximum (as the LSCC does with its absolute maximum of £1 million) gives the flexibility for the level of the penalty to increase in line with the increase in an Approved Regulators “regulatory functions”.

Net Impact

47. As with Option 1, it has not been possible to quantify the costs and benefits set out above, in line with the uncertainties present. However, it is considered that this option would result in a maximum penalty that would be appropriate for all Approved Regulators, regardless of their size. This option would also minimise the administrative costs on all Approved Regulators, and on the LSB. For these reasons, this option is the preferred option.

SUMMARY OF OPTIONS

48. The LSB prefers Option 2. The reasons for this are as follows:

- the use of a figure based on a percentage of regulatory income follows the model that is already in use by the LSCC and allows for a maximum which is proportionate to the relative size of the different Approved Regulators;
- the figure of 5 per cent. (rather than the 1 per cent. that the LSCC can impose) is considered appropriate because the LSB is dealing with a broader range of activity than the LSCC and would provide sufficient deterrent value;
- not limiting the penalty to an absolute maximum (as the LSCC does with its absolute maximum of £1 million) or minimum (such as £10 million in Option 1) gives the flexibility for the level of the maximum penalty to be clearly linked to the scope of an Approved Regulators “regulatory functions”. The LSB believes that this flexibility is important as the regulatory regime for Alternative Business Structures develops;
- the methodology gives a maximum amount which, by sitting between the maximum that can be imposed by the LSCC and the maximum that can be imposed by most economic regulators, recognises the unique oversight relationship between the LSB and the Approved Regulators;
- the proposed structure is simple, which will minimise the administrative costs that both the LSB and Approved regulators would bear in any instances when a fine is imposed.

49. It should be remembered that this policy only sets a maximum amount. The LSA requires the LSB to act proportionally and as a result the actual penalty imposed will be considered on a case by case basis.

Enforcement and Implementation

50. The policy adopted will be implemented by a statutory instrument which can only be made with the consent of the Lord Chancellor.

51. The LSB will be the body who enforces the policy.

Specific Impact Tests

52. Extensive Impact Assessments were carried out in the process of the Legal Services Bill's progress through Parliament⁷. The LSA requires the LSB to make rules prescribing the maximum amount a financial penalty.

Rural proofing

53. The LSB's policy on financial penalties and the amount of the maximum amount of any penalty is not expected to have a specific impact on rural areas.

Environmental tests

54. There is no impact expected on the environment.

Competition Assessment

55. We would expect our enforcement strategy and processes to have a positive effect on competition. Compliant Approved Regulators should lead to a regulatory framework which enables providers of legal services to innovate and develop services that better reflect the needs of consumers.

Sustainable Development

56. There is no impact expected on sustainable development.

Small Firms Impact Test

57. The maximum financial penalty rules will not apply to small businesses. However, as noted elsewhere in this Impact Assessment, it is possible that an Approved Regulator may choose to pass on the cost of any financial penalty to those it regulates by way of an increase in the cost of a practising certificate. If this occurred on a regular basis it could have a disproportionate impact on smaller law firm businesses. In mitigation, the LSB believes that the use of a financial penalty is likely to be a rare event and if it is used, the maximum it proposes (which is the maximum and is therefore not indicative of the likely average level of a penalty) when coupled with the LSB's overarching duty to act proportionately, is not large enough to cause a significant disproportionate impact on small firms.

Legal Aid and Justice Impact Test

58. The LSB's policy is not expected to have a specific impact on legal aid and justice.

Human Rights

59. There are specific requirements on the LSB to make rules concerning the making of oral and written representations in relation to the exercise of certain of the LSB's enforcement functions. Although there is no specific requirement for the LSB to make such rules in relation to the imposition of financial penalties, the LSB has decided that the same rules should apply as those that apply to its other enforcement functions.

60. Section 39 of the LSA provides a mechanism for Approved Regulators to appeal to the High Court against aspects of a decision to impose a financial penalty.

Freedom of Expression Audit

61. The LSB's policy is not expected to have a specific impact on Freedom of Expression.

Privacy Impact Test

62. The LSB's policy is not expected to have a specific impact on privacy.

⁷ <http://www.official-documents.gov.uk/document/cm68/6839/6839.pdf>

EIA

63. Because the LSB is an oversight regulator there is no direct impact on individuals. However, if the LSB achieves its intended outcomes, there will be a general improvement in the standard of regulation and the approach taken to it which we would expect to have a positive impact generally on the provision of legal services to all consumers, and to provide increased opportunities for all groups of those being regulated.
64. It is possible that an Approved Regulator may pass on the cost of any financial penalty to those it regulates by way of an increase in the cost of a practicing certificate. If this occurred on a regular basis it could have a disproportionate impact on solicitors, barristers and any other approved persons on relatively moderate incomes. This may have some impact on diversity given that a high proportion of these approved persons are likely to be Black or Minority Ethnic. However it will be for the Approved Regulator to determine how it passes on the cost of the financial penalty to those it regulates. The LSB believes that the use of a financial penalty is likely to be a rare event and that if it is used, the maximum it proposes, when coupled with the LSB's overarching duty to act proportionately, is not significant enough to cause such an impact.

Specific Impact Tests: Checklist

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

Annexes

None

