Appendix 8

Proposed revisions to ICAEW's disciplinary, fitness to practise and appeals framework – summary of the responses to the public consultation (May 2022)

Summary of 'Stage 1' responses on draft Disciplinary Bye-laws (DBLs) and Investigation and Disciplinary Regulations (IDRs)

1. In total, 11 responses were received to Stage 1 of the consultation. These comprised detailed feedback from 7 large accountancy firms (including the 'Big 4'), one international law firm and 3 individuals. Separately, comments were received on the draft DBLs and IDRs from the Financial Reporting Council (FRC) between November 2021 and March 2022.

2. Amongst the respondents, there was strong support generally for the overall structural approach to distil the DBLs down to just 16 'Core DBLs' setting out the obligations and duties of members / firms and the powers of ICAEW and its committees, panels and tribunals. A number of respondents commented that the DBLs had become unwieldy and that the steps being taken to streamline the DBLs and modernise the language of both the DBLs and underlying regulations were welcome[1].

3. One respondent observed, however, that there was still a large volume of material to navigate given the five-part Regulatory Handbook, so recommended that further efforts be made to assist users – e.g. by inserting a hyperlinked contents page into the Handbook and by grouping bye-laws and regulations concerning subject areas (such as interim orders) together.

4. Three respondents commented that the inclusion in draft DBL 5.1 of a new test for the Conduct Committee, and a departure from *'prima facie liability to disciplinary action',* was welcome. One said that the new test is more precise and will mean that decisions to take disciplinary action will focus squarely on an assessment of the available evidence. It is also in line with the tests used by other professional regulators. Another recommended that, for clarity, guidance be developed to explain the legal meaning of the test.

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[1] Although one individual respondent (an ICAEW member) said that the language used was *'arcane and virtually incomprehensible'* and that the tone of the consultation was one of *'top down enforcement'.*

5. Two respondents said that they welcome the inclusion of non-financial sanctions, such as training, in draft DBL 11. One commented that training is an important tool towards the goal of improving audit quality, and the proposal brings ICAEW into line with the orders available to FRC tribunals. It was queried, however, how compliance with such orders will be monitored by ICAEW.

6. One respondent said that they welcomed the change in the scope of the Reviewer of Complaints process (IDR 28).

7. Detailed responses on the draft DBLs and IDRs are summarised in the table below (see appendix).

Summary of responses to Stage 2 of the consultation (Parts 2 – 3 of the draft Regulatory Handbook)

8. Two responses were received to Stage 2 of the consultation (both the respondents were ‘Big 4’ firms).

9. In respect of regulatory proceedings, both respondents were supportive of the proposed move to public hearings by default, with hearings being conducted in private only in exceptional circumstances. Both firms said that they would welcome guidance on the circumstances that may be considered ‘exceptional’ in this respect.

10. One respondent supported the publication of orders of Review Panels pending an appeal (with a note that the decision of the panel may be subject to appeal). They observed that this was consistent with the approach taken in disciplinary cases.

11. For reasons of fairness and consistency, both respondents were also supportive of the introduction of an appeal right for applicants who are refused status as a provisional member by the Fitness to Practise Committee. One said that they would welcome guidance on the matters that may result in an application being referred to the Fitness to Practise Committee for determination in the first instance.

APPENDIX

[Note – the following table sets out respondents' comments on key provisions / issues arising during the Stage 1 consultation only; comments on more minor drafting points have not been included]

DBL	Comment	IRB response
DBL 2.1 – definitions	The ICAEW Regulatory Board (IRB) has previously determined that the fast-track process for serious conviction allegations relates to those offences which fall within the first category of complaints under section 4 of the Guidance on Sanctions. This information is published on the 'complaints process' section of the ICAEW website. One respondent (a Big 4 firm) commented that this information is not easy to locate, and that consideration should be given to specifying the types of matters that fall within the definition of 'serious conviction allegation' in the DBLs / IDRs.	No change – the current approach provides flexibility to the IRB to update and amend the types of serious convictions that fall within the fast-track process as required. However, consideration will be given to ways in which this information can be displayed more clearly on the website – e.g. through the use of hyperlinks between documents or through guidance.
DBL 3.3 / IDR 3.2	The current DBLs do not specify whether a Committee or Tribunal should apply the sanctions in the Guidance on Sanctions current at the time of the event giving rise to the liability to disciplinary action or whether they should apply the current Guidance at the time of sanctioning. The current practice is the latter (and there have been no significant changes in sanctions in any event in recent years). The 'application' provisions within the DBLs and IDRs were drafted to specified that a person / firm's liability to disciplinary action <u>and the sanctions to apply</u> shall be based on the bye-laws and regulations in force at the time of the event giving rise to the liability to disciplinary action.	The IRB has had regard to this feedback and asked for a review of the sanctions regimes at other professional services regulators. On the basis of that review (and it being advised that there is no case law precedent on this issue), the IRB has now determined that the reference to 'applicable sanctions' in these provisions should be removed and ICAEW will maintain the status quo in applying the Guidance on Sanctions in force at the time of the committee meeting / hearing.

	Concern was raised over the inclusion of 'sanctions' in this provision on grounds that it would be inconsistent with the sanctioning provisions of other professional services regulators and on the basis that there could be some practical challenges in applying previous sanctioning guidance where there are multiple allegations which cross different time periods. It was suggested that applying sanctions in force at the time of the hearing, as adjusted for any mitigating factors concerning the timing and impact of the events, would be simpler and result in a fair and transparent outcome.	
DBL 4.1(a) – liability of members, affiliates and relevant persons to disciplinary action	One respondent argued that, following *Beckwith v SRA*[2] and *Forsyth v FCA*[3], DBL 4.1 should be amended to clarify ICAEW's regulatory remit with respect to acts or omissions that arise outside a member's professional life. It was suggested that guidance on this issue would provide clarity and aid transparency.	Although no change is proposed to DBL 4.1(a) which already allows for disciplinary action to be taken in respect of acts / omissions that arise outside of an individual's professional life, the IRB will consider whether guidance on this issue should be developed in due course.

2 [2020] EWHC 3231 (Admin)
3 [2021] UKUT 162 (TCC)

DBL 4.1(h) and 4.2(h) – liability to disciplinary action on grounds of a failure to comply with a notice to supply information or documentation etc in accordance with DBL 8 (duty to cooperate) within the time allowed by or under the IDRs – i.e. 14 days (or such longer period as may be specified)	One firm noted that these provisions introduce a new ground for liability (currently the provision applies in respect of regulated firms only under current DBL 6). The respondent (a Big 4 firm) stated that, while they are supportive of the change, ICAEW should have regard to the fact that, depending on the nature of the request, compliance within 14 days may not be possible – e.g. in the case of privilege reviews. They suggested, therefore, that the wording of the provisions be amended to provide for a *'failure to comply without reasonable excuse'* (or similar).	No change is proposed to draft DBLs 4.1(h) and 4.2(h) – IDR 16.1 already allows for a period of longer than 14 days to be specified in the notice. If the Conduct Department specifies a timeframe and a complaint is brought subsequently on grounds that the firm has failed to provide information/evidence within that timeframe, it will be for the Conduct Committee to determine whether the timeframe was reasonable in considering an allegation of failure to comply.
DBL 4.3 – liability of former members, firms, affiliates and relevant persons to disciplinary action	This provision reflects current DBL 6A which provides that former members etc remain liable to disciplinary action after they cease to be a member etc, where the relevant acts or omissions occurred during their membership. One respondent commented that it was unclear how DBL 4.3 relates to DBL 13.7 which provides that fitness to practise proceedings may be terminated if a member resigns.	No change is proposed to draft DBL 4.3. Although under the existing DBLs a former member remains liable to disciplinary action for acts / omissions that took place while they were a member etc, a respondent's resignation of their membership or registration will only be accepted in the course of fitness to practise proceedings where acceptance is considered appropriate given the person's mental or physical health. There is no obligation on FTP Committee Chair to accept an offer of resignation (draft DBL 13.7 is framed as 'may' terminate proceedings, rather than 'shall'). The draft FTP Regulations also provide that where fitness to practise proceedings are terminated following an individual's resignation of their membership or

		registration, any background investigation or disciplinary proceedings will be stayed and will be re-opened automatically if the individual reapplies for membership or registration with ICAEW, save where the Fitness to Practise Committee considers that exceptional circumstances exist that require the investigation / disciplinary proceedings to be closed.
DBL 4.6 – liability of members and others to disciplinary action for acts / omissions which took place prior to them becoming a member etc	Two respondents raised concern over this provision which provides for liability to disciplinary action for prior acts or omissions. It was argued that while (current) DBL already provides for liability to disciplinary action for prior acts / omissions, this cannot be right as a matter of law and that liability for a failure to disclose prior acts / omissions under DBL 4.7 should be sufficient. It was suggested that if draft DBL 4.6 is to be retained, it should be made explicit that it is subject to the general 3 year time limit for historic complaints under IDR 10.1. Another respondent suggested that it should be made explicit in draft DBL 4.6 that liability to disciplinary action will be subject to DBL 3.3, which provides that liability is based on the bye-laws and regulations in force at the time of the event. They noted that this will require prospective members etc to ascertain from previous versions of the DBLs whether any act or omission may give rise to a liability to disciplinary action.	Draft DBL 4.6 has been deleted on the basis that draft DBL 4.1 already allows the Conduct Department to bring forward complaints in respect of matters which occurred prior to the individual becoming a member etc of ICAEW (consistent with the current DBLs). So this new DBL is not needed and should be deleted if the aim is to simplify and streamline the DBLs.
DBL 4.7 – failure to disclose prior acts / omissions	One Big 4 firm argued that it was unclear what members, affiliates and relevant persons would be required to disclose on applying to ICAEW for the purposes of draft DBL 4.7 (which is a new provision).	Draft DBL 4.7 (to be re-numbered 4.6) has been amended to clarify the issues that need to be disclosed by a prospective member, affiliate or relevant person on applying to ICAEW.

Current DBL 5.2 – defence that firm took all reasonable steps to prevent acts or defaults	Three respondents noted that current DBLs 5.2- 5.4 had not been carried over into the new DBLs. These provide: • that it shall be a defence to any complaint arising under current DBL 5 for a respondent firm to prove that it had taken reasonable steps to prevent acts or defaults of the kind which are the subject of the complaint; • that the fact that one or more principals have joined or left a respondent firm since the time of the acts or defaults shall not affect the firm's liability to disciplinary action unless the firm has substantially lost its identity with the firm constituted at the time; • that, for the purposes of (current) DBL 5.4, a firm which describes itself as 'Chartered Accountants' shall be presumed to be a member firm unless it proves that it is not. The respondents argued, in particular, that the defence of 'reasonable steps' (DBL 5.2) should be retained. One respondent (a Big 4 firm) observed that the language of this provision aligns with the 'adequate procedures' defence to the corporate offence of a failure to prevent bribery and is analogous to FCA guidance under the Decision Procedure and Penalties Manual (DEPP) which stipulates that it may not be appropriate to take disciplinary measures against a firm for actions of an individual where the firm can show that it took all reasonable steps to prevent the breach. The respondents argued that if the objective of the disciplinary process is to address and deter	No change – in the view of the IRB, the steps taken by a firm to reduce the risk of an issue arising should be mitigating factors only; it would not be in the public interest for a firm to avoid liability completely simply by demonstrating that it had put in place measures and controls to prevent issues of this type arising. If the issue has arisen despite measures and controls being in place, this will be in indicator that such controls are not effective.

	misconduct and incompetence, then the objective can be met by the firm taking all reasonable steps without the need for further action (and the costs associated with this).	
DBL 5.4 – previous findings of fact	Draft DBL provides that certain matters shall constitute rebuttable evidence of any facts found or unfit behaviour for the purposes of the DBLs. This includes, among other matters, any finding of fact in any civil proceedings before a court of competent jurisdiction in the UK or elsewhere, regardless of whether the member etc was a party to those proceedings (draft DBL 5.4(b)). One respondent argued that the meaning of 'finding of fact' in draft DBL 5.4 is unclear and that it is likely to give rise to dispute. With respect of DBL 5.4(b) they noted that the provision will apply regardless of whether there has been any substantive finding by the relevant court and will apply regardless of the rules of evidence that applied. If the respondent was not a party to the proceedings, they will not have had an opportunity to challenge the evidence. The burden then shifts to the respondent to disprove the fact, which will be all but impossible as the respondent has no powers of compulsion even in the UK. The respondent said that clear findings of fact / convictions in proceedings to which the respondent was a party (either as found by the court / tribunal or because the respondent agreed to them) can stand as prima facie evidence, but that going beyond this could render the proceedings unfair. They suggested	Draft DBL 5.4 reflects current DBL 7.2 with some limited amendments. In response to this feedback, draft DBL 5.4 has been amended to apply only in cases where a finding is made in respect of the member, affiliate or relevant person who gave evidence before the court, or who was a party to the proceedings. Any finding of fact will be a rebuttable presumption only.

	instead adopting an approach in line with Rule 15 of the Solicitors (Disciplinary Proceedings) Rules 2007.	
DBL 6.1 – duty to report	A number of respondents expressed concern over the removal of the 'public interest' limb from the test for a report under draft DBL 6.1. They argued that this is likely to result in an increased number of trivial reports being made to the Conduct Department, which could adversely impact the ability of the department to assess and investigate cases in a timely manner. Concern was raised, in particular, over how this change could interact with alleged professional incompetence under DBL 4.1(b). It was argued that in less serious cases, it may not be in the public interest for matters to be reported and that this could have a negative impact on the attractiveness of the profession, particularly at a junior level, if less serious mistakes are required to be reported to ICAEW. It was suggested that consideration be given to a provision that would require a firm to make a report once its own internal investigation has been concluded on the basis that the member <u>is</u> (not may be) liable to disciplinary action. It was argued that sanction within firms can be an effective and efficient way to bring about in change in behaviour in cases of incompetence or negligence. Only one respondent (a Big 4 firm) said that they welcomed the removal of the 'public interest' limb from the test for the Duty to Report, which they consider to be open to differing interpretations and liable to be misunderstood.	While no change is proposed to the test for reporting set out in DBL 6.1, steps will be taken when the existing Guidance on the Duty to Report is updated to ensure that the threshold for reporting is clear (particularly with respect to issues of potential incompetence) along with the timing of reports where there is an internal investigation by the firm. A report need not be made at the outset of the investigation, but may need to be made prior to the completion of the internal investigation, depending on the circumstances.

DBL 7.2 – duty to investigate complaints internally	As above, it was suggested that where matters are being investigated by firms internally, the duty to report matters to ICAEW should arise on the conclusion of the investigation.	No change– the timing of reports to ICAEW where there is an internal investigation is addressed in the existing Guidance on the Duty to Report. Regard should be had to draft DBL 7.2 (which reflects current DBL 11.5) and which provides: *The fact that a complaint is being investigated internally by a firm in accordance with Disciplinary Bye-law 7.1 shall not affect the duty of those persons and firms specified in Disciplinary Bye-law 6 to report any such event to the Conduct Department.*
DBLs 8.1 and 8.2 (duty of cooperation)	While it was recognised that the general duty to cooperate is already a feature of the existing DBLs, it was suggested that DBL 8.1 should state expressly that the duty to cooperate overrides other duties, including the duty of confidentiality owed to third parties (including clients) but not privilege. Alternatively, guidance on how to manage potential conflicts of duties should be developed. It was also suggested that the wording of draft DBL 8.2 be amended to require the Conduct Department or disciplinary body to act reasonably – e.g. '…*such cooperation may include, but not be limited to, providing such information…and other electronic records as the Conduct Department or disciplinary body reasonably consider are necessary to enable them to carry out their duties.'*	Draft DBL 8.1 has been amended to make clear that the duty to cooperate overrides the duty of confidentiality owed to clients and third parties. The drafting of DBL 8.2 has not been amended on the basis that, if the Conduct Department were to bring a complaint on grounds that the firm had failed to comply with the request for information/documentation, it would be for the Conduct Committee to determine whether the request (and the timeframe for response) was reasonable.
DBL 9.2 – transfer of cases to or from the	One respondent said that it would be helpful to understand the criteria and circumstances in which a case will be transferred by the Conduct Committee to the Accountancy Scheme.	A minor drafting change has been made to DBL 9.2(b) to address this point.

Accountancy Scheme		Draft DBL 9.2 now refers to a referral being made where this is considered appropriate by the Conduct Committee, *'based on the test set out in the Accountancy Scheme'* (i.e. – where a case raises important issues affecting the public interest").
DBLs generally	It was suggested that specific cross-references to the IDRs be inserted into the DBLs – e.g. at DBLs 4.1(h), 7.2 and 10.3 – 10.7	No change – generally, efforts have been made in the DBLs to avoid cross-references as any change to the IDRs may require the DBLs to be updated. In time, consideration will be given to providing additional information on the website on how the relevant provisions in the DBLs and IDRs link / interact together.

IDR	**Comment**	**Response**
IDR 5.1 – Constitution of the Conduct Committee	One respondent queried the rationale for reducing the minimum number of members on the Conduct Committee from 14 to 10 given the need for sufficient ICAEW members with specialist technical expertise. They also said that they assumed that the 10 members specified did not include the lay Chair.	No change – the requirement for at least 10 members on the Conduct Committee (and the other disciplinary committees) is a minimum requirement only; the practice operationally is to have around 20 members. The committee chair is included within this number.
IDR 5.4 – Quorum of meetings of the Conduct Committee	The same respondent observed that although the quorum for meetings of the Conduct Committee is 4 members (2 ICAEW members and 2 lay members), there is no requirement to have lay / non-lay parity at meetings if this quorum requirement is met.	No change – the IRB notes from its own observations that this is being managed well by committees at the moment and considers that this issue can be managed operationally without the need to specify in regulation that meetings require a parity of lay / non-lay members.
IDR 10.1(b) – 3 year time limit for the investigation of	It was suggested that guidance should be issued on when an exception may be made 'in the public interest' to investigate a complaint which falls outside the general 3 year time limit.	The IRB intends to issue guidance on this issue in due course.

‘historic complaints’ (subject to a ‘public interest’ override)		
IDR 16 – duty to cooperate and provide information / evidence	Two respondents suggested that the IDRs should be modified to dispense with the current practice of requesting information / evidence informally before a formal notice is issued for the supply of information / evidence in accordance with (current) DBL 13. It was noted that the practice of making informal requests first is at variance with the FRC who, in investigating matters under the Accountancy Scheme or Audit Enforcement Procedure, always use their powers to compel the production of information / documents. It was suggested that ICAEW consider adopting this practice from the outset too as a formal notice will override the duty of confidentiality owed to clients and audited entities.	The IRB asked for feedback from the Conduct Department which noted that there was no issue with the current system and that there was a need to note the very different nature of respondents compared to FRC matters where the FRC only deals with the largest firms whose large risk and legal teams are accustomed to dealing with document requests. Many members/firms who fall within the jurisdiction of ICAEW lack any internal compliance or legal function so there is a need for a staged approach in obtaining information. The IRB has accepted this feedback and does not believe any change should be made but it will continue to monitor this area.
IDR 18.1 – power to reopen a conduct matter after the closure of an investigation	It was suggested that a time limit should be applied to this provision.	No change - IDR 18.1 reflects, to a large extent, an equivalent provision in the current DBLs. A time limit may restrict the Conduct Department’s ability to re-open a serious matter where e.g. there is new evidence or where it is considered that the respondent may have previously withheld information etc.
IDRs 20.2 and 20.4 – right of the respondent to make representations on the conduct report prior to it being	The time limit for representations by the respondent under these provisions is generally 14 days of service (although the Conduct Department may agree an extended period under IDR 20.2). One respondent observed that 14 days seems very short and recommended that it be replaced by 28 days, with provision for the parties to agree an extension.	While the general time limit of 14 days has been retained in draft IDR 20.2, IDR 20.4 has been amended to allow the Conduct Department to agree an extension of time for the respondent to make representations.

considered by the Conduct Committee		
IDR 22.6 – rules of judicial evidence do not apply to the Conduct Committee's consideration of allegations	It was suggested that the rules of evidence that apply in civil proceedings (as set out more fully in the Civil Evidence Act 1968 and the Civil Evidence Act 1995) should be adopted.	No change – IDR 22.6 reflects, to a large extent, current IC Reg 7 which provides: *"The rules of judicial evidence will not apply. The committee may at its discretion treat as evidence any testimony whether in written, oral or other forms."* As the Conduct Committee will consider matters on the papers only, the rules of evidence that apply to oral hearings will not be applicable.
IDR 23 – Conduct Committee to assume conduct of the proceedings where matters are referred to the Tribunal contrary to the recommendation of the Conduct Department	One respondent commented that in such circumstances the Conduct Department should carry out the decision of the Conduct Committee and prosecute the case before the Disciplinary Tribunal. That commented that the proposed approach of having the Conduct Committee assume conduct of the proceedings seemed difficult to justify both in terms of (a) the role of the Conduct Committee in decision-making, and (b) how it will operate in practice. They anticipate that there will be practical difficulties in the Conduct Committee having day-to-day conduct of the prosecution and that external lawyers would need to be instructed at cost who may not be familiar with the processes.	No change – in practice a Professional Conduct Department lawyer who has not been involved in the case previously will be nominated to liaise between a sub-committee of the Conduct Committee and external lawyers.
IDR 24	One respondent noted that, unlike under the current DBLs, no provision has been made for fixed costs where the sanction to be applied by the Conduct Committee is an unpublicised caution (currently the cap is set at £2,500).	No change – the IRB considers that for reasons of consistency there should be no distinction between costs orders where sanctions are agreed by consent at the Conduct Committee stage (whether the sanction be a financial penalty or payment or an unpublicised caution).

		Even if the Conduct Committee determines that an unpublicised caution is appropriate, considerable costs may have been incurred by the Conduct Department in investigating the conduct matter and referring the allegation(s) to the Conduct Committee.
IDR 30 – interim orders	Two respondents noted that the test for an interim order had been expanded, along with the types of interim orders that may be made (to include *'any ancillary orders'* and orders that are subject to *'such terms and conditions as the Tribunal thinks fit'*). One respondent (a Big 4 firm) commented that these changes risk creating uncertainty and the imposition of more onerous implications on those subject to the DBLs. They, along with another respondent, questioned whether further guidance will be issued on the test for an interim order and the types of orders that may	To promote certainty, the definition of 'interim order' in the DBLs and IDRs has now been amended to remove reference to orders being subject to 'such terms and conditions as the Tribunal thinks fit'. However, the ability for the Tribunal to make orders ancillary to the orders available under paragraphs (a) – (e) has been retained. Consideration will be given by the IRB to issuing guidance on the interim orders process in future.
IDR 39.4 – new 'lie on file' process	One respondent recommended that this provision set out expressly what is to happen if the excluded member reapplies for readmission potentially years after the event. They said that they assume that the intention is for the retained evidence to be considered in the context of a readmission application (rather than the disciplinary proceedings themselves being revived) and that it may be worth making this clear.	The IRB has sought further legal advice on this issue. After taking into account the legal advice, the IRB has decided to deal with this issue by making amendments to the Readmission Regulations so as to impose an automatic stay on readmission applications until all matters lying on file are either admitted or re-opened and determined (subject to the Conduct Department indicating that it considers it to be in the public interest to proceed). Consequential amendments will be made to IDRs 21 and 38 to tie in with this process.
IDR 40.2 – service of documents by respondents in response to a referral of the formal	One respondent challenged the timeframe for service of the response form etc of 21 days. They suggested that this should be 28 days for service of the defence (with the option to agree and extension) and then a further 28 days for service of witness statements (again with the option to extend).	The general timeframe of 21 days has been retained (consistent with the position currently under the Disciplinary Committee Regulations) but the provision has been amended to allow the Head of Committees and Tribunals to agree an extension of the period for response in appropriate circumstances.

allegations to Tribunal		
IDR 47.1 – settlement	One respondent suggested that settlement should be possible at any time following the referral of one or more formal allegations to the Disciplinary Committee and that the inclusion of the words *'but prior to the start of the final hearing'* should be omitted.	No change – the IRB considers that, where settlement may be appropriate, the parties should be encouraged to explore this at an early stage prior to the final hearing.
IDRs 56 and 70 – 73	One oversight regulator queried the introduction of different caps on the level of costs orders that may be awarded against ICAEW in IDRs 56 and 70 – 73. They commented that setting a cap at a consistent amount in all cases would seem preferable and expressed concern that too low a cap may disadvantage some small to medium sized firms.	No change – the different levels reflect the differing effort that is required for different matters and also appeal costs where relevant.
IDR 62.3	One respondent observed that the introduction of a 'permission to appeal' process brings the ICAEW appeals process into line with the appeal process in civil litigation. However, they recommended that consideration be given to using the test for permission of *'real prospect of success'* under the Civil Procedure Rules rather than the proposed test of *'reasonable prospects of success'* (or where there is another compelling reason for the appeal to be heard).	The IRB considers that the threshold of 'reasonable prospects' should be retained so as not to set the bar too high and risk inserting an unreasonable barrier to appeal.