

Meeting: Legal Services Board

Date: 26 March 2020

Item: Paper (20) 14

Title: Arrangements for enforcement and disciplinary oversight

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Status: Official

Introduction: Purpose of the paper

1. This paper recommends that the LSB develops and implements new arrangements for enforcement and disciplinary oversight under the regulatory performance assessment framework. The proposed changes follow research presented in this and a previous paper and are consistent with the future of regulatory performance discussed at the November 2019 Board meeting.

Recommendations

2. The Board is invited to:
 - a) **note** relevant learnings from the enforcement and disciplinary oversight approaches adopted by other regulators, as well as the relevant legal advice; and
 - b) **approve** the pursuit of additional actions as part of the LSB regulatory approach, including recommendations that we:
 - i. require regulatory bodies to put in place effective and transparent quality assurance frameworks that demonstrate their disciplinary processes are rigorous and working effectively to ensure consistent, transparent, proportionate, reasonable and evidenced enforcement decisions are being taken; and
 - ii. To build ongoing assurance of those mechanisms into our performance management framework
 - iii. develop an audit process that enables the LSB to gain assurance that effective enforcement and disciplinary procedures are in place in each regulatory body. We propose to design the process to be flexible so we

can undertake proportionate, risk-based audits of other standards in the regulatory performance framework as well.

- iv. To link all of this to our recent statement that regulators should have in place mechanisms to understand any differential impact of their disciplinary processes on diversity characteristics.

Timing

3. Subject to the Board decision, we will develop and introduce the proposed changes from Q1 2020:
 - a) we will expect regulatory bodies to provide details of their quality assurance frameworks by September 2020 through their annual regulatory performance assessment progress update.
 - b) in the interim we will develop the audit process, which will be used more broadly across other regulatory activities, such as supporting our plans to undertake thematic and targeted reviews under our performance framework.
 - c) as such, in the first instance, the audit process will be used to support targeted reviews of one or two regulators or a thematic review of the well-led standard in 2020, which were signalled in the December 2019 regulatory performance assessment report.
4. We have already advised regulatory bodies, in our request of 26 February 2020, for an update in meeting their diversity obligations. We also expect that they will have measures in place to understand any differential impact on protected characteristics within their disciplinary/enforcement procedures. We expect responses by 1 May 2020.

Background

5. The enforcement standard in our framework requires regulatory bodies to have systems in place to ensure they can take proportionate and prompt action where issues arise. This recognises that effective enforcement procedures are vital for protecting and promoting the public interest, as well as ensuring trust and confidence in the legal services sector.
6. Historically, we have placed relatively low emphasis on gaining assurance that regulatory bodies' disciplinary and enforcement systems are fit for purpose and working as intended. This was identified in our March 2019 enforcement report as a strategic priority to take forward. Following on from this, report, this current review considered how we should improve our oversight of regulatory bodies' disciplinary arrangements.

7. A key feature of this review has been understanding the approaches adopted by regulators in other sectors and jurisdictions¹ and learning from what they have found is valuable and effective. Following discussion of our initial research in September 2019, the Board requested that we review the Professional Standards Authority (PSA) approach to consider whether the LSB could and should adopt similar methods.
8. The PSA has two key methods for holding regulators to account on their disciplinary and enforcement work:
 - a) it has a statutory power to review and appeal (to the High Court) disciplinary decisions made by the fitness to practise committees of regulators that it oversees;
 - b) it also undertakes audits of cases closed by regulators prior to hearing before fitness to practise committees/during the initial phase(s) of investigation. This involves reviewing a sample of cases and assessing whether these cases were progressed in line with relevant policies and procedures.
9. We found that the legislative framework for the LSB is markedly different to that of the PSA; in some instances, we have broader powers and in others more restricted powers (see further detail at paragraphs 22-24). It is a simple matter of fact, however, that the express power available to the PSA to appeal cases to the High Court (the so-called section 29 appeal power) is not provided for in the LSA.
10. **However, a clear conclusion of our research is that the absence of such a power need be no impediment to the development of a considerably more rigorous approach to oversight than we currently have.** (Indeed, there are arguments that the section 29 appeal power, while undoubtedly effective in terms of concentrating minds, can be rather slow and costly to mobilise).
11. For example, our conclusion is that it is entirely open to us to develop an audit process along similar lines to the PSA to support our regulatory performance assessment and exercise of the regulatory functions and powers under the Legal Services Act 2007 (LSA).
12. The PSA told us that its audit process provides a useful opportunity to hold regulators to account on their own systems and processes, as well as allowing issues to be identified and addressed early. This feedback was echoed by the FRC, SLCC and OISC, which said that audits were beneficial tools for their respective oversight functions.

Proposed actions

13. Taking into account our findings from other sectors and a review of our statutory powers, we have developed two proposed actions that will improve our oversight

¹ Including the Professional Standards Authority (PSA), General Medical Council (GMC), General Dental Council (GDC), Financial Reporting Council (FRC), Scottish Legal Complaints Commission (SLCC), Office for Professional Body Anti-Money Laundering (OPBAS) and Office of the Immigration Services Commissioner (OISC).

of enforcement and other regulatory performance standards, consistent with our stated intention to undertake more targeted, robust assessments and ensure a culture of continuous improvement.

Proposed action 1: Require quality assurance frameworks to demonstrate that disciplinary arrangements are working effectively to ensure appropriate enforcement decisions are being made

14. A quality assurance framework is a useful tool for regulators to measure the effectiveness and performance of different regulatory functions.² Specific to enforcement, a quality assurance framework is likely to have a process for checking (and revisiting) individual disciplinary decisions, as well as assessing samples of decisions at different stages of the enforcement process to identify any systemic or thematic issues arising.³
15. We are aware that some regulatory bodies currently adopt quality assurance processes or are planning work in this area. The BSB, for example, uses an independent reviewer to review random samples of decisions. We recommend that the LSB makes clear that it expects all regulatory bodies to confirm that they have a quality assurance framework already in place or are preparing to develop one by 30 September 2020.
16. The key benefit of this approach is that it empowers regulatory bodies to work within a framework that is suitable for their individual regulatory models, but consistent with the minimum standards expected under our framework. It also promotes continuous improvement as regulators identify and take action on learning points emerging from their quality assurance reviews, which is consistent with the future direction of regulatory performance.

Proposed action 2: Develop an audit process to gain assurance that disciplinary arrangements are working effectively and appropriate decisions are being made

17. Audit processes, like quality assurance frameworks, are useful tools to assure that regulatory arrangements are fit for purpose and working as intended. We note that several regulators in other sectors have adopted audit processes, which most commonly involve reviewing samples of files and checking overall compliance with policies and procedures.⁴
18. We propose to develop a similar process so we can carry out a small number of proportionate, risk-based audits to support our regulatory performance activities. This would add to our toolkit of approaches for seeking assurance. In theory, it would also support us to engage our own enforcement policy and powers if we identified serious concerns.

² Examples of this from our research include the GMC carrying out internal and external audits to review samples of decisions and the GDC holding a regular challenge group where case handling concerns can be raised.

³ This could include things such as whether particular groups or individuals are over or under-represented in enforcement proceedings.

⁴ The PSA, for example, audits random samples of decisions made by regulators during complaints investigations, while the FRC carries out regular oversight visits which may include randomly sampling decisions made at every stage of the enforcement process. Both the PSA and FRC were clear that they do not request specific cases to audit and the PSA explained that it had in place a process for ensuring it handled anonymised data during audits. The PSA also noted it usually carried out audits after a regulator introduces a new disciplinary process or when concerns have been raised about a regulator's enforcement performance.

19. In the table below, we set out some of the considerations for developing a process to audit regulatory bodies' enforcement and disciplinary processes. As a basic principle, we would not review any single decision and determine whether or not it was 'correct', rather, we would consider samples of decisions and form views whether the processes and procedures followed in reaching those decisions support sound decision-making.

Process	For example, requesting a random sample of decisions within set parameters e.g. a number of decisions at each stage of the disciplinary process; within a specific timeframe; relating to a complaint theme. Review the sample against a regulatory body's own processes and KPIs e.g. guidance for case investigators; processes for triaging cases; supervisory arrangements; timeliness targets.
Triggers	Define appropriate triggers for auditing a regulatory body e.g. following up concerns about performance; ensuring a quality assurance process is fit for purpose.
Reporting	Set out how we expect to report on audit outcomes e.g. through interim reports shared with the regulatory body, setting out identified weaknesses, learning or good practice; regulatory performance assessment reports published on our website.
Terms of engagement	Set out terms of engagement with regulatory bodies e.g. our expectations that regulatory bodies provide us with data; appropriate data handling principles including compliance with data protection law.
Resourcing	The intention would be for existing LSB relationship managers to lead these audits, providing any necessary upskilling.

20. As set out above, we plan to develop this audit function as a tool to support our wider regulatory performance work, not just in relation to the enforcement standard. In our December 2019 regulatory performance progress report we signalled an intention to undertake an in depth review of up to two regulators and to undertake a thematic review of the Well-Led standard. These would be opportunities to test the implementation of an audit function.

21. In introducing these new measures we are increasing our level of scrutiny of the regulatory bodies. In doing so we are being more explicit in our expectations and the ways in which we gain assurance. What we are doing is adopting a more systematic approach in carrying out our oversight responsibilities which will

facilitate greater parity of approach, helping us identify and promote best regulatory practice.

Legal advice

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Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
22-24	s42 – advice subject to legal professional privilege	N/A