Meeting: Legal Services Board

Date: 26 April 2022

Item: Paper (22) 21

Title: Disciplinary arrangements across regulators

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Status: Official

Introduction

1. This paper presents our planned work to identify the principles that underpin effective disciplinary and enforcement decision-making by the regulators, which will form the basis of a statement of policy setting out our expectations in this respect.

Recommendation

2. The Board is invited to **discuss and agree** the plans for this project.

Timing

3. This project is a new activity in our 2022/23 business plan. The current schedule includes plans to undertake scoping, information gathering, stakeholder engagement and publication of our findings this year, so we will be proceeding with pace.

Background

4. Our work will promote the regulatory objectives in the Legal Services Act 2007 (the Act), particularly protecting and promoting the public interest; protecting and promoting the interests of consumers; encouraging an independent, strong, diverse and effective legal profession; and promoting and maintaining adherence to the professional principles. The professional principles include that authorised persons act with integrity, maintain proper standards of work and act in the best interests of their clients. The Act also provides for regulators' regulatory arrangements, including 'disciplinary arrangements in relation to regulated persons', and we have an enforcement standard in our regulatory performance assessment framework.[1]

[1] We note that a draft revised performance framework is currently under consultation. Our view is that our expectations for disciplinary and enforcement processes are sufficiently clear and consistent in both the current and proposed frameworks.

5. Our work is also central to the LSB’s ambition to reshape legal services to better meet society's needs and provide consumers with fairer outcomes, stronger confidence and better services. Effective disciplinary and enforcement decision-making is essential to protect consumers and the public from harm, as well as to build and maintain public confidence in the legal services sector.

6. This project builds on a wide range of previous LSB work. This includes our review of the SRA and BSB’s enforcement processes in 2018/2019; research into the enforcement oversight approaches adopted by regulators in other sectors discussed by the Board in 2019/2020; information provided by the regulators on their arrangements to quality assure their enforcement decision-making in 2020; our annual regulatory performance assessments; work to revise our regulatory performance assessment framework in 2021/2022; and to tackle counter-inclusive misconduct through disciplinary processes in 2022.

7. It is also informed by the correspondence we regularly receive from members of the public, consumers and other stakeholders about regulators’ complaints handling; reports about regulators’ handling of cases in the media and through other channels; and recent and planned changes to regulators’ disciplinary and enforcement processes, for example, the introduction of new powers or decision-making bodies.

8. As oversight regulator, we need to be assured that regulators are taking effective disciplinary and enforcement decisions to ensure consumers are protected from harm. Some of the key observations from our work to-date are included below, with more information provided at Annex A:

   - Regulators have adopted different disciplinary and enforcement processes, so there is not a common approach across the sector. While this reflects the diversity of the sector, there are some gaps and potential areas for improvement.

   - Regulators have different quality assurance mechanisms to ensure the quality of their own decision-making. Good practices adopted by some of the regulators include regular sharing and embedding of lessons learned and ongoing training for staff, but not all regulators do this.

   - Through our performance monitoring, we have identified concerns about the proportionality of regulators’ complaints handling, approaches to enforcement and the potential risk to consumers.

   - Some stakeholders have raised concerns with us about the transparency of some regulators’ processes for complaints handling, which could indicate systemic issues.

   - There have been concerns raised publicly about the consistency of sanctions used by different regulators in response to similar cases, which could undermine public confidence. Our work on the joint principles statement on *Tackling counter-inclusive misconduct through disciplinary processes* was triggered by the inconsistencies of approaches.

Proposal

9. To take this work forward, we consider that there would be value in identifying what principles underpin effective disciplinary and enforcement decision-making. This will ensure all regulators are taking decisions that build public confidence, deliver fairness for professionals and uphold proper standards of conduct and competence.

Information provided by the regulators

10. We propose to explore the information and assurance provided by the regulators about their disciplinary and enforcement approach, so that we can identify good practice and build consensus on principles that should underpin all regulators' decision-making.

11. We consider this should include seeking to better understand what risks and evidence inform regulators' approaches and how they evaluate the impact of their work and respond to changes in the market. We plan to carry out desk research and engage with the regulators on the following:

    - How do they provide transparency of their disciplinary and enforcement processes?
    - Is it clear and accessible who takes decisions, when and why?
    - Are the regulators' approaches proportionate and how do they take the seriousness of the concerns raised into account?
    - Do the regulators have effective mechanisms to quality assure their decision-making and make changes to their processes where necessary?
    - Is there appropriate senior oversight of the processes and decisions made?
    - Are regulators taking objective action where required (i.e. regardless of the size of the firm)?
    - Are the regulators' approaches flexible and responsive to change and challenge?
    - How do regulators identify and share learning from their work, as well as use it to inform their other regulatory activities?

12. We will also engage with other interested stakeholders, including disciplinary tribunals, representative bodies and consumer groups to get their views on what principles should be included.

Thematic reviews

13. In addition, we consider that more in-depth reviews of some of the regulators would be beneficial. This would provide an opportunity to test how they apply

their processes in practice and whether this results in effective disciplinary and enforcement decision-making.

14. Our process for reviews[2] sets out a range of criteria we may take into account when deciding to undertake a review, having regard to the better regulation principles. In this case, we may want to consider factors such as size of the regulator; coverage of market; information provided to the LSB (e.g. in relationship management meetings or through the performance assessment process) that indicates we may need to seek assurance of performance; any recent changes to processes; or the number of complaints and disciplinary cases handled.

15. Our process also provides for us to determine the scope of the review, which we would discuss with the regulator(s) under review. There is also a possibility that regulators themselves may wish to undertake a review, in which case we could work in collaboration to develop the scope and terms of reference.

Next steps

16. Subject to the Board's discussion, we will commence our information gathering and engagement with regulators. We will return to the Board to discuss our plans for the thematic reviews in due course.

Risks and mitigations	
Financial:	N/A.
Legal:	The legal team will be involved throughout this project and will advise on legal risks.
Communications and engagement:	We will engage with regulators and other interested stakeholders on this work, seeking support from the communications and engagement team as required.
Equality and diversity:	Disciplinary and enforcement processes must not be discriminatory or disadvantage some groups over others. The consistency and objectivity of regulators' processes are proposed to be explored via the lines of enquiry.
Resource:	For the thematic reviews, based on our experience of conducting reviews under the performance framework, we will need to ensure we plan our resources appropriately.

Annexes

Annex A – Previous LSB work on disciplinary and enforcement oversight

[2] https://legalservicesboard.org.uk/what_we_do/consultations/closed/pdf/2017/08122017_Regulatory_Performance_Process_Document.pdf.

Freedom of Information Act 2000 (FoI)		
Para ref	**FoI exemption and summary**	**Expires**
NA	NA	NA

Annex A

Enforcement review

1. Our review of the BSB and SRA's processes, published in March 2019, identified three strategic priorities for the LSB to take forward:

   - timeliness of enforcement processes, including transparency of timeliness information
   - effective and consistent use of interim sanctions
   - assurance of the quality of enforcement decisions by regulatory bodies.

Regulators in other sectors

2. In September 2019, the Board discussed the enforcement oversight approaches adopted by regulators in other sectors, including the Professional Standards Authority for Health and Social Care (PSA) and Financial Reporting Council. This included research into the PSA's specific statutory powers to review and appeal decisions made by the healthcare regulators to the High Court in some circumstances. The PSA also uses its performance monitoring function to review some decisions (via case sampling) and identify whether the regulators followed their own processes.

3. The Board agreed to explore whether we should carry out case sampling of regulators' cases under our regulatory performance assessment framework. We discussed that while we do not have the statutory power to intervene in individual cases, we could adopt a more rigorous approach to disciplinary and enforcement oversight that may include case sampling.

Quality assurance mechanisms

4. In March 2020, the Board agreed that we should better understand how regulators quality assure their own decision-making. We requested information from the regulators in September 2020 and received responses that identified a range of existing practices and plans to adopt new procedures. This includes use of independent reviewers and identification and dissemination of lesson learned. However, there were gaps in the processes adopted by the regulators, for example, some did not have clear means for senior oversight of decision-making and others did not have provisions for ongoing training.

Correspondence and horizon scanning

5. Over time, we receive correspondence and information from a range of stakeholders about regulators' handling of disciplinary and enforcement cases. This information, as well as our ongoing monitoring of regulators' performance, informs our annual regulatory performance report. In the 2021

report, we indicated plans to increase our focus on regulators' approaches to and delivery of disciplinary and enforcement activity.[3]

Regulatory performance assessment framework review

6. In 2021/2022 we reviewed the performance framework to ensure it remains fit for purpose and are now consulting on a draft revised framework (as of April 2022).

7. The draft revised framework has a proposed 'operational delivery' standard (operational activity is effective and clearly focused on the public interest) that we will expect regulators to meet and the following proposed characteristics (i.e. features of effective regulators) that we will expect regulators to demonstrate:

    - Sets out clear, accessible criteria for taking decisions about the authorisation, supervision of authorised persons and enforcement proceedings against them to protect the public; adheres to the criteria when taking decisions.

    - Takes concerns raised by the public, the profession and other stakeholders seriously; pursues those concerns with appropriate rigour and pace under a transparent process.

    - Proactively seeks to maintain high standard of conduct and responds to thematic issues arising from operational activity, including ensuring that those they regulate take action, where relevant.

8. While this is different to the enforcement standard and outcomes in the current framework, our view is that our expectations for disciplinary and enforcement processes are sufficiently clear and consistent in both the current and draft revised frameworks.

[3] https://legalservicesboard.org.uk/wp-content/uploads/2022/01/LSB-2021-Regulatory-performance-report-22-December-2021-Final-version-for-PUBLICATION2.pdf.