

Meeting: Legal Services Board

Date: 18 September 2019

Item: Paper (19) 42

Title: Arrangements for disciplinary oversight

Introduced by: Chris Nichols / Margie McCrone

Status: Official

Introduction: Purpose of the paper

1. This paper:
 - presents the results of preliminary research into mechanisms for overseeing disciplinary processes in some other sectors including healthcare and financial services
 - notes points of contrast between the LSB's approach and that, in particular, of the Professional Standards Authority for Health and Social Care (PSA), notably in relation to case audits and appeal powers
 - It makes a proposal for further work to scope out whether and how a "file review" process might be built into our regulatory performance processes.

Recommendation

2. The Board is invited to:
 - **note** the research
 - **approve** the proposal set out

Background

3. 'Enforcement in other sectors' was included in the Business Plan 2019/20 as a new project under the *Promoting the public interest through ensuring independent, effective and proportionate regulation* strategic objective. It follows our completion of an end to end review of the enforcement processes used by the BSB and SRA, published in March 2019, which identified three strategic priorities for the LSB to take forward. These were:
 - 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.

4. This review was completed in parallel with the development of a new regulatory performance framework, which gives enforcement considerably more emphasis than before, as well as enables us to seek greater assurance of regulators' performance. This recognises that enforcement is a key responsibility for regulatory bodies and oversight regulators, not least because effective enforcement functions, including disciplinary arrangements, are vital to ensuring consumer and public confidence in the sector.
5. Currently, under our regulatory performance framework, we take into account the following sources of information to assess regulators' performance:
 - performance management dataset provided by regulators
 - third-party feedback
 - informal information requests
 - publicly available information e.g. desktop research.
6. Based on our transitional assessments of regulators' performance in January 2019, we found that only three of the 48 required enforcement outcomes (across all regulators; with six per regulator) were not being met. Our progress update in August 2019 saw that improve to two out of 48. As such, this is the performance standard where regulators are most consistently meeting our requirements at present. Whilst this suggests limited concerns at the high level at which we have carried out reviews to-date, the LSB has never sought to assess the quality of regulators' enforcement processes or work.
7. With all of this in mind, it is timely to look to other sectors and jurisdictions for any relevant learnings that could be adapted for our purposes as we consider our future approach to overseeing enforcement under our regulatory performance framework.

Compare and contrast: Key themes

8. We reviewed the disciplinary oversight arrangements for the Financial Reporting Council (FRC), Office for Professional Body Anti-Money Laundering Supervision (OPBAS), and PSA.¹ We also reviewed the disciplinary oversight arrangements of our regulatory counterparts in Australia and Scotland.² We have noted key themes below.

General alignment with financial oversight regulators

9. Our statutory powers for enforcement oversight are broadly similar to those of the FRC and OPBAS, including powers for reviewing the performance of,

¹ FRC is the competent authority for statutory audit regulation. OPBAS is the oversight regulator for professional bodies supervising anti-money laundering. PSA is the oversight regulator of nine medical regulators.

² In Scotland, the government is responsible for overseeing regulation of the legal profession and Scottish Ministers have powers under the Legal Services (Scotland) Act to do so. In Australia, the Legal Profession Uniform Law provides the governing legislation for practitioners in Victoria and New South Wales, with ultimate authority sitting with the Standing Committee (Attorneys General).

requiring information from, issuing directions to and imposing financial penalties on regulators.³ Our general approach to using our formal powers sparingly is also broadly aligned.

Greater powers vested in the medical oversight regulator

10. The PSA appears to have greater statutory enforcement powers than the LSB, FRC and OPBAS in terms of its ability to oversee regulators' decision making processes, and in some cases, decisions made. These powers are either explicitly stated in legislation, or have been adopted as a way of monitoring regulator performance through the PSA's interpretation of the general duties it shares with its nine regulators.
11. The PSA reviews all of the decisions made by regulators' fitness to practise committees, with each regulator sending its decisions to the PSA for review on a rolling quarterly basis.⁴ The quality and scrutiny team receives these decisions and can share learnings about good practice or ask to see evidence where it has concerns with any particular decision. If it remains concerned on review, a case meeting will be convened to decide whether the decision should be appealed to the High Court. This case meeting must be attended by lawyers, at least one Board member and will typically involve three decision makers.
12. A decision will be appealed when the PSA considers it was insufficient to protect the public and there are no other effective means to do so; this includes protecting public health, safety and wellbeing, and maintaining public confidence and proper professional standards and conduct (the statutory objectives for health and care regulators). In practice, this will usually be if the PSA believes there has been an insufficient sanction imposed, but it could also relate to a finding made by the committee before it considered sanctions. On some occasions, the PSA will be able to find ways to avoid a Court hearing, for example, agreeing a way forward with relevant parties that the Court approves.⁵ If it does go to a Court hearing, the court may dismiss the appeal, allow it and quash the relevant decision, substitute the original decision, or send the relevant case back to the regulator for reconsideration. Appeals are relatively rare but it is common for the PSA to provide feedback on case handling, on which it expects a response from regulators.⁶
13. The PSA also reviews, and provides feedback on, some cases that are closed by regulators prior to hearing before a fitness to practise committee as part of

³ It is actually the Secretary of State, to which the FRC is accountable, that issues directions to and imposes financial penalties on recognised professional bodies.

⁴ PSA reviews an average 3,000 cases per year.

⁵ PSA currently agrees consent orders on an average 6.5 cases per year.

⁶ PSA currently appeals up to 20 cases per year.

its overarching regulatory performance framework.⁷ The PSA tends to use these audit / file review powers to better understand how a regulator is managing its fitness to practise decision making processes, for example, collecting a sample of decisions to review after a regulator has introduced a new disciplinary process or concerns have been raised about a regulator's enforcement performance. The powers are relatively limited: the PSA cannot review, challenge, re-open or ask for an explanation in any *particular* case, but it can raise general concerns with regulators based on the information it reviews. Any common themes that emerge are then used when assessing whether a regulator has met the standards expected by the PSA as part of its regular performance review process. This provides the PSA the opportunity to influence regulators to improve their disciplinary processes where necessary.

14. Further, the PSA appears to routinely use its formal powers, with medical regulators accustomed to receiving and responding to formal information requests, engaging with specific case review / appeal processes and being subject to performance reviews that are informed by common themes the PSA has read through file reviews.

Limited learnings from other jurisdictions

15. We have reviewed approaches to overseeing regulators' enforcement processes in other jurisdictions. This included looking at the regulation of legal services in Scotland and Australia, and the Financial Stability Oversight Council in the United States of America. From this work, we have not identified any examples of oversight regulators in other jurisdictions that have notably different or greater powers than the LSB in relation to oversight of enforcement.

Reflections on enforcement approaches

16. The PSA's approach to oversight of enforcement was the subject of recent consultation and stakeholders said that ensuring fitness to practise is an essential part of the regulation and performance of regulatory bodies that should not be watered down.
17. Meanwhile, the FRC has been criticised for its overall tendency to take an 'excessively consensual approach to its work'.⁸ The recent government-commissioned independent review recommended that the FRC be replaced by a new independent statutory regulator with stronger powers, which has been accepted and is to be taken forward. Whilst there has been little focus on oversight of enforcement so far, it is possible that there will be changes in this area.

⁷ PSA currently carries out 2-4 audits per year, with each comprising a review of 60-70 files across approximately 100 audit days.

⁸ John Kingman, [Independent Review of the Financial Reporting Council](#).

18. There have been occasions where greater oversight of enforcement by the LSB has been called for publicly, for example, in relation to the SRA's prosecution of Leigh Day, where the SRA's prosecution and appeal, which followed on from findings from the Al-Sweady inquiry, were unsuccessful. In this example, we have followed up with the SRA through our regulatory performance framework, focussing in particular on lessons learned, as relevant to the Well-Led standard.
19. We have not asked for, received or reviewed any files from the SRA on Leigh Day or other cases as we do not currently have powers or established processes for doing so. The PSA would have both legal powers and established processes to act if it found itself in a similar position.
20. Notwithstanding the important questions of whether the LSB has the legal authority (or resources) available to do as the PSA would do, it is important to note that there are clear cultural differences between the LSB and PSA's current approach to enforcement oversight that require careful reflection.
21. For example, our current approach to assessing regulators' performance on enforcement standards is based on reviewing processes and performance metrics provided through regulatory performance datasets and some additional sources. It would be a significant cultural change for us to seek to start reviewing and commenting / otherwise intervening in individual cases, or undertaking file reviews of samples of cases to inform our assessment of regulatory performance.

Proposal

22. Following our recent update of our performance assessments, there is only one regulator that is not currently meeting all of the performance outcomes; at a pure process level, we are generally satisfied with the approaches that regulators are taking. It could be argued that a sensible next step would be to seek to review samples of some of the regulators' case files, so that we can better understand how they are applying policies to effectively protect consumers and promote the regulatory objectives in practice. On a related note, the regulatory performance team is preparing to start using rule change applications that we receive from regulators as a source of intelligence and evidence on their performance, to provide further depth to our assessment.
23. It is therefore proposed that, following the initial work already undertaken to understand approaches of other oversight regulators, the 'enforcement in other sectors' project should focus on establishing the desirability and feasibility of incorporating file reviews within our oversight of approved regulators' performance against the enforcement standard.

24. Desirability considerations will include reflecting on how a change in approach would enable us to better meet our strategic objective to promote the public interest through ensuring independent, effective and proportionate regulation; as well as taking forward our strategic enforcement priorities to assure the timeliness and quality of regulators' decision making processes and use of interim sanctions. Feasibility considerations will include operational requirements. On a practical level, the PSA's review, appeal and file review processes involve well-resourced, dedicated teams, as well as requiring Board and legal involvement for case meetings. This is a specialised and resource intensive undertaking, although the Board should note that it is managed within an overall organisational resourcing model that is comparable in size to the LSB.
25. There are also legal issues to consider. We believe that specific statutory powers would need to be sought in order to assume appeal powers similar to those exercised by the PSA, so this is unlikely to be a practical option to pursue unless legislative reform of some sort becomes a reasonable prospect. For this reason (amongst others) it is not proposed to be the focus of further investigation at this time, although legal advice should be sought to confirm any potential scope under the Act.
26. There is likely to be more scope, for example through section 7 supplementary powers and s.55 information requests, to undertake file reviews to inform regulatory performance assessments. However, legal advice would need to be sought on what restriction or limitation s.32(5), which prohibits the LSB from issuing directions in relation to specific disciplinary cases, could have in this regard.

Next steps

27. Subject to the Board's discussion, we plan to scope and begin work on assessing the feasibility and desirability of our proposal. A key element of this will be obtaining legal advice to establish the potential scope that the Act provides the LSB to exercise the powers discussed in this paper and what limitations it would place on us. Seeking legal advice will not commit us to taking any particular action.
28. It would also involve identifying operational considerations, such as the expertise and resource that would be required to undertake file reviews. Another key element will be discussion and engagement with regulators and other key stakeholders. The intention would be to return to the Board by March 2020 with a completed assessment, seeking a decision on the way forward.

Risks and mitigations	
Financial:	N/A
Legal:	Legal advice will be required to clarify the extent of current powers under the Act should there be good practices we can learn from and adopt / adapt for our purposes.
Reputational:	Ineffective enforcement functions could lessen trust and confidence in the legal sector so it is useful to consider whether there are good practices to learn from and adopt / adapt in other sectors / jurisdictions. It is too early to know stakeholders' views on this project and identify any associated reputational risks.
Resource:	At this time the project team is adequately resourced.

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
N/A	None	N/A