Meeting: Legal Services Board

Date: 11 June 2024[1]

Item: Paper (24) 28

Title: **Disciplinary and enforcement progress update**

Author(s): Angela Latta, Head, Performance and oversight; Comfort Ochefu, Policy manager; Tomoko Langtry, Policy manager; Toakase Tonga, Senior legal adviser

Status: Official

Introduction

1. This paper updates the Board on progress with our work to review regulators' disciplinary arrangements. This work is to identify principles that underpin effective disciplinary and enforcement processes, which is intended to form the basis of a policy statement setting out our expectations. It follows on from the project inception Board paper dated April 2022 (Annex A) where the Board approved the proposed approach.

Recommendation(s)

2. The Board is invited to **note** the progress of the project and to **discuss** the preliminary draft working principles.

Timing

3. This project is expected to be complete by the end of the 2024/25 business planning year, rescheduled from 2022/23 due to resources being diverted to other higher priority work including the investigation into CILEX and CILEx Regulation.

Background

4. The LSB first outlined an intention in the 2022/23 business plan to "establish and embed clear principles to underpin effective disciplinary and enforcement processes to ensure that processes build public confidence, deliver fairness for professionals and uphold proper standards of conduct and competence". The key output of this project is therefore to identify and promulgate principles that underpin effective processes and procedures. This has remained a focus point for the LSB and has been highlighted as a key priority in the LSB`s most recent business plan (2024/25).

5. Since the inception paper, we have refined the overall aim of the project to focus on the broader outcome we are seeking to achieve, that is:

---

[1] Circulated on 4 June 2024

To ensure that all regulators are taking disciplinary and enforcement decisions that build public confidence and uphold proper standards of conduct and competence. *Improvements in this area should encourage an independent, diverse, and effective legal profession and the results of this work should protect and promote the interests of the public and consumers of legal services.*

6. The revised overall aim of the project reflects our focus on raising the standards of regulators' disciplinary and enforcement processes and procedures, to ensure that all regulators are taking disciplinary and enforcement decisions that build public confidence and uphold proper standards of conduct and competence. While this project sits apart from other work relating to discipline and enforcement – in particular, relating to the BSB's enforcement processes including in view of the FieldFisher review of the BSB's enforcement system, and the LSB's reviews of the SRA's actions in relation to the Axiom Ince and SSB Group – the findings of those reviews will inform our policy on the principles.

7. In September 2023, we wrote to regulators asking for information on their information gathering and financial penalty powers. The responses from regulators confirmed that they or their independent panels or tribunals have powers to gather information and apply financial penalties which they either themselves set or is prescribed by legislation. The SRA's fining powers for code of conduct breaches are limited by the Solicitors Act 1974 as amended by the Economic Crime and Corporate Transparency Act 2023. [2]. However, the SRA may refer cases to the Solicitors Disciplinary Tribunal (SDT), which has unlimited fining powers and can also strike-off solicitors.

8. In parallel to this work, we conducted desk research which included looking at the publicly available information on regulators existing disciplinary and enforcement processes and procedures. We also looked at other regulated sectors to assist in understanding best practice and procedures in discipline and enforcement.

9. The policy team have developed a preliminary set of draft working principles (draft principles) informed by the above initial work and based on the better regulation principles that regulators must have regard to in discharging their regulatory functions under the Legal Services Act 2007. These draft principles are a working draft intended to encourage discussion, and are subject to further consideration and refinement, including of further evidence and legal review.

10. In March 2024 we engaged with regulators in a workshop to seek their early feedback on these draft principles (Annex B)

Early engagement with regulators

11. The objective of the March 2024 workshop was to share our early thinking with regulators and discuss the draft principles, get feedback on how these align with regulators' existing processes and procedures, and to identify any gaps in our

[2] In August 2023, we announced plans to review the enforcement and investigative tools available to the legal services regulators, including the Solicitors Regulation Authority (SRA). This work is being progressed to a different timetable to the development of the draft principles.

thinking. We also sought further information to deepen our understanding of how the regulators' procedures work in practice and where they themselves may have identified areas for improvement.

12. From the workshop, we identified that whilst each regulator operates its own processes and procedures, there are some common elements across the board including:

- All regulators receive information related to a potential breach or misconduct from various sources.

- Regulators supervisory activities and/or compliance work is also a source for identifying potential instances of misconduct.

- Initial assessments are carried out to determine if further investigation is necessary.

13. There were also some differences across regulators:

- Regulators have different criteria for their assessment stages. On escalation to the next stage of their processes, some regulators use internal investigation teams to conduct investigations whilst others appoint independent third parties to carry out this work.

- Regulators use different methods when deciding on serious allegations or breaches, some using internally appointed disciplinary panels and others externally independently appointed ones. Some are established by statute; others under a regulator's regulatory arrangements.

- All regulators have varying powers to impose interim sanctions, but some regulators have not used these powers, and some rarely use them. The exception is interim sanctions for solicitors which are governed by the Solicitors Act 1974 and imposed by the SDT and not the SRA.

14. Early feedback from regulators on the draft principles indicates that they can see the benefits of a focused set of criteria. However, there was discussion on the inherent tensions between some draft principles such as consistency and proportionality that resulted in in-depth discussions and suggestions for refinement. Regulators noted that the draft consistency principle must be clear on its intention, and whether the purpose of this principle should relate to consistency in process or consistency of the outcomes. The discussion on proportionality centred on how to balance the needs of consumers with the broader public interests. Regulators' consensus was that the draft proportionality principle should include and explicitly refer to effective disciplinary and enforcement processes operating in the public interest. These issues will be considered at the next stage where we begin to flesh-out the principles in more detail.

Immediate project priorities and current work

15. We are currently in the middle of phase one of the project which consists of evidence gathering and stakeholder engagement. We have begun a second round of meetings with stakeholders on a one-to-one basis. The aim of these is to follow up on areas that were not covered in the workshop, to obtain more detail on areas that were covered, and to fill in any gaps in our knowledge to ensure that we fully understand the regulators' disciplinary and enforcement processes and procedures before progressing our work.

16. We will also further consider the additional principles suggested by regulators at the March workshop centred on accountability, inclusivity, and fairness.

17. From our research, we know that legal professionals who are from ethnic minority backgrounds and men are disproportionately overrepresented in disciplinary and enforcement proceedings and decisions. This prompts how we might incorporate considerations of fairness and equity into the draft principles or as expectations within a disciplinary and enforcement framework. We will continue to consider EDI issues to ensure that our work also takes into account the wider regulatory landscape.

18. This project complements the work of the Professional Ethics and Rule of Law ("PERL") project, particularly where disciplinary action relates to professional and ethical misconduct. We will continue to work with the PERL team focusing on where the projects intersect, to ensure we mitigate any inconsistencies while managing any gaps.

19. We would welcome a steer from Board on:

    - The preliminary draft working principles and the additional proposed principles suggested by workshop attendees - accountability, inclusivity, and fairness. We are aware that the principles are predominantly focused on processes and procedures, and we would welcome feedback on incorporating expectations for fair and proportionate outcomes.

Next steps

20. The next part of phase one of this project will involve:

    a. consolidation of the information and evidence gathered throughout this phase of the project, which includes the work carried out in 2022.

    b. engagement with other stakeholders including consumer and professional groups, and disciplinary panels and tribunals to give us their perspectives. We will also consult the Legal Services Consumer Panel for their views on consumer issues.

    c. Further examination of the approaches of regulators in other sectors to learn any lessons or identify best practices to aid our consideration the viable policy options for the draft principles.

21. The project will then move to phase two which involves preparations for the consultation on the draft principles, which may be included in a policy statement

or guidance. We expect to bring our proposals back to the Board in October 2024 prior to consultation. We will aim to finalise our approach by the end of March 2025 subject to the outcome of the proposed consultation.

Risks and mitigations	
Financial:	N/A
Legal:	The Legal Team are part of the project team.
Communications and engagement:	We have been engaging with regulators and will be expanding our discussions with approved regulators, tribunal services and other parties involved in disciplinary and enforcement.
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.

Annexes

Annex A – Board paper (22) 21 – Disciplinary arrangements across regulators

Annex B – Working Draft Principles – May 2024

Freedom of Information Act 2000 (FoI)		
Para ref	**FoI exemption and summary**	**Expires**
N/A	N/A	N/A