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IMPACTS OF THE ENFORCEMENT PROCESS REVIEW: A VIEW FROM THE RDC

The Financial Services Authority's enforcement process review (EPR) was described by Jason Mansell in the last Quarterly Bulletin. As highlighted in that article there have been significant changes to the FSA's enforcement process, including to the role and practical operation of the Regulatory Decisions Committee (RDC). This article is intended to give some insight into the way in which the RDC now operates. Despite the changes, the fundamental characteristics of the RDC have not changed (nor could they) and they continue to influence its practice:

1. The RDC is a committee of the FSA's Board, answerable to it for its decisions generally.
2. The RDC is a part of the FSA (as required by the Financial Services and Markets Act 2000 – FSMA), and is thus not independent from the FSA. Its role is to ensure that certain decisions are not made by those responsible for investigating the issues. The RDC's role is, in truth, to ensure separation of functions rather than full independence.
3. The RDC is an administrative decision-maker. FSMA may specify separation and a particular process, but the RDC is not a judicial or quasi-judicial body – FSMA does not equip it to be one. Indeed the EPR considered it important that the procedures should not become indistinguishable from a trial before a tribunal.

4. The RDC strives to make the best (administrative) decision that it can on behalf of the FSA, having regard to all facts and matters relevant to the decision it is making (including any representations made). Members may be interested in wider aspects of a case, but the RDC recognises that it is not a policy maker.

For those who come across the RDC in action there will be some very noticeable differences. These are designed to improve transparency of the process and the efficacy of the representations stage, and to reinforce the separation between investigation and decision-making functions. The EPR, rightly, stressed that the RDC processes "must be fair, and seen to be fair, as well as being efficient and effective". In particular it noted that fairness requires that a recipient of a warning notice should be aware of the case he has to meet, and should not "leave those subject to [the process] with any justifiable sense that they have been dealt with unfairly". Although some legal commentators have expressed disappointment that the revised RDC processes do not more closely resemble a trial, it is worth noting that the third characteristic mentioned above means, in particular, that the RDC has no power to compel anyone (except members of the FSA's own staff) to appear before it, and no power to require evidence to be provided on oath.

Some of the practical changes reflect the fact that the RDC now has a dedicated legal team – currently two full-time lawyers supplemented as necessary by secondees or external counsel. This team is responsible for assisting the RDC with finalising warning notices, settling decision notices, for advising on disclosure issues and generally for "assist[ing] the RDC in taking an impartial and objective view of the case, enabling a greater degree of challenge to the case" than previously, when legal support was provided by Enforcement lawyers (which tended to blur the required separation between decision-maker and investigator).

INCREASED TRANSPARENCY

The RDC takes seriously the concept of the warning notice or first supervisory notice as setting out the case as the RDC then sees it. As a result of the EPR changes, the RDC has full control over the notice and, with the help of its own legal advisers, ensures that the notice reflects its view of the proposed action and the reasons for proposing the action.

The recipient of a warning notice will now ordinarily receive with it a bundle of related material. This includes a copy of the submissions paper made to the RDC, other materials which the RDC saw and which it took into account in reaching its decision to issue a warning notice, and substantive communications from the Enforcement team to the RDC not otherwise in the case papers. (It will not include the RDC's own legal advice, and in rare cases there may be material which the FSA is unable to disclose.) There is, therefore, more extensive disclosure of material by the FSA than previously. The aim of this is very straightforward – it is to enable the recipient of a warning notice to be well-informed about the case as it was seen by the RDC when it decided to issue the warning notice, and thus to enable him to make representations on an informed basis.

If there is an oral representations meeting the RDC will usually indicate which issues it considers to be key to its deliberations and therefore which it is interested in hearing about in particular. Obviously it is more effective to direct representations to the substance of the case in the warning notice – after all that is the description of the case which therefore needs to be answered. The RDC is unlikely to find it helpful or persuasive, for example, for either party to concentrate on procedural issues or on peripheral matters not mentioned in the warning notice. However, the person making representations is free to make whatever representations he wishes and if there are other matters relating to the substance of the case of which the RDC ought to be aware, of course these should be drawn to its attention.

During the meeting the Enforcement team will have the opportunity of responding to oral submissions and of suggesting points which the RDC may find it helpful to have clarified (the RDC's legal adviser will advise the RDC about this as well). But generally speaking the RDC will expect the last word to be given to the recipient of the notice. After that the RDC will deliberate, attended only by its own staff (including its legal adviser). The Enforcement team will leave the meeting at the same time as the recipient of the notice and will receive no indication from the RDC about the outcome before the RDC issues its decision to all sides.

SEPARATION AND ITS LIMITS

The fact that the RDC is not a tribunal and has no role to make a judicial determination between two parties is especially important to bear in mind when matters of law arise. The RDC's function is not to decide what the FSA's interpretation of the law is but to make the appropriate decision on the specific matter before it. The FSA forms its views on the correct legal interpretation of the law having regard, not only to the issues in an individual case, but also to the wider context of precedent and implications for the FSA more generally. The FSA's lawyers in its

Enforcement Division, General Counsel's Division and elsewhere advise the FSA on such matters.

It is Enforcement's task, when making its submissions to the RDC, to present clearly and accurately the FSA's interpretation of the law when legal issues arise. The role of the RDC is not to substitute its own view in place of a reasonable view presented to it. Enforcement will need to consider representations about points of law and assess whether the FSA's position should be modified as a result. This may require discussion between Enforcement, General Counsel's Division and other parts of the FSA. Enforcement may then make further submissions (disclosed in the usual way) expressing the FSA's view and explaining any change made in the light of the representations received.

There is no question of the RDC merely "rubber stamping" the FSA's view as put by the Enforcement team. The RDC legal adviser will assist the RDC with its understanding of the legal issues, and the RDC will test and scrutinise the legal submissions in order to be satisfied that it is reasonable, in the context of the particular case, for the FSA to rely on the legal arguments and views advanced. The RDC will apply the relevant law to the facts of the particular case in reaching its decision.

FEEDBACK

The EPR report contemplated formal feedback, and we look forward to receiving and to taking on board (to the extent we can) constructive suggestions from those who experience the revised RDC process. Anecdotal reaction so far (necessarily limited) to the changes has been favourable – in particular about the new style oral representations meetings. Finally, it is worth noting that the RDC itself has found the changes helpful – particularly in emphasising the distinction between investigation and decision-making.

Tim Herrington, Chairman of the RDC
Richard Everett, Senior legal adviser to the RDC

DEVELOPMENTS POST CLEMENTI – AN OBJECTIVE VIEW

There can be few lawyers who do not at least have a passing knowledge of the proposals for regulation of legal services made by Sir David Clementi in his December 2004 report. These proposals were broadly adopted by the Government and welcomed by the profession resulting in the white paper of last October. It is apparent that in the not too distant future there is going to be a new regulatory framework for legal services in England and Wales.

It is worth saying from the outset what this article is not intended to be. It is not a critique of the proposed reforms from the profession's perspective. It is interesting though,

as a regulatory lawyer, to take an objective view of the white paper's proposals which certainly have new regulatory aspects when applied to any profession.

THE OVERALL STRUCTURE

The structure will comprise these new bodies:

- Legal Services Board ("LSB"). The LSB will oversee all the various Front Line Regulators ("FLRs") such as the Law Society and the Bar Council. The LSB will be a non-departmental public body and will comprise 9 to 12 members. The Secretary of State for Constitutional Affairs will appoint the Chair and the other members after consultation with the Chair. The first LSB Chair will be a non-lawyer as will be the majority of the members.
- Office for Legal Complaints ("OLC"). The OLC will work with the FLRs in relation to complaints brought by consumers. The OLC is intended to be the only 'post-box' for consumer complaints. It is accountable to the LSB (who appoints its 7 to 9 members and has power to remove them). The majority of its members and its Chair will also be non-lawyers.
- Consumer Panel. This will provide advice to the LSB. The Consumer Panel will be approximately 6 people including representatives from the National Consumer Council, Which? and other consumer groups.

The LSB

FLRs will have to be authorised by the LSB. The Government has proposed that the existing professional bodies will be authorised, provided the LSB is satisfied of their governance arrangements. This requires the FLRs to split their regulatory functions from their representative ones. Therefore the Law Society announced steps in January to achieve this.

Giving or taking away authorisation is the key power in the LSB's armoury. The LSB will be able to remove authorisation from an FLR in particular areas. As a stronger sanction, the LSB will also be able to recommend to the Secretary of State that secondary legislation is passed fully removing authorisation. As with any regulatory scheme, defining what is needed for authorisation and the process by which this can be achieved is an area where detail is essential and where disputes can arise. Certainly disputes might be anticipated if authorisation is refused or removed. The white paper does not give details on this key area probably because a draft bill is due this parliamentary session. The paper sets out basic requirements that the LSB should be satisfied that the FLRs will regulate in the consumer interest and will be competent to regulate. Careful thought will need

to be given to what the eventual criteria for authorisation should be. For example, should the criteria be expanded to refer to other matters identified in the seven principles which are expressly part of the legislation? These principles include aims such as access to justice and increasing understanding of a citizen's legal rights in addition to the aim of increasing competition.

In addition to other direct sanctions such as striking down the rules of an FLR, the LSB will have co-operative powers such as issuing guidance and working with the FLRs to achieve better regulation. Experience from other schemes suggests that this type of co-operation and communication is an important component of effective regulation.

If co-operation does not do the trick, the LSB will also be designated as an enforcer under Part 8 of the Enterprise Act 2002. This would allow the LSB to obtain Court orders requiring practices or individuals to cease a specific activity, where that harms the interests of consumers.

A competition angle

The competition aspect gives the scheme a degree of extra complexity. This is emphasised by the power the LSB will have to authorise Alternative Business Structures. These may include multi-disciplinary practices. Also one of the LSB's functions will be to look at the legal services market to make recommendations to the Secretary of State for new areas of regulation. The Secretary of State will be able to authorise new FLRs through secondary legislation.

This is an area of interest for a number of groups and certainly for those representing the interests of consumers. One of the issues raised by Which? in its consultation response is that of plugging the regulatory gap, highlighted by its example of someone with a personal injury claim going to a regulated solicitor or taking the same action through a currently unregulated claims manager. Ensuring consistency in scope is always an issue for any scheme and the proposed solution here is consultation followed by secondary legislation. Some of the advantages of this are certainty and the ability to take on board stakeholder's views. However, the downside is the time that it takes to go through this process and it will be interesting to see if greater flexibility is thought to be needed.

The OLC

The OLC will be able to deal with many consumer complaints itself. These will be matters that do not involve misconduct and which are not high value or complex negligence claims. As it is proposed that £20,000 will be the maximum financial redress the OLC can provide, this indicates that claims above this amount may involve Court proceedings. The OLC will be

independent from Government and the legal sector. Submissions were made to the Department of Constitutional Affairs that the OLC might be able to delegate some of its investigative functions to FLRs. This was rejected on the basis that the OLC should be entirely independent.

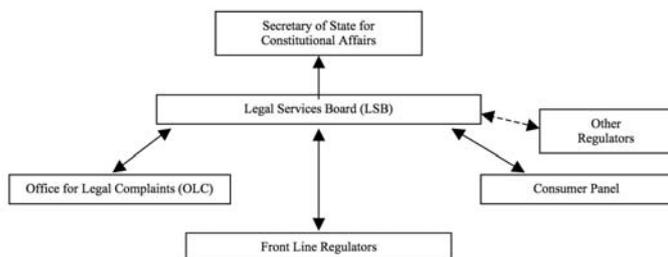
There will be a range of sanctions open to the OLC where it deals with a case including requiring waiver of some or all fees and ordering a payment for loss or poor service. Providing an appeal route from the OLC to the Court was rejected although it is recognised that OLC decisions may be subject to judicial review. Whilst it is hard to envisage many cases in this area, there are likely to be some which allow the Court to consider this aspect of the scheme.

Where misconduct is involved the OLC will refer the case to the relevant FLR and it may ask to be informed of the outcome. This gives weight to professionally-led regulation which is not unusual in schemes of this nature. The intention seems to be that the OLC will act as the LSB's deputy in overseeing disciplinary matters. It will be open to the OLC to report to the LSB if it is concerned that an FLR may not be adequately performing its functions. The example in the white paper is where an FLR decides not to pursue a series of potential misconduct matters. It will then be for the LSB to decide what steps to take including using the Enterprise Act power.

WHAT HAPPENS NEXT?

Comments have been requested and stakeholders are invited to continue to engage with the process. This is always sensible as the success of regulation is often dependent on buy-in from those being regulated. Taking an objective view, the white paper is a well structured explanation of the scheme and what it is setting out to achieve. However, there is no doubt there are complexities involved, particularly in fostering competition and achieving the other objectives. The devil is in the detail (as they say) and that is the part to get right.

**Len Murray, solicitor
 Baker & McKenzie**



LEGAL UPDATE

In three recent cases the Court has had to consider procedural issues arising before disciplinary tribunals. The cases are:

***Harris v. Appeal Committee of the Institute of Chartered Accountants of Scotland* [2005] CSOH 57;**

***Henshall v. General Medical Council* [2005] EWCA Civ 1520;** and

***Regina (S) v. Knowsley NHS Primary Care Trust, and Regina (Ghosh) v. Northumberland NHS Care Trust* [2006] EWCA 26 (Admin).**

In *Harris v. Appeal Committee of the Institute of Chartered Accountants of Scotland*, the Scottish Court emphasised the need for regulatory bodies to ensure that irrelevant and prejudicial matter was not included in papers which were submitted to disciplinary tribunals. Although the judgment in this case was given by a Scottish Court, the principles which it applied were of more general application. Included before the disciplinary and appeal committees, were “summaries”, which contained detailed narratives of the findings and conclusions of the investigations committee, and a number of affidavits which were prejudicial to the appellant. Lady Smith, in reaching her conclusion to quash the Appeal Committee’s decision, held that the hearings below did not comply with Article 6, and because the material had been read and considered by at least the chairman and one other member of the appeal committee the possibility of the appeal being influenced by the material could not be ruled out.

In *Henshall v. General Medical Council*, the Court of Appeal said that the rules of the GMC’s preliminary proceedings committee, set up to screen complaints before they reached the professional conduct committee, should not be interpreted so as to enable a medical practitioner to put in potentially contentious material in response to a complaint and deny sight of it to the complainant. Sedley LJ said that not every document which came to the preliminary proceedings committee required disclosure. But a general inhibition which enabled a petitioner to put in potentially contentious material in response to a complaint and to deny sight of it to the complainant was capable of stifling the individual’s right to bring a tenable complaint to the attention of the professional conduct committee.

In the *Knowsley and Northumberland NHS Care Trust* cases, Toulson J held that when considering removing a general practitioner from a performers’ list at an oral hearing, a primary care trust had to afford the doctor certain rights of legal representation and in certain circumstances allow the attendance and cross-examination of witnesses. Although the statutory provisions did not

provide for a right to legal representation, such representation was not precluded and might be necessary in order that a proper case could be presented. Whether or not legal representation was necessary depended on the nature of the case and the extent to which it would advance the decision-making process.

R (Council for the Regulation of Health Care Professionals) v. General Medical Council, and R [2005] 5 EWHC 2973 (Admin).

In this case the appellant contended that the GMC “under-charged” the case against the doctor involving an allegation concerning a former patient. In a nutshell, the appellant contended that the charge should have alleged that the doctor’s conduct was sexually motivated and/or indecent and not simply incompetent and/or inappropriate. Before the disciplinary tribunal, Counsel for the GMC was not asked to and did not give any explanation as to why the facts did not allege sexual motivation and/or indecency. The disciplinary tribunal concluded on the basis of the charge as laid that the appropriate sanction was a suspension of the doctor’s registration for 18 months. The appellant contended that if the tribunal had concluded that the doctor’s conduct was not simply incompetent and/or inappropriate but indecent and/or sexual motivated, then that sanction would have been unduly lenient.

The appeal was allowed on the grounds that there was a serious procedural irregularity. Sullivan J found that on the alleged facts the charge should have included an allegation of indecency and/or a sexual motivation on the part of the doctor. He remitted the case back to be heard by a differently constituted panel with a direction to the GMC to amend the charge accordingly.

Giele v. General Medical Council [2005] 4 All ER 1242.

This is a case of wide ranging importance on sanctions, and the appropriate test for any disciplinary tribunal or panel considering sentence, and the possibility of erasure or striking off. The appellant was a distinguished plastic surgeon who had formed a relationship with a former patient. The fitness to practice committee of the GMC found him guilty of serious professional misconduct and decided that, notwithstanding the impressive mitigation, there were no exceptional circumstances in the case, so that the proportionate sanction was that of erasure.

Collins J in quashing the sentence and substituting a suspension for 12 months drew attention to the *Indicative Sanctions Guidance for the Professional Conduct Committee* issued by the GMC. It cites the observation of Lord Hoffmann in *Bijl v. GMC* [2001] EKPC 42 that the panel’s concern with public confidence in the professional should not be carried to the extent of feeling necessary to sacrifice the career of “*an otherwise*

competent and useful doctor who presents no danger to the public in order to satisfy a demand for blame and punishment.” It goes on to say that these words should be weighed against the observations of Sir Thomas Bingham MR in *Bolton v. Law Society* [1994] 2 All ER 486 as approved by the Privy Council in *Gupta v. GMC* [2001] UKPC 61. Those observations were that “*the reputation of the profession is more important than the fortunes of any individual member (and) membership of a profession brings many benefits, but that is part of the price.*”

Collins J held that when approaching the question of sanctions the panel had to start with the least severe. It was not a question of deciding whether erasure was wrong, but whether it was right for the misconduct in question after considering any lesser sanction. Furthermore, it was wrong to ask whether there were exceptional circumstances to avoid erasure. Although the maintenance of public confidence in the profession has to outweigh the interests of the individual doctor, that confidence would be maintained by imposing such sanction as was in all the circumstances appropriate, and in considering the maintenance of confidence, the existence of a public interest in not ending the career of a competent doctor would play a part.

**Kenneth Hamer
 Henderson Chambers**

FORTHCOMING EVENTS

**ARDL Annual Dinner (our fourth!)
 Tuesday 9th May 2006
 Venue: Quaglino’s
 Champagne reception followed by fabulous three
 course dinner.
 Dress: Black tie
 Speaker: Robert Marshall-Andrews QC
 SOLD OUT! Reserve list being maintained.**

**REQUEST FOR COMMENTS
 AND CONTRIBUTORS**

We would welcome any comments on the Quarterly Bulletin and would also appreciate any contributions for inclusion in future editions. Please contact any of the members of the editorial committee with your suggestions. The editorial committee is:

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