Professional Associations
RESEARCH NETWORK

Guidance Documents

PARN Regulation Special Interest

April 2019

Acknowledgements

PARN would like to thank the members of the Steering Group supporting the Regulation Special Interest Group (SIG) for their work in reviewing and enhancing these notes. The Steering Group comprises Philip Yelland (Law Society Scotland), Debrah Harding (Market Research Society) and Tina Russell (Chartered Institute of Personnel and Development).

Notes have been compiled and edited by Andy Friedman, CEO of PARN, based on presentations and discussions which have taken place at the Regulation Special Interest Group. In this, he has been ably supported by the members of the Steering Group.

Our thanks also go to Bates Wells who have been sponsoring the Regulation and Legal SIG as of 2018, in particular the staff who took the time to help revise the Data Protection sections.

Contents

Introduction

As can be seen from the Table of Contents, a wide range of issues have been dealt with by the PARN Regulation and Legal Special Interest Group and have found their way into guidance documents. The contents of these guidance documents can be regarded as the basis for a valuable induction to new recruits to the regulatory procedures of professional bodies, as well as reminding old hands of the collective wisdom of the many who have been attending regular SIG meetings over the past seven years.

There are many valuable types of guidance contained in these documents:

- Advice on strategic policy such as:
    - How many sanctions should be available;
    - How to decide how much information to provide and how to provide it when dealing with a subject access request;
    - How to deal with resistance to thorough recruitment procedures for volunteer participants and how to approach their appraisal.
- General advice or protection against risk for participants in regulatory processes
    - Ways of protecting yourself and your organisation when threatened by legal action against you as a regulator;
    - Ways to maintain good customer relations when dealing with a subject access request
- Distinguishing general good practices and good practice that depends on circumstances such as issues around publication policies concerning disciplinary results
- Advice on common dilemmas such as whether to publish decisions before or after an appeal period
- Manage expectations of complainants
- How to deal with anonymous complaints
- Guidance on operating policies such as how to decide on the appropriate sanction
- Explanation of techniques and procedures available but not used by all (e.g. Mediation)
- Definition, explanation and guidance on applicability of difficult issues such as vexatious complaints
- What to do in an extremely challenging situation e.g. When you are actually threatened by legal action
- Sensitising to pitfalls that may occur e.g. Lay members 'going native'
- Ways to economise on resources such as through consent orders
- General food for thought on how to improve processes.

This compendium of guidance notes has been generated from reviews of presentations and discussions at the PARN Regulation and Legal SIG, which has been operating since 2011.

The notes were first written up by PARN and then sent out to the Regulation and Legal SIG steering committee members who commented and suggested amendments as well as Bates Wells. These were then agreed and sent out as individual guidance notes to members of the

Regulation and Legal SIG (i.e. those who have attended the Regulation and Legal SIG in the past).
This compendium of Regulation and Legal SIG guidance is intended to be a living document. We expect the guidance to be revised and updated based on continuing conversations as part of the Regulation and Legal SIG.

We invite all PARN members to contact us if you think revisions are needed for particular documents, and to make any comments on this material. Please send comments to Ella Preda at ella@parnglobal.com

SECTION A: Participants in regulatory processes

Recruitment, Development & Appraisal of Regulatory Participants (2016)

Issues with recruitment

Resistance among 'candidates' for participation on regulatory committees or panels may arise:

1. Because they are volunteering, and particularly if they are members of the professional body, they may believe they should not have to undergo a formal recruitment process to 'allow them' to volunteer.
2. The process may resemble employment recruitment and this may lead to a cross into the legal requirements for employee protection.

Answers to these concerns should focus on the importance of what volunteers will be doing. It may be worth having a bank of examples of unacceptable behaviours of members through previous decisions (and consequences for the quality of the process and the reputation of the professional body) to emphasise the seriousness of the roles to justify a rigour in recruitment.

Examples might include cases when:

- Predetermined views were expressed leading to a less than satisfactory outcome and/or where much resource and expense was spent correcting those views after the decision was reached.
- Committee or panel members did not ask questions when they received responses they were unhappy with, leading to second guessing what the responses were and/or the need to have a supplementary hearing or deal with an appeal.
- Disciplinary decisions took too long or were unsatisfactory due to:
    - Pre-conceived views
    - Bias
    - Lack of consensus
    - Lack of proper reasons
- Not reading the case file in enough detail, leading to failure to understand the issues and properly evaluate all submitted evidence or pursue lines of enquiry, resulting in unsatisfactory outcomes and/or appeals.
- Failure to disclose an interest/conflict at the earliest possible stage requiring the process to be re-started with a different committee/panel.
- Discussing case details with unauthorised third parties.

Guidance for recruitment

Interested individuals should be informed what the role and remit involves before applying, including a clear indication of the time commitment and that they will have to undertake induction and possibly top-up training at regular intervals.

Some knowledge and skills assessment should be considered beyond filling out an application form and submitting a CV. Phone or face-to-face interviews and assessment centres may also be helpful to assess candidate suitability.

Many volunteers may be retired members. It is reasonable to limit recruitment to suitably experienced practicing professionals who are fully conversant with current practice and up-to-date with issues that could arise. If retired members are deemed unsuitable, it is important to draft criteria clarifying why qualified working practitioners are required. This should be agreed before recruitment is undertaken to ensure that clear and consistent responses can be supplied should queries arise from ineligible candidates.

Consider appointing individuals for a limited term with a possibility for term renewal to ensure there is proper turnover of members, with fresh new recruits being introduced regularly.

As with all volunteer roles within professional bodies, it is important to emphasise expectations in terms of desires and good practices, rather than requirements and necessary practices.

Recruitment needs to be supplemented by induction and support. The support should include some explicit written requirements, such as confidentiality, but, again, should be accompanied by rationale emphasising good practice.

Job descriptions are useful for all professional body and regulatory volunteers and particularly so for those involved in regulatory processes. It should emphasise behavioural characteristics desired and a link between those and how they contribute to good outcomes.

Involvement in mock investigations and hearings can provide a better idea of how well individuals will perform in interaction with others. As these can be resource intensive, it may be worthwhile to do this when significant numbers are being recruited at the same time.

Providing papers while ensuring data protection & confidentiality

Data protection and confidentiality need to be considered within the administrative procedures that underpin regulatory procedures. Issues to consider when providing papers:

- Mailing of paper regulatory documents – special delivery, secure mailboxes or couriers should be used rather than standard delivery.

- Ensure that all regulatory participants either securely destroy papers, or that all papers are returned. Data protection training is essential.

- Use of security measures for the circulation of digital records and standard password protection may not be sufficient. Use of secure FTP (File Transfer Protocol) should be considered.

- Formulate a social media policy for cases that go public for any reason; identify sensitive cases and plan ahead.

Reflection

Practice should be regularly informed by reflection on experiences. Processes should be put in place to encourage sharing reflections, collecting issues to be used to inform future induction and general training, as well as for updating procedures and codes. It is important to make time for these activities.

Guidance and appraisal of disciplinary panels

It may also be advisable to provide guidance to volunteers on disciplinary panels. This may go as far as providing a tick-box to remind volunteers that they are following the standard format. Consider distributing self-assessment forms for completion after every meeting or a six monthly or annual assessment.

Appendix: Example interview questions

Below are typical questions which may facilitate the recruitment of suitable regulatory participants:

- Motivation of candidate – let the candidate explain why they want the role.
- Experience – let them draw on their experience so they can come up with examples of their skills and knowledge that they think may be helpful for the role. In addition, verify whether they have direct experience of conducting investigations and/or hearings.
- Assess whether they are interested in the profession and keep up to date with current developments in the profession, as well as CPD.
- Assess their understanding of professional regulation and their professional body's regulatory framework.
- Examine their ability to cope with perhaps unfamiliar areas of practice, time constraints and heavy workloads.
- Assess their skill of argument – have they ever changed someone's viewpoint?
- Learn whether they are comfortable working within a team; how they have contributed to teams they have been involved with in the past and whether they can resolve conflicts.
- Ask how they plan to fit this volunteering commitment in with their busy professional schedule.

Regulatory Committees (2015)

Good practice

- Offer induction and ongoing training to panel members.
- Offer extended training to lay panel members.

Good practice, but dependent on the circumstances

- Buddy system allowing experienced members to introduce new people to the role.
- Mock case hearings as a form of training – previous cases and how the decision is reached and if the trainees' expectations match original decisions.
- If there is a breach of the code of conduct but no named complainant, the organisation can take on the case as if they are the complainant (if regulations allow for this).
- If an allegation has been made but complainants do not want to be named, cases are referred to relevant disciplinary bodies/committees and they should carry out an initial investigation to decide if there is a case to answer.

Other areas to consider

- Paying panel members a nominal fee to enable a diverse range of individuals to serve.
    - Payment can be dependent on performance and require a specified level of service delivery.
- Using webinars as introductory training.
- Recruiting for protected characteristics based upon an audit of needs.

Working with Lay Members (2013)

How do you recruit lay members?

Lay people should be representative of the public at large, but they also need certain skills. Some professional bodies go through a rigorous selection process involving advertising in national newspapers, interviewing candidates and making appointments.

What is the most effective way of training lay members?

Not all of the bodies give formal training to lay people. Training is generally provided on an annual basis and covers the process of handling complaints and a general introduction to the principles of the organisation.

What qualities should lay members have?

Independence, experience, an outside perspective, and impartiality were all suggested as important qualities that a lay member should have. The main purpose of including lay people in a disciplinary process is to increase the transparency and openness of the process. By allowing lay people to sit on hearing panels or investigating committees, the process is automatically more open. It is important, though, that lay persons do not 'go native'.

How long should lay members serve?

Long association with an organisation can impinge on a lay person's independence. Some organisations indicate that, in order to prevent this, lay persons serve limited three year 'terms' that can only be renewed once. Other organisations do not have a formal policy for how long lay persons could serve. A key difference between organisations is how often a lay person's services are required. Some organisations hold hundreds of hearings a year, meaning a lot of contact with their lay members, while others hold just a few a year, meaning there is less contact with lay members and the risk of their impartiality being impaired is decreased.

Complainants
Vexatious & Anonymous Complaints (2015)

What is a vexatious complaint?

Determining whether a complaint is vexatious can be quite complex and often must be determined on a case-by-case basis. However, there are factors and principles to consider when assessing whether a complaint can be considered vexatious, which affect how complaints are treated.

A vexatious complaint is one "which is intended, or tends to vex, worry, annoy or embarrass", and is a complaint that is without foundation. Other definitions also refer to the 'frequency' and 'persistence' of the complaints as a significant determining characteristic of vexatious complaints. There are several other issues to consider with these definitions:

- Complainants may not be seeking to cause harm or annoyance. The complainants may believe their complaints to be genuine. If complainants are persistent, this might result in complaints being considered vexatious, even once complaints have been considered and progressed through the appropriate stages.
- Even if complainants are malicious and intending to cause annoyance, there might still be merit in their complaints that require investigation, e.g. a complainant might have a personal dislike for a member, but their complaint highlights potentially bad practice.
- Complainants may have genuine complaints, but are unable to articulate their concerns e.g. a complainant might be upset about how an issue has personally affected them or they may know that something was not quite right, but are unsure how this relates to the code or rules relating to a specific profession.

Some questions to consider when determining whether complaints are vexatious:

- Is the real purpose to obtain information to support court proceedings? Some delegates highlighted that some complainants do not actually want a disciplinary hearing but instead hope to gather more evidence from the professional body to aid them in a court hearing.
- Is there any merit or evidence?
- Is there substance to the complaint? I.e. is the allegation specific? Is there any corroboration? Can alleged harm be identified and measured?
- What is the motivation for the complaint? E.g. is the complaint the result of a breakdown in a personal relationship between the member and the complainant? This is not a reason to dismiss a complaint as the concerns might be valid, but it is worth bearing in mind.
- Is it a civil matter to do with unpaid debts?

It is important to remember in all of this that the issue is whether the complaint is vexatious and NOT the complainant themselves.

Policy areas to consider for inclusion in vexatious complaints policy:

- Information to help complainants understand the process and which complaints will and will not be considered. The professional body should be transparent about its policy for considering vexatious complaints.
- The ability of the professional body to seek legal advice where necessary.
- The burden of proof rests with complainants.
- Allowance for initial reviews to determine if there is substance to any complaints received.
- Procedures for identifying and excluding trivial complaints.

Professional bodies should also consider:

- Asking complainants what they hope to achieve from the process. This can determine reasons behind complaints and help manage expectations.
- Requiring complainants to supply evidence in a structured manner (e.g. an online form) that systemises complaints allowing professional bodies to determine whether there are any gaps and whether there is merit to the complaint.
- Including gateway systems where the eligibility of complaints is considered. For example, the Scottish Legal Complaints Commission where in statute the eligibility test requires the Commission to consider whether a complaint is "frivolous, vexatious or totally without merit".
- Complainants who submit repeated complaints should be judged upon the merits of each complaint, not on the behaviour of the complainant.
- Not including an appeals procedure for complaints that have been deemed vexatious.
- Being cautious about labelling complaints as 'malicious' as this might be considered a judgement about complainants rather than merits of complaints.
- Be particularly cautious if the nature of the complaint indicates mental health issues on the part of the complainant.

Anonymous complaints

Two possible scenarios could be considered for anonymous complaints:

1. Individuals who are known to a professional body but wish to remain anonymous to members against whom they have complained. In such scenarios the following should be considered:

- Is the reason for wanting anonymity justifiable?
- Include anonymity scenarios in guidelines but do not define them too tightly; staff and associations require discretion on a case-by-case basis. Complainants should be made aware of the challenges of remaining anonymous.
- Be clear in policies providing the rationale for why a professional body CAN deal with anonymous complaints as well as the reasons why it CAN'T; consideration should be given to the standing and reputation of the organisation.

- The probable outcome and the importance of an individual's evidence to the whole.
- Balance the risk of reaching an incorrect decision based on weak evidence vs. fulfilling the role as a regulator and ensuring natural justice is being undertaken.
- Members' rights under common law to know their accuser and have a right to a fair trial.
- Members' rights to challenge evidence, which could be difficult if complainants are anonymous.
- The data protection implications, for example if a member puts in a subject access request; in such circumstances professional bodies can redact any material released to protect individual identities.

2. Anonymous complaints sent to professional bodies. In such scenarios the following should be considered:

- The information could be treated as 'intelligence' and used to conduct a preliminary investigation to establish if there is a case to answer.
- There are potential challenges in using intelligence or information which may or may not be in the public domain – the position of whistle-blower is different and is regulated by legislation.
- The challenge in treating anonymous information as intelligence or trying to progress a complaint without any further corroboration.

Managing Expectations of Complainants (2017)

Managing expectations is a broad term and can involve managing the expectations of users of your services, the profession as well as the complainants, of which the latter this section will be focused on.

The aim for dealing with complainants is threefold:

1. acknowledge the importance of managing expectations and identify whose expectations you are managing;
2. mitigate risks (i.e. this includes identifying types of risks); and
3. find ways to improve your services.

Use your standards of code which the members or registrants abide by as standards of expectations instead of interpreting the standards as rules.

Upstream your complaint processes

- Use blogs or eBulletins (e.g. Dear Architect) to convey your experience of complaints.

Managing complaints

- Know your audience for profession-specific complaints. For example, the health regulators such as the General Medical Council (GMC) often deal with complainants who are vulnerable whilst regulators such as the Architects Registration Board frequently deal with more sophisticated complainants.
- Do not abandon the 'one-size-fits-all' rule, since you will need to have guidance in place. However, too much of this guidance is also not encouraged.
- Build a relationship with the complainant so that they feel they are being noticed. No complainant will ever want to be a number.

Indicative complaints guidance may include information on

- What powers does the organisation have?
- (Why do you regulate?)
- What can you investigate?
- Examples of matters that you cannot investigate
- What you can expect from each other
- What the complaint process looks like
- What the complainant's options are

It is important to signpost the complainants to somewhere else if you cannot help them.

Standards of Acceptance

- **Identify your member**
  The information needs to sufficiently identify the member against whom the allegation is made.

- **Be sufficiently serious**
  The nature of the allegation needs to be sufficient and detail the events and circumstances giving rise to the complainant in order for you to be able to understand the allegation.

- **Have credible evidence**
  The evidence provided must be credible in respect of the allegations as a whole, in that the nature of the facts alleged must suggest that the actions of the professional fall below the standards of the Code of Conduct and Practice. Credible evidence will vary from case to case, but evidence is more likely to be regarded as credible if it provides a coherent, logical and reasonable explanation of the events in question, particularly if it is supported by other evidence.

- **Agree on formal allegations**
  If the standard of acceptance is met, the allegations will be drafted by the ARB and sent to the architect concerned with the supporting material which is available at that time.

- **Understand their role as a complainant, and that of the regulator**
  A complainant will often not have a full understanding of what they are complaining about; they only have an idea. Reflect on their statements, for example 'my understanding of your complaint is that you …'

Accessibility

An online portal allows complainants to have improved access to making a complaint and allows your organisation to frame the complaint. It also allows the organisation to frame the complaint. For example, the organisation can find out more about the complainant's background, extract further information about any actions they have taken so far and upload any evidence they have.

This way, you will find out more about the complainant's background and extract information about what actions they have taken regarding their complaint thus far.

Most of ARB's complaints can now be processed online. Their online portal allows the complainants to have improved access to making a complaint, while this also allows the organisation to frame the complaint. For example, the organisation can find out more about the complainant's background and extract background information about what actions they have taken regarding their complaint so far. They can also upload any evidence they have.

Risk mitigation

There are two risks to look out for:

1. **Disengagement**
   Unmet expectations
   Perceived unfairness
   Frustration
   Why does it matter

   It is possible for the complainant to lose interest in their case, for instance when the complainant realises that they will not be given any compensation. This disengagement may seem positive at first but as a public body, you care about the reputation of the organisation as are here to serve the public's interest.

2. **The complainant from hell**
   Judge how much of your time and resources are used when dealing with a complainant.
   Arrange for a judicial review where the lawfulness of a decision is reviewed or litigation.
   Assess neutrality

Professional bodies should consider:

1. Making the process easier for both parties involved
   - Determine how the complainant would like to communicate
   - Provide clear Guidance that is easily accessible and readable
   - Employ persuasive engagement strategies in your communications
2. Have a contract of understanding
   - Highlight the guidance which needs to be fed to the complainant
   - Agree on the allegations
   - Agree on behaviours listed in your code of ethics (e.g. transparency, confidentiality, regular communication and respect). Despite the decisions not going their way, the complainant will still feel good about being treated with respect throughout the complaint process.
3. The importance of training
   - Know your own organisation
   - Use appropriate communication styles
   - Beware of unconscious bias
   - Expertise
4. Systems of review
   - Carry out management oversights and case reviews using surveys. Online surveys are much easier to send and retrieve than post. Consider getting feedback at different stages of the complaint process.
   - Inform the Registrar and/or CEO of the case
   - Allow an independent third party

The Effect of Complaints on Staff *NEW*

Dealing with complaints very often prioritises the complainant, and the corollary business recovery. There has been little focus on those who have been complained about whether members and or the officers who deal with the complaints process.

Complaints can have a profound effect on the subject, often causing them to lose confidence in their competence, changing the way they react to and work with service-users, and negatively impact on their health and well-being. This can include the staff members that deal with complaints.

Carolyn Hirst – one of the speakers at the April 2019 meeting - and Chris Gill have produced some guidelines for staff who have been complained about which can be accessed online here.

Good Practice

- The above mentioned guidelines are based on four principles:
    1. Fairness: the person complained about should have the opportunity to share their version of event.
    2. Transparency: both the complainant and the person being complained about should be kept informed of the process throughout.
    3. Confidentiality: this is not about secrecy, but giving all the necessary information to both parties within the parameters of the law.
    4. Efficiency: complete the process as quickly as possible.
- Once the person who is being complained about has been informed, ensure that they are provided with support – either through member support schemes that run within your organisation or by signposting them to external support schemes.
- The person being complained about should be informed of the outcome of the complaint – even if it did not result in sanctions – and have an opportunity to comment on it.
- The person being complained about should be involved in resolving the complaint if possible.
- Ask the complainant what outcome they would like to see and give the member and or officer a chance to respond to this.
- It is helpful to highlight that the complaint process is not intended to be punitive and that the opportunity for reflection can be far more impactful on the individual's future practice.
- Consider providing members and or officers resources or links to resources that support mental health issues/counselling.

Individual vs Systemic Issues

Sometimes complaints that come down on a single member are the result of a systemic failure in their workplace. It is important to evaluate this in order to find the best outcome for the service user, member and your organisation.

- Consider using a tool similar to the 'Incident Decision Tree' used in adverse healthcare situations.
- This tool asks a series of questions to decipher whether the issue is individual or systemic, such as 'would another practitioner from the same professional group with

the same qualifications and experience behave in the same way, in the same circumstances?'

- Tests like these should be carried out early on in the complaints process; even if the complaint is informal it can be a useful tool to understand the situation.

Other Areas to Consider

- The tone of your correspondence with members and complainants is important, and should not be accusatory towards the member who has been complained about. Stress that they will have a chance to respond and provide counter evidence. For example rewording a 'grievance procedure' to 'resolution procedure' can be helpfully powerful.
- Consider writing to all members even if a complaint has not been accepted, referred. This enables members to attempt to resolve the issue directly with the complainant. Apology can be an effective tool in resolving issues, if done properly and sincerely. Guidance on apology can be found here.
- Your members' employing organisations should also have a responsibility to ensure that they are receiving support and guidance throughout the complaints process.

Members under Investigation
Dealing with Members Threatening Legal Action against the Regulator (2012)

Stick to Your Rules and Regulations

The rules and regulations are your protection

Proceed with the process in accordance with your rules and regulations and adhere to timeframes set down in those regulations. In the event of a judicial review, it will be important that a professional body has completed its processes in accordance with its rules and timeframes.

The threat of legal action is rarely followed through with when it can be demonstrated that you acted strictly in accordance with your rules (to which the member has signed up).
Even in the event of a legal challenge being successful, the best defence a professional body can offer is that they acted strictly in accordance with their regulations. In addition, in the event of a body's regulations being found by a court to be deficient in any way, employees who act strictly in accordance with those regulations will be protected.

Check you do what you say you do

Beware of rules that say one thing, compared with custom and practice that causes something else to be done. Ensure that even if there are no specific rules governing the process, there is a document setting out the normal process that can be referred to. Complaints and threats of legal action are perhaps more likely if there is an information gap, even where what happens is actually fair. You either need to go back to following the rules strictly, or update the rules to reflect how interpretation of them has evolved, or publish a policy statement on applying the rules. In the situation where you have a live threat of legal action for not following rules, you must be careful not to confuse taking what has become a routine step, which is normally not controversial, with following the rules.

Explain that you are following the rules and regulations

Demonstrating that there is nothing personal and you are following a laid down process is important. You may have every indication that a member is not willing to accept anything you say, but it is best to put explanation of what you are doing into correspondence in anticipation of it being independently reviewed. Even if there is no legal action, the approach is still likely to assist you, should the case go to one of your body's own committees (whether it's investigation/ disciplinary/appeal). If members have access to a website which has process information on it you can refer them to it – make sure the information is kept up to date.

Avoid Distraction

When threatened with legal action, it is very easy to get distracted from the issues under investigation; such threats are often part and parcel of lengthy letters that are multi-faceted. You may, for example have been asked two questions and in reply received numerous procedural queries and even challenges to your authority to correspond. Whilst it is important

to look at the threat of legal action, you must still return to the issues such as the two unanswered questions from your last letter. It is important to proceed as far as possible within the timeframes set out in your regulations and not succumb to tactics that are very often employed simply in an attempt to frustrate the process (such as querying authority, threatening legal action, seeking large volumes of additional and often unrelated information). If you are not sure of what to do, seek advice form a colleague.

On Insurance

- **Check your indemnity insurance policy for precise wording**
  The policy will generally require you to have acted reasonably.

- **Check your Royal Charter, byelaws or other foundation documents**
  Check the above documents for circumstances in which a court claim against you will be accepted by your employer as a claim against them. Ideally you want your employer to deal with any claim that results from anything other than wilful misconduct.

  You need to clarify whether you are within the scope of the indemnity. The byelaw may refer to indemnifying officers or senior officers, whereas your contract of employment may refer to a particular pay grade and you may not necessarily have the word 'officer' in either your job title or job description. .

  If the byelaw uses the phrase 'may be indemnified' rather than 'shall be indemnified', you need full information on what factors affect the 'may'. The professional body needs to decide very early on if it will defend the employee. Certain initial actions may allow the complainant to impute that the professional body is defending the employee even if the professional body has not yet decided to do so.

- **Speak to your insurer**
  Discuss the case and steps you are taking (e.g. taking legal advice).

- **Obtain written confirmation from underwriters**
  This is to ensure that you are covered in the event you need to make a claim.

- **Check with your underwriters which solicitor you should use**
  If you choose a solicitor who is not approved by the underwriter, you may have to do it twice (this is similar to getting your own surveyor or solicitor on buying a house when your mortgage company has a list of approved surveyors or solicitors).

Get Adequate Legal Advice to Stay On Track with Regulations

At the earliest stage of intimation of action, make sure that you notify the circumstances to the insurers. If you don't already have advice or guidance on the subject of the action, discuss with

the insurers whether it is prudent at this early stage to seek advice on the process under dispute.

Seek a Second Opinion

Get someone else in the organisation to look at a threat before acting on it to ensure that there is nothing personal or culpable that is being complained about and that you are not acting on your own personal feelings. This can save time and resource if in the end an objective opinion of a colleague will lead to a decision which is less than fighting the threatened action 'all the way'.

Avoid 'group think'. If you are asking a colleague for a second opinion on a threat, only give the facts. Otherwise, you may manipulate the second opinion towards your own opinion by how you express it to them. So, generally you need to separate facts from opinions. Stick also to the issue at hand and do not bring into discussion background information about the complainant.

Assess the Risks of Losing the Legal Challenge

Regardless of whether you think the complaint is wrong, you need to assess the risk of you losing. The financial risk and the risk of damaging your reputation and that of the organisation, may not be worth winning the legal battle.

If you conclude a case is not worth fighting, there may be a very small risk that the person concerned may demand some form of apology or even compensation for distress, so it is important to distinguish between giving up on a lost cause and appearing to concede the case.

Ensure Members are Aware of Alternatives to Legal Action

Point out to members that if they are not happy with the outcome of the complaint or with how the case was dealt with, there are several actions they can take short of legal action, i.e. going to the ombudsman if your scheme allows it. Check to see what other recourses there may be short of court action and consider if something needs to be built into your scheme to lessen the risk of such action.

SECTION B: Application of regulatory processes

Mediation (2013)

Mediation is a voluntary, confidential process which addresses the underlying (root) causes of a complaint. Mediators create the conditions for dialogue using a non-adversarial, non-partisan approach. Any outcomes from mediation are crafted and agreed by the parties, not the mediator.

Mediation may be used during a regulatory process at any stage. It is the role of the regulator or professional body to establish the potential usefulness of mediation and any role it might play in addressing a complaint. Regulators and professional bodies looking to make use of mediation should ensure they have access to a panel of trained and accredited mediators. Mediators should be members of the Professional Mediators Association and subscribe to the PMA Practice Standards. Available from: www.professionalmediator.org.

How is mediation conducted?

The majority of mediation carried out in the UK can be described as 'facilitative mediation'. Mediation can be carried out via any of the following three means:

- **Shuttle Diplomacy**
  This process is undertaken via private meetings between the mediator and the parties. The mediator conveys messages between the parties. The private meetings may be online, face to face or by phone. This is most useful when a financial settlement is required. It is less useful when there is an ongoing relationship between the parties or there are complex emotions which need to be conveyed directly.

- **FAIR Mediation**
  This process comprises private meetings with the mediator followed by a joint mediation meeting. This process allows complex issues to be discussed with the mediator privately prior to the parties meeting each other at a joint meeting.

- **Online Dispute Resolution (ODR)**
  This process of resolving complaints is growing in popularity rapidly. ODR allows the parties to mediate via an online system without the need to meet each other face to face.

When should mediation be used (or not used)?

Mediation can be used in situations where there appears to be no case to answer or where there is a case to answer but the likely sanction imposed will be low level. In these cases, mediation can reduce the time, costs and stress associated with a formal panel process. A 2011 study into use of mediation within Health and Care Professions Council (HCPC) suggested that mediation could be used:

1. At the beginning of the fitness to practice process when a concern is submitted and does not meet the standard of acceptance for a fitness to practice issue.
2. In the middle of the fitness to practice process when an investigating committee finds whether there is a case answer.
3. At the end of the process after a formal hearing is held.

Another factor to consider is the nature of the relationship between the complainant and the respondent. In some professions, complaints are more likely to be lodged by colleagues or other members than by members of the public or clients. This may have a bearing on the suitability of the case for mediation. Some cases are likely to occur as a result of the actions of other regulators or as a result of criminal or civil court proceedings. In these cases mediation would not be appropriate.

Securing a Commitment to Mediate

Mediation may be viewed with some scepticism, or even suspicion and doubt. This is to be expected, given that both complainant and respondent may be feeling vulnerable, worried and anxious. There are many misperceptions of mediation and these can act as a barrier to people engaging fully in the process. In order to make mediation a credible option, and to secure a commitment from the parties, the following tips may prove useful:

- Undertake a mediation pilot to trial mediation in a small number of cases. The data collected can then be used to develop and refine your processes and procedures.
- Ensure that registrants are aware that mediation plays an important part in the resolution of complaints and addressing fitness to practice issues.
- It should also be communicated that mediation provides an opportunity to develop a greater understanding of a complaint and, if things have gone wrong, it offers an opportunity to learn from any mistakes that have been made.
- Provide simple, jargon free documentation to all parties at the point when a complaint is lodged. HCPC, for example, have had all of their mediation documents approved by the Plain English Campaign.
- Ensure that registrants are aware that mediation may be offered at any stage of a complaints or fitness to practice process.
- Ensure that investigation and disciplinary panels are aware of the role and benefits of mediation.
- Ensure that you have access to fully trained and accredited mediators.
- Ensure that there is a named officer within your organisation who will be responsible for the implementation and management of the mediation programme.
- Ensure that there is adequate feedback between the mediator and the regulator or professional body so that mediation outcomes can be monitored and satisfaction levels can be evaluated.
- Ensuring confidentiality can encourage people to engage in mediation, but it must be made clear what the limits of confidentiality are. If further breaches of regulations, or harm caused to others, become apparent during mediation the mediator may have a duty to report this to the regulator or other authorities.

Sanctions and Sentencing (2016)

Number of sanctions

The number of sanctions available to professional bodies will vary depending on the nature and complexity of cases that arise. Disciplinary bodies/professional bodies should review whether there are sufficient sanctions available, as too few may result in sanctions that do not appropriately fit a range of misconduct offences.

On the other hand, too many sanctions may result in the process being unnecessarily long and complicated. Where professional bodies have a large range of sanctions, the difference between sanctions can become unclear: specifically, differences between reprimand, admonishment or terms that mean a variation on 'warning'. Some professional bodies have removed 'admonishment' as a sanction as it is too difficult for disciplinary panels to distinguish it from other sanctions.

Key points:

- Ensure there are enough sanctions appropriate for a range of possible cases
- Remove sanctions that are too similar to other sanctions, which make it difficult for disciplinary panels to make judgements

Defining sanctions

Sanctions should be sufficiently defined and, where possible, examples given of when specific sanctions might be imposed. These definitions should be available to disciplinary panels to facilitate the decision making process.

Professional bodies should ensure sanction guidance is available to members under investigation, to enable members to assess the appropriateness of any sanctions and take action if unsuitable sanctions are imposed.

Guidance for panel members

Professional bodies should provide extensive sanction guidance for panel members, irrespective of the number of cases reviewed. In instances where disciplinary panels consider a low number of cases per year, it is still crucial to have robust guidance in place (perhaps even more so, as panel members will most likely be less experienced). Guidance is important to ensure fairness and consistency and should be published (via professional body websites, etc.)

Indicative sanctions guidance may include information on:

- Whether actions were deliberate
- Aggravating or mitigating factors
- Impact of sanctions
- Process of decision making

The following publications for designing guidance for panel members:

- Kenneth Hamer (2013) Professional Conduct Casebook, Oxford: Oxford University Press.
- Gregory Treverton-Jones QC and Alison Foster QC (2015) Disciplinary and Regulatory Proceedings, London: Jordan Publishing

In terms of deciding which sanction is most appropriate, the professional body should decide on the approach that is most suitable and advise panel members accordingly. Two approaches could be considered:

1) Starting with the least severe sanction and discussing if that could be applied, then moving on to the next sanction until a decision is reached.
2) Selecting the sanction thought to be most appropriate and then discussing other possible options.

There should be a procedure that the panel adopts for every case to allow consistency.

Conditional sanctions

Sanctions that impose a conditional order, such as further training, should be monitored in some way. Some professional bodies have monitoring departments to check that disciplinary conditions are being met, with cases referred back to disciplinary panels if non-compliance is found. Other approaches included requiring members to complete online ethics courses followed by surveys.

Evaluation

- Guidance should be reviewed every two to five years, or sooner if a particular case or change triggers a review.
- Decisions should be reviewed annually, using samples of cases to assess whether appropriate sanctions were imposed and trend analysis to examine consistency over time.

Publication Policy (2015)

Publication of Decisions

Good practice

- Publishing disciplinary findings and the sanction unless there are exceptional circumstances.
- Identifying members within published statements by name, company (if applicable) and location where the individual practices.
- If disciplinary proceedings confirmed that a criminal breach of the law has occurred, you are required to inform and cooperate with the police. If police begin criminal proceedings before a disciplinary decision has been made, the investigation may be put on hold.
- Publishing the findings in a way that make them easily accessible to those who may be interested.

Good practice, but dependent on the circumstances

Publishing a brief summary/rationale about cases:

- If cases are in the public interest and relating to dishonesty (perhaps in the form of a criminal conviction outside of work hours) rather than competence, it may be necessary to publish such instances if there is a breach of the code or regulatory rules. This might be easier to uphold if there is a section in the code of conduct relating to behaviour and/or character.
- Identifying the employer of the member who is in breach of a code may not be well received by current employers, but future employers ought to be able to access and assess such information. Employers should also be encouraged to support publication in order to demonstrate their corporate social responsibility. This furthers the maintenance of good practice on an institutional level and allows clear identification in cases where members work and live in different locations or have a common name.

Other areas to consider

- Consent orders can prevent lengthy disciplinary processes and complainants are often satisfied if the details of the order are published. This may provide an incentive to seek agreed outcomes between all parties to avoid a hearing, thus reducing costs.

A decision should be made regarding:

Whether to publish decisions before or after an appeal period. Factors to determine such issues include:

- Is it in the public interest that decisions are published as soon as possible?
- Does this affect members' rights?
- Is there a need to be transparent about the process? Is it sufficient to publish the result of any appeals?
- Does any delay materially prejudice the public?

Should publication last longer than the period of rehabilitation?

1. Is it important for the public interest and future employers that complainants, stakeholders and the public know about an issue indefinitely, even if members have concluded a sanction?
2. Was the issue of professional conduct related to a personal matter, such as health?
3. Was the matter unique to the profession (i.e. a lapse in technical ability)?
4. Has an individual found in breach moved on to another profession or become self-employed?
5. Could there be prejudice to the member by publishing for more than the sanction period? Should proportionality be considered in this matter?

SECTION C: Regulatory records and outputs

Data Protection (2011)

Individuals submitting a Subject Access Request (SAR) are entitled to their own personal data only and not the documents

With SAR, an important issue is to avoid giving:

- Too little information and therefore triggering a complaint to the Information Commissioner's Office (ICO).
- Too much information and unnecessarily exposing your organisation and its procedures to excessive scrutiny and/or potential criticism. For example, giving third party personal data without their consent thus triggering a complaint from the third party, or giving information outside the scope of the original request thus triggering more follow-up correspondence from the requester.

Seek legal advice on what information you can withhold and what information you need to release. Consult case law interpreting the Data Protection Act (e.g. Durant vs FSA, Ezias vs Secretary of State for Wales), the definition of personal data, and seek advice from the Information Commissioner's Office.

Extract personal data and provide it in a new document rather than provide the redacted originals. Creating new documents to disclose requires more time, and thus expense, but prevents issues such as complainants trying to figure out what has been redacted, which can trigger further enquiries and requests for unredacted documents. When dealing with audio/video materials, have them transcribed and only give what relates to the SAR in an intelligible form, rather than handing them over.

Make sure SAR is immediately recognised as such by your staff

Consider having a data protection policy, especially with regards to SAR that, among other things, spells out how to recognise a SAR and who within your organisation to give it to for processing. You are legally obliged to respond within 40 calendar days from the date of payment. Out of time responses to SAR are one of the most common reasons for complaints to the Information Comissioner's Office.

The whole organisation needs to understand data protection issues

With SAR, a member is entitled to all information you hold about them (unless exemptions apply), including, for example, information relating to a disciplinary investigation where someone might have included disparaging remarks as a part of the contact tracking on a database. This would have to be revealed.

Ensure that information which an information office at your organisation may want to declare confidential does not make its way into the public domain. The Information Commissioner's Office view varies across cases as to what information can be regarded as confidential. For

example, your organisation may state that certain information is confidential but if the information makes its way into the public domain it is not possible to continue to argue that it is confidential.

Publishing names of members who have been struck off

Some organisations that are not statutorily regulated publish the names of members who have been struck off, expelled or similarly disciplined, while others don't, due to concerns regarding the Human Rights Act. To address this issue, when members apply for or renew their membership seek agreement from them to be bound by the byelaws/regulations/rules/code of your organisation, including rules on disciplinary proceedings and their publication. This can be achieved via a signed declaration at the end of the application form for example. This will ensure transparency and will enable your organisation to name individuals expelled from membership in your publications and/or on your website. Publication protects the collective reputation of your membership and the reputation of the professional body and its disciplinary procedures. It demonstrates enforcement action on non-compliance and encourages other members to stay compliant.

Consider having processes in place that will enable you to quickly establish if a particular individual has been subject to disciplinary procedures should you get an enquiry about them from the public.

Maintain good customer service

If you are unable to provide some information relating to SAR, or are withholding it, explain why you are doing so. Treat it as a consumer service enquiry and give reasons patiently.

Know when the Data Protection Act applies

The DPA will apply to your international members if the data about them is held in the UK. Similarly, the DPA will apply if you are established in the UK but process data overseas if the processing is in the context of UK activities. However, the Act does not apply if you have a subsidiary function in the UK and the activity relating to the data is done elsewhere.

Data protection legislation varies across countries

Be aware that different EU member states have different interpretations of the Data Protection Directive. For example, guidance from the Irish Data Protection Commissioner differs from that issued by the UK Information Commissioner's Office.

Data Subject Access Requests (2019) *NEW*

The Facts

- All requests must be treated as genuine and you should be seen to be co-operating.
- Organisations must act quickly and without undue delay; you have 30 days to respond to requests. Identify at the outset if more time is needed.
- You cannot charge for Data Subject Access Requests, unless they are large enough to justify it being deemed necessary. You can refuse a disproportionate request – for example, requesting anything with the name 'Chris'. You can ask the requestor to reframe their request because as written, the request is excessive.
- Data Subject Access Requests don't necessarily give clients the right to view every shred of their data; they are supposed to show how data is being used and processed.
- This process is about copies of records which contain the data subject's data to show how your organisation holds and processes data. It is does not allow unconditional access to confidential business data or data about other subjects.
- It is the responsibility of the data controller to confirm the *bona fides* of individuals making any requests before allowing access to personal data as a result of receiving a SAR.
- Do not underestimate the time needed to gather and review the relevant data.

Good Practice

- Once a request comes in, act quickly.
- The person who manages this data must be objective.
- Run a spot check on how much data the request would produce if you were to respond, to get an idea of the scale of the request.
- All documents the search has come up with needs to be reviewed. There may be confidential or third party data involved.
- Try to identify the parameters of the request; this should reduce the burden of meeting the request, and ensure that you only disclose documents that the data subject is actually interested in.
- Engaging with the data subject is an important part of the process. This will help you to better give them what they want, and can help to limit the scope of the data to search.
- If there is a complaint to the Information Commissioner's Office it is advantageous to your organisation to be able to show that you have tried to engage and cooperate with the data subject.
- The Information Commissioner's Office also has a helpline which can be accessed here.

Other Things to Consider

- Consider what is written in things like interview notes, application forms, references and emails – all of these may have to be submitted to claimants in a SAR. It is best to tackle the source of this behaviour than deal with the fall out once a SAR comes through.
- Excel Spreadsheets can contain multiple tabs. When disclosing these, ensure that all the tabs are meant to be disclosed.

- Review the material being disclosed to avoid duplication. For example, two different people may have provided the same piece of information, but one is redacted further than the other; this can raise questions from the data subject.
- How much data does your organisation store? If there is data going back 10 years, a SAR may pull up a huge amount that must be manually reviewed and redacted as necessary. It is better to have data retention and deconstruction policies suitable for each type for data your organisation holds, making any future requests more manageable.
- For example, bookings for a conference may be kept for only a year, while membership and disciplinary records may be kept permanently.
- Data minimisation can be a solution; for example, while your organisation will want to keep a record of disciplinary procedures, it may not be necessary to keep all of the information regarding a case. While you may need information on the outcome of the case, you may not need to keep all of the information surrounding the case permanently.

Third Party Data

Third Party Data is one of the biggest issues for organisations when complying with SAR's.

- In terms of data subject access requests, you do not necessarily need the consent of the third party to disclose this data. However you should consider:
    - Are there reasonable circumstances to give this data out?
    - Can the information be disclosed in a way that protects the third party?
- The group discussed that requests can be used to try and access the responses or data of the opposing side and or third parties. It is acceptable for your organisation to respond that 'it is third party data and we consider it an unreasonable request.
- It is sometimes best to remove all the relevant data onto a separate document rather than redact – this way it can be harder to tell who said what.

Certificates of Good Standing *NEW*

Certificates of Good Standing come in many shapes and forms, depending on the sector or organisation requesting them. Some regulators and sectors require completion of standard forms in which the following areas may be requested:

1) Current membership status;
2) Membership history (e.g. date of joining and if membership has been continuous)
3) Qualifications
4) Disciplinary matters and or complaints

Consideration should be given to how the information provided will be interpreted. For example, is the response deemed to be a character or professional reference for the individual?

Good Practice

- Review your terms and conditions of membership to ensure that responding to requests are included.
- Establish who in the organisation will be responsible for dealing with these requests and ensure that all staff are aware.
- Agree in the organisation what information will be provided and if there is agreement that answering any of the above questions will be accepted as providing a 'Certificate of Good Standing' and or a reference on behalf of the member/individual/registrant.
- Identify risk categories of Members and consider if this affects responding to such requests. For example – how frequently have there been touch points with the member over the years? Has this member participated in CPD audits/reviews? If there has not been sight of the member's CPD, should a response be issued or is the request an opportunity to request sight of the member's CPD?
- If the organisation decides not to respond to such requests for individuals or risk categories of members, for example, those subject to disciplinary action, notify them of this.
- Consider who is asking for good standing assurance and what specific information they might need. For example, a member of the public is unlikely to need the details of a disciplinary investigation. However, a prospective employer might need this information.
- You can treat these requests much like references – answer the questions they have asked factually, giving no more information than asked for. This way you do not open your organisation to defamation.
- Ensure that the member's permission/authority has been obtained before providing the response.
- Keep a record of the requests that have been dealt with and either use a template to standardise responses or keep a copy in order to track what has been confirmed.
- Consider providing a copy of the response to the member.

Data Retention and the Disclosure of Information

Certificates of Good Standing providing information on an issue that has been spent or rectified may be in opposition to the Rehabilitation of Offenders Act 1974.

The Disclosure and Barring Service (DBS) is also a key resource for checking criminal convictions.

Disclosing Disciplinary Information

- Agree within your organisation how far back a member's record will be examined.
- When disclosing information about investigations or disciplinary procedures, be as factual as possible; be clear about what happened, but do not express subjective views on it.
- If the issue has been rectified or spent it may not be necessary to disclose this information. See below for more information on this.
- Be clear in your organisation if disclosure is only regarding completed disciplinary cases or whether ongoing and or investigations should be disclosed.

Good Practice

- Ensure that your data retention policies are in line with the Rehabilitation of Offenders Act and the approach to responding to these requests. Think about what information you legitimately need to keep.
- Have a policy in place to determine how long you will keep records in certain situations.
- As an organisation you can only disclose what you are legally able to provide. Getting rid of information on a spent or rectified issue means that you no longer have this information, and do not have to disclose it in a Certificate of Good Standing.
- A statement on your organisation's website as to the approach taken with such requests will help in managing expectations and clarify what can be provided.

Other Areas to Consider

- Limiting the data you keep can solve many of the issues mentioned, as long as it is covered in your privacy policy.
- Think about what information you legitimately need to keep – you may not need to keep all the details and evidence from investigation(s), just the outcome.
- Members can request a right to be forgotten. However, erasure requests to not include disciplinary and or qualification records.