

PUBLICATION OF DISCIPLINARY DETERMINATIONS

CLC RESPONSE TO CONSULTATION FINDINGS

September 2014

Executive Summary

1. In April to June 2014, the CLC consulted on its proposal to publish additional disciplinary and regulatory information. There were a number of areas where there was no clear consensus, with a variety of views expressed about what should and should not be published. Support was strongest for publication of themed regulatory activities and findings, whilst significant concern was expressed about the proposal to identify respondents to Adjudication Panel disciplinary determinations and to identify individual practices in reports of monitoring activities.
2. Having considered these responses, Council agreed to extend and review the range of information it published in three stages:

- a) What will be published and from when
 - i. 30th September 2014 –forthcoming Adjudication Panel meeting dates and locations; and
 - ii. 1 November 2014 – Adjudication Panel determinations of conduct complaints received after this date;
- b) Determination by Council in October 2014 for the naming of respondents to forthcoming Adjudication Panel hearings;
- c) Determination by Council in December 2014 of the regulatory and other information to be published.

CLC Publication Policy

3. As stated in the CLC Publication Policy, the CLC is committed to making freely available information about its work to increase both our transparency and public accountability and to assist: consumers of legal services; the regulated community; the oversight regulator; partners in regulatory activity and law enforcement; and policy makers. Unless otherwise stated, information will be published on the CLC's website.
4. As part of the new CLC Publication Policy, CLC Council agreed that the policy for publication of disciplinary determinations should be reviewed. Proposals were put forward for consultation earlier this year. The revised disciplinary publication provisions, as informed by that [consultation](#) and subsequent corporate and operational review, are:

- Publication of a schedule of the dates of forthcoming Adjudication Panel meetings (from September 2014);
- determinations of conduct complaints, received after November 1st 2014, made by the Adjudication Panel will be published;
- the Adjudication Panel will direct that the respondent is not named when a disciplinary determination is published, if in its opinion to do so it would prejudice proceedings or investigations; risk breaching a person's rights under Article 8 of the ECHR; or would not be just;
- respondents may make representations to the Adjudication Panel explaining why they should not be named in any notice of hearing or determination which is published.

The policy is at Annex 1.

5. The CLC is continuing to review the information it will publish about Adjudication Panel meetings and CLC regulatory information. An update is currently expected by early 2015.

Policy Purpose

6. The new policy explains how information about disciplinary determinations of the Adjudication Panel is made available to consumers, and other stakeholders.
7. The intended outcome is to provide consumers and other stakeholders with assurance about the CLC's disciplinary process and to provide information about individual practices when deciding whether to instruct a particular practice. We are aware some respondents expressed concern that publication of disciplinary determinations may have adverse reputational and financial implications for respondents. However, we consider this is outweighed by the need for transparency in this area.

Consultation

8. A consultation on this matter was undertaken April-June 2014. 17 responses were received; respondents included firms, sole practitioners, the Legal Services Consumer Panel and the SRA. The overall findings were as follows (majority results formatted in green):

Figure 1. Consultation Questions and % Responses

| CLC Consultation Question | No. of responses | No. of Yes responses | No. of No Responses | Don't know |
|--|------------------|----------------------|---------------------|------------|
| 1. Should all formal disciplinary penalties imposed by the CLC be published? | 17 | 9 | 8 | - |
| 2. Should a Schedule of Adjudication Panel meetings be published? | 17 | 10 | 5 | 2 |
| 3. Do you agree that it is for the Adjudication Panel to determine whether the respondent should not be named? | 16 | 9 | 6 | 1 |
| 4. Do you agree with the circumstances in which the Panel will determine that the respondent should not be named? | 16 | 10 | 6 | - |
| 5. Do you think the CLC should publish anonymised summaries of monitoring activities and reports? | 17 | 14 | 2 | 1 |
| 6. Should there be circumstances in which individuals/firms should be named when we are publishing reports of monitoring activities? | 14 | 7 | 5 | 2 |

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| 7. Do you think the CLC should publish information about regulatory actions taken by staff under delegated powers? | 17 | 11 | 4 | 2 |
| 8. Is there in your opinion any other information the CLC should publish? | 17 | 8 | 5 | 4 |

In line with our current consultation policy, a detailed summary of the responses and underlying comments is provided at Annex 2. The main headlines are:

- 8.1 Polarisation of stakeholders: several respondents, strongly opposed to the proposals, argued that publication of disciplinary information for an indefinite period would be disproportionately prejudicial to practitioners and considered that an individual or firm should only be named when cases concern only the most serious of breaches, such as fraud; and then, only after that case has been determined. Others argued that since Adjudication Panel hearings are held in public notice of those hearings should be published, naming those involved.
- 8.2 Some respondents argued that a £0.01+ publication threshold is as arbitrary as the current £5,000 threshold; others proposed that a determination should be published only if it exceeded a percentage of turnover. Several were convinced of the need to publish information on regulatory actions, including naming those subject to directions made under delegated powers, whilst others expressed concern that consumers are not sufficiently well-equipped to differentiate less serious from more serious breaches, risking the usefulness of this information.
- 8.3 Information on monitoring activities: by far the strongest support was for the publication of anonymised summaries of monitoring activities and reports. These would be valued not only for the increased accountability placed upon our regulatory activities but for the “lessons learned”/frequent errors, compliance levels and good practice elements that the regulated community consider such information would provide.
- 8.4 Consumer Panel response: the Panel’s response is broadly in agreement with our proposals, though it also suggests a diverse range of additional data the CLC should consider publishing, including: naming those subject to CLC staff directed undertakings and directions; all individual survey responses (not just a summary); naming individuals and firms where evidence is obtained through mystery shopping exercises; an anonymised record in the CLC Annual Report, highlighting when the Adjudication Panel has decided not to name a respondent, together with the reasons for the non-disclosure; publication of an audit of the regulatory information held and a list which sets out what is and isn’t published with “reasons to justify what it considers should remain secret”; aspects of conveyancing process such as speed, and accurate and timely registration of documents with the Land Registry.
- 8.5 It also voices concern regarding the proposed circumstances in which the Adjudication Panel will determine that the respondent should not be named if to do so :

- Is likely to prejudice legal proceedings or other regulatory or disciplinary investigations;
- Is likely to risk breaching a person’s rights under Article 8 [right to privacy] of the European Convention on Human Rights (ECHR);

- In the opinion of the Panel would not be just.

- a. In particular its concerns are focused upon the Article 8 reference.

Determinations Policy

9. The text of the new disciplinary determinations publication policy is provided at Annex 1. It is broadly in line with proposals 1, 3 & 4 made in the [consultation](#), though tailored to take into account consultation feedback. For example, the CLC will limit the period for which disciplinary determinations are published because of concerns that an individual or firm is disproportionately prejudiced if details of the determination remain indefinitely on the CLC website.
10. We will publish determinations of all Adjudication Panel disciplinary determinations in respect of referrals received after November 1st 2014. This will include the name of the respondent (unless the Adjudication Panel directs it should not be published in a particular case).
11. We note the concerns expressed by the Consumer Panel about Article 8. Within 12 months of inception, the CLC Council will carry out a review of the policy to assess how it is being managed by the Adjudication Panel and will, if necessary, amend the policy.
12. Some consultation feedback suggested that naming any individual or firm subject to any penalty was as arbitrary as the £5,000 publication criteria threshold it sought to replace. For the avoidance of doubt, the penalty publication policy applies only to disciplinary determinations made by the Adjudication Panel, not those made by CLC staff under delegated powers and which involve fines imposed on a summary basis (e.g. £100 fine for late Accountant's Report).

For further review by the CLC – publishing details of name and allegations before the hearing

13. The schedule of Adjudication Panel hearings to be published from October will provide dates of the hearings. It will not currently include the name of respondents. The publication of information about disciplinary matters referred to the Adjudication Panel for hearing and determination, including naming the respondent and details of the allegations is an understandably contentious area. To ensure we take account of the concerns raised through the consultation we are continuing to review the approach we should take.

For further review by the CLC - Regulatory Activities

14. The consultation found overwhelming support for publication of anonymised summary information - such as inspection numbers, triggers and themes, frequent errors etc. - on our regulatory activities. Consultation responses are mixed whether individuals and firms should be named under regulatory activities. We are currently looking at the regulatory and other information which we would publish.

15. A second response to the consultation, to include subjects covered under paragraphs 13-14 is likely to be published in early 2015.

Review

16. The CLC is not aware of any historical disciplinary bias against any characteristics protected by the Equality Act but will review its decisions and publication provisions regularly for consistency. This will include reviewing the policy itself to identify if there are any amendments needed as a result of lessons learned in applying the policy.

Annexes

1. Proposed CLC Disciplinary Determinations Policy
2. Summary of Consultation Findings

ANNEX 1 – CLC DISCIPLINARY DETERMINATIONS POLICY

Adjudication Panel Hearings

To replace existing paragraph 8.3 of the CLC's Regulation and Enforcement Policy

We will publish details of any disciplinary determination made by the Adjudication Panel including the name of the respondent. Whether or not an application has been made, the Adjudication Panel may direct the CLC not to name the respondent in any notice of hearing or determination if in its opinion, to do so would:

- a) prejudice legal proceedings or regulatory or disciplinary investigations;
- b) risk breaching a person's rights under Article 8 of the European Convention on Human Rights, or
- c) not be just.

Unless otherwise directed by the Adjudication Panel, any disciplinary determination made against an individual or firm, will remain listed on the CLC website for the duration of any suspension, disqualification, or other sanction, subject to a minimum of 2 years from the date of publication. The respondent may ask the CLC not to include their name in any disciplinary determination which is published where the case against them has been dismissed. In exceptional circumstances we may publish details of the progress of an investigation which has given rise to significant public concern.

ANNEX 2. SUMMARY OF CONSULTATION FINDINGS

| | Responses * | | | Comments - for | Comments - against or don't know |
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| | Yes % | No % | Don't know % | | |
| <p>1. Should all formal disciplinary penalties imposed by the CLC be published? YES (MIXED RESPONSE)</p> | 53 | 47 | | <p>Suggests the CLC publishes information such as rebukes; transparency; public interest; only if severity of penalty warrants it in the public interest; provide clarity of grading; the £5,000 threshold is artificial since this could indicate quite a significant breach for a small firm.</p> | <p>No good to view the more trivial outcomes; shouldn't have to pay for a mistake indefinitely - provides example of branding an 11 year old shoplifter as a criminal for life; can provide data perfectly satisfactorily without naming individuals; publish only above a certain threshold and repeat decisions against the respondent; agree £5,000 is an arbitrary figure but CLC could base publication criteria on appropriate % of turnover: unsure if token or de minimis fines are ever imposed but cannot see the value in this; small firm shouldn't have to pay for a mistake indefinitely; trivial outcomes will not be understood by the public.</p> |
| <p>2. Should a schedule of Adjudication Panel meetings be published? YES (MIXED RESPONSE)</p> | 59 | 29 | 12 | <p>Assumes AP meetings are public and so should be publicised in advance; suggests giving consideration to also publishing a brief summary of the allegations that the individual faces as well as the name and identity of the individual concerned; transparency; public interest; alerting consumers to potential issues before the case is determined supports the 'right to know' argument.</p> | <p>Prejudicial to practitioners; better to know just the outcome; see smoke, think fire; promote an automatic assumption of guilt; such information provides no additional benefit to the consumer/public interest and could be highly prejudicial to practitioners.</p> |
| <p>3. Do you agree that it is for the Adjudication</p> | 56 | 38 | 6 | <p>Dependent on circumstance; should be a threshold understood and easily applied; if there is a reason the public should know this would be just; Panel better able to judge than an individual; only when in public interest, based on</p> | |

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| <p>Panel to determine whether the respondent should be named? YES (MIXED RESPONSE)</p> | | | | <p>severity of penalty imposed - provide detailed guidelines in respect; suggests publication, perhaps in the CLC annual report, an anonymised record in aggregated form of instances when the AP has decided the respondent should not be named, together with reasons for this disclosure.</p> | <p>Cannot see how it can help the consumer make an informed judgement about a firm when it is not yet known if there is a case to answer; it may prejudice a consumer against using a Licensed Conveyancer for no good reason.</p> |
| <p>4. Do you agree with the circumstances in which the Panel will determine that the respondent should not be named? YES</p> | <p>62.5</p> | <p>37.5</p> | | <p>There should be a presumption in favour of publication unless there are compelling reasons in a particular case why the respondent should not be named; AP must have discretion; limited to matters in interests of public to do so because of the severity of the breach; the system needs flexibility in exceptional circumstances; Panel should have ultimate power to decide; AP best able to judge if appropriate to do so; should only be named if very serious such as a criminal case; concerned that the risk of breaching an individual's entitlement to privacy will lead to an inconsistent approach and drawn out argument in individual cases, presumes CLC has legal advice that its transparency policy is consistent with the ECHR and application of an approach similar to the FCA.</p> | <p>Only name respondent if the breach is very serious; the proposed circumstances are too narrow; the commercial interests and reputation of a firm should be considered before the determination of a case by the AP; it is in the public interest to publicise the name of a firm only after the determination and any appeal; respondents should not be named at any earlier stage.</p> |

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| <p>5. Do you think the CLC should publish anonymised summaries of monitoring activities and reports? YES</p> | <p>82</p> | <p>12</p> | <p>6</p> | <p>Publish on a monthly or quarterly basis; in interests of profession; the published data should cover the types of matter that gave rise to monitoring, the type and nature of the firm/individual being investigated and the outcome of the activity; only in the event this serves the public and the profession enhancing the services of Licensed Conveyancers; good deterrent, reducing similar defaults; promotes best practice and good regulation; assist focus on problem areas which need attention; in interest of profession; highlight current areas of concern and enable firms not inspected to take corrective action to promote a safer market place for consumers; explore further the benefits and risks of publishing a firm's overall risk score, informed by inspections and other activities.</p> | <p>Do not see this would be in the public or professional interest if the organisation could not be identified; should not be a matter for individual decision, there should be a threshold which is understood and applied evenly.</p> |
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| <p>6. Should there be any circumstances in which individuals/ firms should be named when we are publishing reports of monitoring activities? YES (MIXED RESPONSE)</p> | <p>50</p> | <p>36</p> | <p>14</p> | <p>Where a large number of reports or complaints have been made or the CLC is investigating a high profile matter that may impact upon multiple clients or which would risk public confidence; provide proper caveats about no conclusions having yet been drawn or the likely outcome of the monitoring activity; if engaged in criminal activity or acting in a way which would cause a member of public acting reasonably to be concerned should they instruct them; a balanced way to show you are actively doing your job as a monitoring organisation without making out that the firms being monitored have done something wrong would be a listing that the CLC has a constant rolling review system and that XXXX firms have been monitored; only if very serious or (confirmed) fraud cases; where impacts upon decision as to whether to accept undertakings or send completion monies; only when sufficiently serious as this could affect other firms or clients engaged with them (as well as the future of firm); only where a disciplinary penalty is imposed; criminal cases only; levels of compliance; maintain a discretion to publish in certain situations e.g. evidence obtained through mystery shopping exercises that might identify quality concerns and/or regulatory breaches but which are not sufficiently serious to lead to disciplinary action; maintaining predictable and consistent regime and clarity about enforcement approach should counter any potential for discouraging cooperation from industry.</p> | <p>Threatens to break co-operation and trust between firms and those monitoring them leading to reduced co-operation; consider anonymised monitoring summaries sufficient; only if in public or profession interest, failing which, it could damage the reputation of the firm being inspected.</p> |
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| <p>7. Do you think the CLC should publish information about regulatory actions taken by staff under delegated powers? YES (MIXED RESPONSE)</p> | <p>65</p> | <p>23</p> | <p>12</p> | <p>Only where balanced against the impact, volumes and proportionality e.g. not publishing letters of advice as this may be disproportionate; <i>if</i> protect public and fellow practitioners; best practice and transparency; if promotes best practice; both consumers and fellow practitioners are aware; knowledge of frequent errors can prevent recurrence; publish information on undertakings and directions as they indicate that an individual or firm has breached the rules and remedial action has been identified; SRA advises it currently publishes: fines and rebukes; conditions; SDT bringing of proceedings; Regulatory Settlement Agreements; Intervention decisions and legal basis; recognition revocation; decisions to approve employment of people struck off or suspended; refusals to issue a practising certificate and suspensions of such a certificate due to bankruptcy.</p> | <p>Extremely damaging even in the most effectively supervised organisation and potential not to reflect quality of organisation and only the misdemeanour of the member of staff; matters resolved or determined under delegated powers are likely to be less serious but it may be difficult for consumer to give context to such decisions if published; data and accountability can be provided satisfactorily without naming individuals; justified only to provide name if above certain threshold and in event of repeated decisions against a firm.</p> |
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| <p>8. Is there in your opinion any other information the CLC should publish? MIXED RESPONSE</p> | 47 | 29 | 24 | <p>Transparency supports consumer's rights to know about poor behaviour; informs choice; credible deterrent; increase confidence in regulation; enhance accountability of regulation; demanded consumers; should CLC come within the jurisdiction of the Freedom of Information Act 2000 it is better to publish proactively and systematically rather than reactively and defensively; SRA suggests an equality impact assessment due to concerns regarding disproportionate damage, especially to practitioners with unusual names (it however considers that the transparency benefits outweigh this); publish only after the respondent has had an opportunity to make representations (except regarding a no-notice intervention); "Lessons learned", especially from monitoring; frequent errors; a person has tried to make a CLC firm commit fraud; CLC Management Structure organogram; the Legal Services Consumer Panel (LSCP): ideally, the CLC should audit the regulatory information it holds and publish a list which sets out what it does and doesn't publish with reasons to justify what it considers should be kept secret; publish individual stakeholder submissions to its consultation exercises aspects of the conveyancing process e.g. speed, accurate and timely registration of documents with the Land Registry, which published could inform choice and provide incentives for providers to raise standards; commends CLC for using Consumer Principles to inform this exercise and for being the first regulator to publish core regulatory data in a reusable format; the quality and disciplinary data should also be published in such way.</p> | <p>Limit publication to information of a serious nature; likely to affect operation of the CLC practice and prove a threat to profession; could unnecessarily tarnish reputation of an organisation; commends CLC staff and regulated community and suggests it doesn't want to become a bully like some other regulators; consumers may struggle to process large volumes of information which may distract from the key information which is genuinely valuable: though there is a risk that consumers might misinterpret information and make poorer choices, consumers can make more nuanced and sensible use of information than they are given credit for.</p> |
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