Consultation response

CLC: Publication of disciplinary information

Overview

1. **Overall the Panel supports the proposals and commends the CLC for using our consumer toolkit to aid the development of its policies.**

2. **Transparency is an important regulatory tool. It supports the consumer's right to know about poor behaviour so they can protect themselves; informs choice; can act as a credible deterrent; may increase confidence in regulators; enhances the accountability of regulators; and is anyway now demanded by consumers. There are risks of information overload, consumers making poor choices due to misinterpreting data and undermining industry cooperation with regulators. However, the starting point should be a presumption in favour of transparency with exclusions justified by evidence.**

3. **We agree with the proposal that all formal sanctions should be published.**

4. **An advance schedule of Adjudication Panel hearings should be published to support the consumer's right to know and consistent with good practice in some other regulated industries.**

5. **We accept the Adjudication Panel should have discretion not to name individuals and firms it sanctions. Clarity is needed over how the CLC will apply Article 8 of the ECHR – the right to privacy – in practice.**

6. **We agree with the proposals around anonymised summaries of monitoring and inspection reports. There may be limited situations when naming would be appropriate, e.g. mystery shopping data.**

7. **Undertakings and directions should be published since these are specific and formal actions which form part of the compliance and enforcement regime.**

8. **It is difficult to suggest what other data the CLC might publish as only the CLC knows what other information it holds. 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 remain confidential. The Financial Conduct Authority has developed a transparency framework which the CLC could learn from. Beyond disciplinary information, the CLC should review its approach to transparency more widely covering its own activities and information about the quality of work that is held by the CLC and other public agencies it deals with.**

9. **Disclosure must be in a reusable format. The CLC is the first regulator to publish core regulatory data in a reusable format and should build on this good practice.**

The proposals

10. The Council for Licensed Conveyancers (CLC) is proposing to make two specific changes to its policy on publication of formal disciplinary findings made by the Adjudication Panel, as follows:

- Remove the £5,000 publication threshold so that any level of penalty is published
- Publish notice of Adjudication Panel hearings to include month, name of respondent and broadly the nature of the allegations. However, while operating with a general presumption in favour of publication, the Panel may decide not to publish information under certain conditions

11. The CLC is considering whether it should also publish:

- Anonymised summaries of monitoring and inspection activities
- Regulatory actions taken by staff under delegated powers, e.g. undertakings, directions, informal advice etc
- Other decisions it has made and, if so, which

The Panel's response

12. We are delighted the CLC has used our consumer principles toolkit, which we developed in collaboration with the CLC, to inform these proposals. This has helped the CLC to examine the issues in a rounded way and explore trade-offs between various facets of the consumer interest. It may be no coincidence that our response is in large agreement with the CLC's proposals.

13. We hope it might be help to set out some general arguments about the importance of transparency around disciplinary sanctions, which apply to all the questions below. In short, a high level of transparency is justified because:

- Consumers have a fundamental right to know about those businesses which have failed previous customers through wrongdoing in order to protect themselves from potential harm
- It could help consumers to choose high quality providers in a market where this is difficult due to infrequency of purchase and gaps in knowledge and power
- The desire among legal businesses to maintain their reputations means transparency over sanctions could act as a powerful incentive/deterrent on individuals and firms to behave well
- When regulators are seen to act to protect consumers it increases confidence in the regulatory framework, which also encourages people to engage/buy more in the market
- It improves accountability for regulators, enabling scrutiny of their decisions, improving timeliness, quality and consistency of process, and reinforcing perceptions about the independence of regulators from industry
- We are in a climate where consumers expect and demand more information about businesses than ever before. Further, the CLC may soon come within the jurisdiction of the Freedom of Information Act 2000 - it would be better to publish proactively and systematically, rather than in a reactive or defensive fashion following individual requests for information

14. However, transparency can have some downsides. Consumers may struggle to process large volumes of information which may distract from the key information which is genuinely valuable. There is a risk that consumers might misinterpret information and thus make poorer choices, although in our experience consumers make far more nuanced and sensible use of information than they are often given credit for. Transparency might also discourage providers from sharing information or cooperating with regulators, leading to a less safe market place.

15. Despite these risks, the starting point should be a presumption in favour of transparency and any limitations on disclosure must be evidence-based. The focus should be on the overall effect of disclosure on the market rather than the risk that some consumers might misinterpret information. Regulators also have a responsibility to publish disciplinary information in a way that is fair and meaningful, and in a form that can be used by consumers and intermediaries. Disclosure in itself is not sufficient to provide transparency, it needs to be in a form consumers can act upon.

Q1. Should all formal disciplinary penalties imposed by the CLC be published?

16. Yes, we agree with the proposals, which are consistent with the general points made above. As the CLC indicates, the £5,000 threshold is artificial since this could indicate quite a significant breach for a small firm.

Q2. Should a schedule of Adjudication Panel meetings be published?

17. Yes, the CLC should follow the example set by regulators such as the Financial Conduct Authority (FCA) and Ofcom by alerting consumers to potential issues before the case is determined. This supports the right to know argument made above and recognises there may be a considerable period of time between the alleged breach and publication of the Panel's decision.

18. The FCA decided this approach would mean industry and consumers would be able to understand the types of behaviour it considers unacceptable at an earlier stage, which in turn should encourage more compliant behaviour. The FCA also concluded this policy would maximise the deterrent effect of enforcement action and pointed out that this aligns the stage at which publicity is given in regulatory cases with the stage at which publicity is given in civil and criminal cases.

Q3. Do you agree that it is for the Adjudication Panel to determine whether the respondent should be named?

19. Yes. We suggest the CLC publishes, perhaps in its annual report, an anonymised record in aggregated form of instances when the Panel has decided the respondent should not be named, together with the reasons for non-disclosure. This will give stakeholders confidence the CLC is indeed operating with a presumption in favour of transparency.

Q4. Do you agree with the circumstances in which the Panel will determine that the respondent should not be named?

20. The circumstances listed in the consultation document are:

- Prejudice legal proceedings or regulatory or disciplinary investigations
- 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 it would not be just to do so

21. We are concerned that the risk of breaching a person's privacy category will lead to an inconsistent approach and drawn out argument in individual cases. We presume the CLC has legal advice, as the FCA and Ofcom must also have, that its transparency policy is consistent with the ECHR. We would wish the CLC to set out in its finalised policy document how it will consider claims that publication would breach a person's right to privacy. The FCA's approach may offer a useful template here. It states that it is not sufficient for a person to argue that their reputation might be damaged. Instead, '*a person who sought to demonstrate potential unfairness from publication would have to provide clear and convincing evidence of how that unfairness might arise and how they could suffer a disproportionate level of damage*'.[1]

Q5. Do you think the CLC should publish anonymised summaries of monitoring activities and reports?

22. Yes, this could highlight current areas of concern and enable firms not inspected to take corrective action thus promoting a safer market place for consumers. Such a policy would also reinforce the general public confidence benefits of transparency, as discussed above. We agree that publication of detailed individual inspection reports would not be proportionate, although it might be useful to explore further the benefits and risks of publishing a firm's overall risk score, which inspections and other activities would help inform.

Q6. Should there be any circumstances in which individuals/firms should be named when we are publishing reports of monitoring activities?

23. We would not wish the CLC to rule out naming individuals/firms in all circumstances, but instead maintain a discretion to publish in certain situations. For example, we think it would be fair for the CLC to publish 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. This could inform consumer choice and support the overall credible deterrent effect. We take the CLC's point about discouraging cooperation from industry, which currently works well. However, we expect this derives in large part from it having a predictable and consistent regime which can be maintained through clarity about the CLC's enforcement approach.

Q7. Do you think the CLC should publish information about regulatory actions taken by staff under delegated powers?

24. We consider that undertakings and directions should be published since these are specific and formal actions which form part of the CLC's compliance and enforcement regime. They indicate that an individual or firm has breached the rules and remedial action has been identified. Publication would be proportionate and supports the benefits of transparency outlined above.

Q8. Is there in your opinion any other information the CLC should publish?

25. This is difficult for the Panel to answer as we do not know what other information the CLC holds. 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 remain secret.

26. This consultation is focused on disciplinary action, but we would encourage the CLC to think about transparency more widely. In particular, the FCA has published a transparency framework setting out how it will continue to generate and evaluate transparency initiatives moving forward.[2] The framework covers:

- How the FCA could be more transparent (transparency of the regulator)
- Information about firms, individuals, markets (disclosure as a regulatory tool)
- Information the FCA could require firms to release about their products and about other aspects of their performance and behaviour

27. The Panel has previously criticised the CLC for lacking transparency around its own processes, in particular the absence of minutes and papers for board meetings, and not publishing submissions by stakeholders to its consultation exercises. We are pleased to note that meetings of Council meetings are now published, but the remaining information still is not (although an anonymised summary of feedback to some consultations is published). The variability between approved regulators in this respect is not based on any logic or sectoral differences. The Legal Services Board has also identified this as a problem in its regulatory standards work.

28. The Panel has previously set out on many occasions the difficulties consumers face in assessing the quality of legal services. As a 'credence good', sometimes quality cannot be judged even after the legal service has been delivered. There are aspects of the conveyancing process, e.g. speed, and accurate and timely registration of documents with the Land Registry, which if published could inform choice and provide incentives on providers to raise standards. This information would also help inform a risk-based approach by the CLC. We would like to explore with the CLC what information about the quality of service it has, what is held by other agencies and then to discuss the benefits and risks of publishing this information and how to make it available to the market.

29. Finally, the format of publication is also important. The CLC is to be commended for being the first approved regulator to publish core regulatory data in a reusable format. We would like to see this added to through the quality and disciplinary information discussed above. This will assist intermediaries to repackage this information to guide consumers to make better choices.

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[1] Financial Conduct Authority, Policy statement PS13/9: Publishing information about warning notices, October 2013.
[2] Financial Conduct Authority, FCA transparency framework, August 2013.