Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

# When Should Regulators Enforce "Someone Else's Law"?

by Erica Richler
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Practitioners are expected to obey the law. Especially laws that apply to their practice or reflect on their integrity. However, a recurring issue arises as to how involved regulators should become in enforcing the laws of other entities (e.g., government, other regulatory bodies). Typically, they enforce their own laws.

The issue is simple where the primary enforcement body makes a finding about conduct that is clearly improper for a member of the profession. But what about situations where someone is attempting to involve the regulator rather than the primary enforcement body? This could occur for various reasons including: a lower cost to the complainant, a desire to avoid having to gather the evidence, the promise of a ready appeal mechanism or the goal of causing damage to the livelihood of the practitioner.

Regulators could be asked to enforce "someone else's law" in many circumstances:

1. An upset client complains that a practitioner breached their privacy by disclosing sensitive personal information about them, despite the fact that the Information and Privacy Commissioner is the principal enforcement body.
2. An employee of a practitioner asserts that the practitioner harassed them based on gender and race despite the availability of remedies through the Human Rights Tribunal.
3. A third party insurer reports that a practitioner gave in-person treatments during the pandemic for routine matters despite the emergency order to close establishments for everything but urgent care.

It is fairly clear that the regulator generally need not await the outcome of the primary enforcement body: *Berge v College of Audiologists and Speech-Language Pathologists of Ontario*, 2016 ONSC 7034, http://canlii.ca/t/gvtpb; *Dufault v British Columbia College of Teachers*, 2002 BCSC 618, http://canlii.ca/t/4vzn. Even where an argument could be made that the regulator has no jurisdiction to enforce the statute (e.g., a federal offence provision), the conduct will often have aspects of integrity or ethical implications that make it relevant to the practice of the profession: *Law Society of Saskatchewan v Abrametz*, 2016 SKQB 320, <http://canlii.ca/t/gv5r4>.

There are a number of arguments supporting the involvement of regulators in the enforcement of "someone else's law", including:

1. Often the conduct is quite relevant to the suitability of the practitioner to be a member of the profession. The reputation and credibility of the profession would be damaged if no action were taken. For example, respect for women, children, people with disabilities and for Indigenous peoples, racialized or religious groups is essential to the effectiveness of the profession and the regulator should act even if there is another available enforcement mechanism.
2. Regulators need to be "good citizens" and should be part of the solution for significant societal issues. For example, during the pandemic, leaving enforcement of physical

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E-Mail: info@sml-law.com

distancing measures solely to the police is insufficient and often counter-productive. All societal organizations need to help communicate (and, in some cases, even help enforce) the nature and rationale for the provisions.

3. Regulators which routinely refer conduct concerns to other enforcement bodies become irrelevant. Who needs a regulator who ducks responsibility for behaviour by their members because someone else can also deal with it?
4. Regulators often are obligated by their enabling statutes to process complaints and concerns. Exceptions are often limited (e.g., where a complaint is frivolous or vexatious). Members of the public who have a concern often choose to approach the regulator because they do not wish to pursue other options. For example, some people deliberately bring sexual abuse concerns to a regulator rather than the police because they may wish to avoid participating in the criminal justice system.

Of course there are countervailing considerations as well, including:

1. For some matters, regulators of professions may not be best suited to enforce the requirements. The primary enforcement body may have special investigative powers (e.g., to require the employer of the practitioner to provide information), added expertise (e.g., workplace safety, employment relations) and extra enforcement options (e.g., immediate compliance orders) that the regulator may not possess.
2. The issue may be of marginal relevance to the practice of the profession or public confidence in the regulator. It may even distract the regulator from its core mandate. For example, is it appropriate for a regulator to expend resources on investigating and dealing with a practitioner who has had several by-law infractions because their loud dog has bothered the practitioner's neighbours? The concern may be legitimate, especially to the neighbours, but the regulator's involvement may not be warranted.
3. The issue may involve delicate judgment calls or interpretation questions that are best left to the primary enforcement body, otherwise, inconsistent results may occur. For example, regulators may not be the best option for interpreting a client's entitlement to a benefit or funding under a specialized social assistance program.
4. In some, usually rare, cases the person raising the issue is unhappy with the decision of the primary enforcement body and is searching for another enforcement body hoping for a different outcome. Similarly, a party to a dispute, for example, in an employment setting, may wish to involve the regulator in a dispute in order to put pressure on the other party or as a means for obtaining evidence for their case.

Given these competing considerations, regulators should carefully consider when it should get involved in enforcing "someone else's law". A principled approach should facilitate a consistent, public interest and practical approach to such complaints and concerns. Those principles might involve the following:

a. As a starting point, processing those concerns where the regulator is obliged to do so under the terms of its enabling statute.

b. Where the regulator has discretion, lean towards taking action on concerns that impact public safety, reflect on the integrity or ethics of the practitioner, or otherwise fit within the public interest mandate of the regulator.
c. In appropriate cases where the regulator has discretion, providing information about their options to the person raising the concern without actively discouraging the individual from using the regulator's process. Many regulators are already doing this where it appears that the complainant is under the misapprehension that the regulator can award monetary damages.
d. Where the regulator has discretion, lean towards declining to take action on the concerns where there is a compelling reason for not doing so, such as where the regulator cannot deal with the issue effectively, where the concern has little impact on the suitability of the practitioner, or where it would be an abuse of process to deal with the concern.

A thoughtful approach to this issue will help protect the public and enhance the relevance and reputation of the regulator without imposing an undue burden on practitioners or the regulator itself.