

## A Risk-Management Approach to Registrar's Investigations

The Registrar is often faced with making decisions about launching Registrar's Investigations. The power to launch a Registrar's Investigation is set out in Section 30 of the Surveyors Act:

“Where the Registrar believes on reasonable and probable grounds that a member of the Association has committed an act of professional misconduct or incompetence or that there is cause to refuse to issue or to suspend or revoke a certificate of authorization, the Registrar by order may appoint one or more persons to make an investigation to ascertain whether such act has occurred or there is such cause, and the person or persons appointed shall report the result of the investigation to the Registrar.”

While it is legally necessary to interpret “on reasonable and probable grounds” and/or “that there is cause to refuse to issue or to suspend or revoke a certificate of authorization” appropriately, it is important to recognize that the use of the word “may” means that not every concern meeting the criteria needs to be investigated. The Registrar also needs to consider the severity and outcome of the professional misconduct or incompetence concerns. The Surveyors Act refers to “an act” of professional misconduct or incompetence as opposed to a series of acts. The Surveyors Act also describes “cause” which may refer to multiple acts. A single act of professional misconduct may not be of significant public risk depending on the severity of the misconduct. As an example, if a survey monument was mislabeled by mistake on a plan it could be a violation of Ontario Regulation 525 and therefore be considered professional misconduct as outlined in Ontario Regulation 1026 (failure to comply with a regulation). Common sense would suggest that this, in itself, is not putting the public at risk. In the Association's experience, problems arise for the public when there is ongoing or serious misconduct or incompetence. It would not be a good use of resources to prove that minor infractions may have occurred and then take that member through a discipline process to have no sanctions imposed. As a result, even though there may be very good evidence of professional misconduct, it would not be in the public's interest to have every incident result in a Registrar's Investigation. We believe that severity and potential public harm must be a consideration. This is somewhat further supported in section 34 (h) of Ont. Regulation 1026 which requires “every professional member shall report to the Registrar any gross or consistent practice or omission of another professional member, of which the member is aware, that may constitute professional misconduct or incompetence”, with the key words being “gross or consistent”. Determining “reasonable and probable ground” and what constitutes “gross or consistent” behaviour requires judgement that should be consistent in practice. Even where this threshold is met, there remains discretion with the Registrar not to appoint an investigator where the public interest would not be well served. We have therefore established this framework for consideration by the Registrar.

This framework is based partially upon the Right-Touch approach to regulation used by the Professional Standards Authority (UK overseer of Health Regulation), the work of AHPRA (Australian Health Practitioner Regulation Agency) and other research. While these organizations are both Health Agency Regulators, their approach and principles transcend a variety of professions and have been used internationally by a range of regulators. As an example, the Royal Institute of Chartered Surveyors has taken advantage of the Right-Touch to Regulation thinking in developing some of their approaches.

Many regulatory agencies are adopting a risk-management approach to regulation whereby emphasis is put on dealing with those areas and members that are most likely to cause harm to the public. The

AOLS is challenged with protecting the public and this risk-management approach makes sense especially given our small numbers and limited resources. Emphasis and efforts need to be focused on those areas and members that are of highest risk to the public.

One of the tenants of good risk management is that it should be based on the best information possible. Decisions to move forward with a Registrar’s investigation needs to be based on information. In the past, the information available may have been only a complaint or series of complaints. While a single complaint may be sufficient to warrant an investigation, the proposed approach is to take a more holistic view of factors and evidence that may lead to increased public risk.

This is not suggested in any way to replace the formal complaints process, which uses its own risk framework in its formal Practice Manual, and this approach is being suggested in dealing with decisions regarding Registrar’s Investigations only.

The following matrix notes factors to be investigated/considered that may lead to launching a Registrar’s Investigation.

<p><u>Characteristics of the Notification</u>          Potential significance of breach in Code of Ethics or incompetence when considered against public risk/harm (see below)          Strength of evidence (from questionable to irrefutable)          Characteristics of complainant (consider potential conflicts of interest, is it anonymous, OLS or member of the public)</p>	<p><u>Practice Type</u>          Sole Practitioner, Partner, Employed Surveyor           Size and complexity of the work undertaken by the surveyor/firm           Potential for the nature of the work typically performed to harm the public</p>
<p><u>Practice Settings</u>          Number of firms in the community (from one to many)           Location/Region of firm (Rural or Urban location)           Comprehensive reviews within the firm (e.g. the firm may pass but the individual member scores high; the individual may have done very well or a high score not warranting a referral)</p>	<p><u>Characteristics of the Practitioner</u>          Employment turn-over          Multiple concerns from the public (these may not necessarily be formal complaints)          Errors on systematic reviews           Late payments for insurance, dues, etc.          Late CPD reporting resulting in notices from the AOLS          How long the member has been licensed.          Extended absence from the profession.          Issues discovered during the member’s articles          Response of the practitioner to public or AOLS regarding concerns</p>

**Triggers to use this approach**

The following are examples of factors that make it more likely that a Registrar’s Investigation may be required:

- Two or more concerns raised recently from the public regarding the same surveyor

- A concern raised by another member related to matters that could harm the public
- A history of concerns about the same surveyor which arose throughout the member's practice
- Repeated annual interventions by the AOLS on fees, CPD compliance, etc.
- An SRD referral
- A combination of several complaints, SRD referrals, CPD compliance AOLS Fees, and/or etc.

## Considerations

### 1. Characteristics of Notification

Obviously, evidence of significant breaches in the Code of Ethics as defined under Section 33 of General Regulation 1026 under the *Surveyors Act* or of significant incompetence could in itself lead to launching a Registrar's Investigation. The overarching concern should be the potential harm to the public (i.e. if the incident(s) were true, what is the potential impact on the public). Consideration needs to be given to the detail contained in the complainant and the strength of the evidence provided as well in assessing this. As an example, if the complainant has a grudge or something to be gained by launching the complaint, this needs to be considered. If the evidence happens to be on the face of a registered or deposited plan, it would be harder to discount.

Where the evidence points to minor items, other evidence in the matrix should be considered. The over-riding concern must be protecting the public from potential harm.

### 2. Practice Type

While being a sole practitioner, partner or employed surveyor makes no difference unto itself, it could be a contributing factor when considering risk. As an example, an employed surveyor would have someone overseeing their work. If that supervisor happens to be a surveyor, then perhaps a simple conversation with the supervisor with the consent of the surveyor in question could diminish risk to the public and therefore avoid the need for a Registrar's investigation. If the member is a partner in a firm, there is at least the ability for the member to discuss issues with their partner and lean on them in time of need, which may reduce risks to the public. A sole proprietor has the least ability to lean on others for help and may represent the largest risk in the event of problems.

### 3. Practice Settings

If the firm is the only firm in a community, there is less likelihood of scrutiny of their work by other surveyors and more potential that inappropriate practices could go unnoticed.

Particular regions or areas may contain survey fabric which is more complex or ambiguous, causing a greater risk of errors or issues to occur.

Comprehensive reviews of the firm should be reviewed for specific files or the member in question. It is possible that a firm could have passed while individual member's work may have been marginal. Positive reviews that reflect on the type of complaint may also be considered.

### 4. Characteristics of the Practitioner

High employment turn-over can be an indicator that problems are occurring with the member. A call to former employers may be warranted.

The Registrar is now logging concerns raised by the public. Many concerns raised do not lead to a formal complaint. Multiple expressions of concerns from the public may be a symptom of poor business practices or poor work that could be grounds for professional misconduct or incompetence. Prior formal complaints or discipline, especially for related issues and especially if remedial measures were required in the past, are also concerning.

Errors identified in systematic reviews may be pointing to a lack of attention or knowledge, even though they may in themselves have not resulted in a referral.

Late payments for insurance, dues, etc. and late CPD reporting resulting in notices from the AOLS can point to a lack of mindfulness. While not a risk to the public on its own, lack of mindfulness could have significant impact on the members work.

The length of a surveyor's membership in the profession may be an indicator of whether or not further intervention would be warranted when information is received concerning issues with the member's practice. Additionally, absence from the profession for a lengthy period of time could also be an indicator that intervention is needed if issues are brought to the AOLS' attention.

The history of issues discovered during the member's articles could also indicate a need for further investigation. If, for example, behavior of an unethical nature discovered during articles could add further to allegations of unethical behavior during a member's practice.

## **Implementation**

This framework establishes considerations but does not offer any advice on process. The provisions for a Registrar's Investigation are silent in the process of determining "reasonable and probable grounds" or whether a particular concern warrants a Registrar's investigation to protect the public. If all considerations lead to a determination of "reasonable and probable grounds" and there appears to be sufficient severity of the allegations/evidence, then it makes sense to proceed immediately. Where questions remain, it makes sense to delve deeper into the evidence and perform some preliminary inquiries prior to moving forward with a Registrar's Investigation. The Registrar should be able to conduct preliminary inquiries (e.g. phone calls to a member or clients to ascertain information to help understand the concern further) prior to deciding to undertake a Registrar's Investigation. Protection of privacy and confidentiality must be considered in doing such.

The above considerations are intended to facilitate consistency and prioritizing of risk. However, the Registrar is always free to act as appropriate in the individual circumstances of each case.

## **Appendix – Public Risk/Harm Considerations**

There are many types of public risks that can result from surveyors' professional misconduct or incompetence. In the summer of 2019 Council used a risk management workshop to identify the three highest categories of risk: construction errors due to poor surveying (these can result in significant additional costs, significant delays in project completion, or even having to demolish infrastructure), inappropriate service to the public (this includes significant delays in providing services, inappropriate billing practices (overcharging), etc.), and wrong or unnecessary boundary differences (these result in

social turmoil, inability to use the land for the purpose intended, costly litigation, etc.). These are certainly not exhaustive, and many other public risks or harms exist.

Consideration should be given to the potential harm that was or could be caused:

- emotional or social (e.g. social unrest caused by fighting over boundary differences; abuse of an individual by a surveyor, poor communication when exercising a Surveyor's right of entry)
- financial harm (this could range from inappropriate billing practices to poor advice that results in significant costs; boundary disputes that escalate to the courts)
- property damage (inappropriate boundaries can impact the usability of the land)
- breach of confidentiality (e.g. could impact potential business deals)
- Project impacts (could result in costly delays and/or rework)