

City of Westminster and Holborn Law Society

Response to Consultation Paper 14: Legal Services Act New Forms of Practice and Regulation

Preamble

The City of Westminster and Holborn Law Society (CWHLs) is committed to fair, proportionate and transparent regulation for the benefit of the profession and the public. With the increasing economic difficulties facing solicitors, we believe that the regulator must adopt a pragmatic and flexible approach in order to ensure solicitors retain the highest standards without unnecessarily impacting the commercial interests of solicitors' firms.

Our members include those who regularly represent those who are prosecuted by the SRA and also members of the SDT.

Consultation Paper 14 relating to the new disciplinary powers of the SRA asks seven questions. We will deal with these in turn:-

1. Are the rules clear and transparent?

For the most part the rules themselves are clear. We believe it is helpful to have all of the rules relating to the SRA's disciplinary powers in one document to assist in clarity and transparency. We are somewhat concerned to note that the rules, whilst containing detailed descriptions of the SRA's powers, make very little reference to the SRA's obligations in the exercise of those powers.

We believe that certain of the rules will lead to confusion and an unnecessarily complex approach. Other rules are somewhat vague or not in accordance with the prevailing legal position and may well give rise to satellite litigation which should be avoided where possible.

Unnecessarily Prescriptive Rules

Turning first to the first category of rules, we believe that rule 3, rule 5 and rule 6 are unnecessarily prescriptive.

Rule 3 contains a list of circumstances which permit the SRA to make a disciplinary decision. The list of circumstances is so wide (eg causing "inconvenience" to a third party) as to be worthless and leaves a great deal of discretion open to the SRA. Indeed, perfectly proper conduct could fall within the meaning of the listed circumstances. This type of approach is counter-productive as it creates imaginary obstacles, as the factors listed do not create real restrictions or pre-conditions which have to be met. Moreover, it involves the making of substantive judgments which appear to give the regulated person scope to contest any decision on the grounds that the judgement was incorrectly made or that the circumstance relied on did not in fact apply. The effect of such rules is to encourage challenges and litigation which will ultimately prove fruitless unless any decision was manifestly unreasonable and at risk of a successful challenge upon judicial review. Overall, the list of prescribed circumstances does nothing to improve transparency in the regulatory process.

We feel that the listing of prescriptive circumstances is unnecessary where the true test is whether, taking into consideration all of the circumstances, it is just and proportionate to impose a disciplinary sanction. It would improve clarity and assist in understanding if

common concepts such as objective factors to be taken into consideration in determining proportionality, public interest and what may constitute “just” were annexed as a schedule to the rules and applied by the SRA across the board in its dealings with solicitors.

Rules 5 and 6 may be disapplied by the SRA where it is just and in the public interest to do so and this would appear to be a clear indication that these rules are not appropriate in all circumstances.

We see no reason why a simple rule cannot be promulgated setting out that a regulated person will be given a specified period to provide an initial explanation of their conduct, following which further information or explanations may be sought. Once the SRA has collated sufficient information, a report will be compiled and sent to the regulated person for final comment within a further specified period. The SRA may disapply these rules if the investigation may be prejudiced by disclosure, there is a risk of flight or an immediate risk to client funds, the public or the profession.

The proposed period of 14 days to provide an explanation is unacceptable. The SRA invariably specifies this period in practice, although it has often taken six, nine or twelve months to review a report from an investigating officer or other information supplied. In many cases the period of 14 days is wholly unreasonable taking into account the solicitor's need to collect information and documentation. In these circumstances the SRA gives the impression that it has no regard to the interests of justice or fairness by imposing such an unreasonable period.

1.2 Abstract & Inconsistent Rules

We believe that Rules 7(7) and 7(8) fall into the second category of rules which may well lead to satellite litigation.

Turning first to Rule 7(7), in which the SRA seek to disapply strict rules of evidence, we are concerned that this rule has the potential for serious abuse and may give rise to litigation as to which rules of evidence the SRA will apply. The SRA cannot simply disapply strict rules and expect the profession and the public to know whether this simply means that there will be no oral testimony or whether it means that the SRA can include irrelevant and pejorative evidence. The SRA intends making and publicising decisions which may have a dramatic effect on solicitors' reputations and livelihoods, it is only just and proper that the affected person should know what test the evidence against him must meet in order to be accepted as reliable evidence.

Rule 7(8) is a contravention of settled case law as interpreted by the Privy Council and the House of Lords.

In *Re Doherty* [2008] UKHL 33 Lord Carswell stated at paragraph 23

"Much judicial time has been spent in the last 50 or 60 years in attempts to explain what is required by way of proof of facts for a court or tribunal to reach the proper conclusion. It is indisputable that only two standards are recognised by the common law, proof on the balance of probabilities and proof beyond reasonable doubt. The latter standard is that required by the criminal law and in such areas of dispute as contempt of court or disciplinary proceedings brought against members of a profession."

Lord Brown of Eaton Under Heywood affirms Lord Carswell's judgement and adds, at paragraph 48:

"It is because of the serious consequences of criminal convictions or adverse disciplinary findings that the criminal standard of proof—proof beyond reasonable doubt—is required in those cases."

This is a very recent decision and clearly indicates that the House of Lords would take the position that the standard of proof should be the criminal standard.

In *Campbell -v- Hamlet* [2005] UKPC 19 Lord Brown of Eaton Under Heywood, commenting on English authority, stated [at para 16]:

"That the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession, their Lordships entertain no doubt."

This is further clear authority that the standard of proof in disciplinary proceedings should be the criminal standard i.e., beyond a reasonable doubt.

We believe that it would lead to an absurd dichotomy if the SRA imposed a civil standard of proof when, on appeal to the Tribunal or the High Court, these bodies would impose a criminal standard of proof. It is also possible that weaker cases which do not satisfy the evidential burden and standards imposed in the Tribunal and the High Court would result in the SRA imposing internal penalties on the basis of a lower burden and standard of proof leading to significant injustice and inequality, particularly for those regulated persons who cannot afford the benefit of professional advice and assistance.

We are aware that Adjudication proceedings within the SRA have previously adopted the civil standard of proof. However the decisions we have seen in which the issue has been raised have provided no authority for the presumption that the civil standard should apply. We have reason to believe that the issue has never been seriously raised with the SRA or expressly considered by the Court in any case other than those involving dishonesty (which are now accepted to be subject to the criminal standard in any event) in view of the limited penalties which the SRA could impose. In view of the widening of the SRA's powers, we believe that it is time for the SRA to acknowledge that a criminal standard of proof is appropriate.

2. Do you agree with the approach of the prescribing of circumstances in which the SRA may make a disciplinary decision?

We have touched on this point above; we believe that the prescriptive approach set out in rule 3 is unhelpful and unnecessarily complicated. The prescriptive approach adopted is so wide as to be of very little practical relevance and we see no need to waste readers' time, academics' verbiage and printer paper including such a rule.

We should make it absolutely clear that our complaint is not that the SRA is setting limits to the circumstances in which it may use its new powers but that we disagree with the limits set as they are not real limits as explained above.

3. Do you agree that disciplinary decisions should be made only by adjudicators?

We do agree that disciplinary decisions should be made only by adjudicators or adjudication panels with appropriate qualifications in the relevant areas, particularly where a question of law in a specific area of practice may be involved. We would be concerned to ensure that the SRA has internal processes and procedures to ensure that adjudicators are appropriately qualified for the specific matters they are being asked to determine, have at least some

practical familiarity with the area of law concerned and are in fact wholly independent from the investigating side of the SRA.

We also believe that there should be greater transparency in the Adjudicator's decision making process as detailed in our answer to Question 7 below.

4. Do you agree that it is helpful to provide for referral to the SDT in the rules even though that is not required by section 44D of the Solicitors Act 1974?

Yes. It is helpful for all of the rules relating to the possible disciplinary sanctions which may be faced by a regulated person to be accessible in one coherent set of rules.

5. Do you think that there should be an internal appeal process for cases where there is a statutory right of appeal to the SDT and the High Court?

Yes. We believe that there should be an internal appeal process in addition to the formal routes of application through the Tribunal and the High Court on the grounds that many members of the profession may not be in a position to incur the cost of proceeding with a formal appeal.

Further, there is a real concern and risk (and indeed anecdotal evidence) that some SRA decision makers may be influenced by improper factors in making a decision or may not have the requisite knowledge and expertise to determine certain issues. The risk of any such influence or lack of expertise exerting a damaging effect on the overall regulation of the profession – and leading to unnecessary use of Court and Tribunal resources - can be minimised by an internal system of checks and balances such as easily accessible internal appeals as well as the provisions of Rule 10.

Finally on the issue of appeals, we believe that it should be made absolutely clear that an appeal can be made against all or any part of a disciplinary decision so that, for example, where there are several disciplinary findings leading to an aggregate fine and a rebuke, it should be possible for any one or combination of the findings or decisions, including any decision to publish the matter, to be appealed separately. This will avoid the necessity for regulated persons to appeal all aspects of a decision and allow the parties to focus only on the elements which merit an appeal.

6. Do you believe that that draft rules will have a disproportionate impact on any group or category of persons?

No. We do believe that the rules are general and will not, in themselves have a disproportionate impact on any group or category of persons.

We believe that the subjective requirements of the Rules – such as whether taking action is in the public interest provides potential space for a disproportionate impact in the enforcement of the rules and for abuse of the rules. The references to the interests of justice and the public interest should be clarified. Without objective clarification, these concepts are open to abuse.

7. Do you have any other comments on the draft rules?

We have been concerned to note that it may take a significant period of time for information and evidence to be compiled, during which a regulated person is not kept informed that their case remains under review. We believe that the SRA could and should commit to informing regulated persons, on at least a quarterly basis, that the case remains under review or that information is still being collated. We believe that this would assist in the communication

process between regulator and regulated and encourage the SRA to ensure that its cases are regularly reviewed and progressed promptly and efficiently.

It would be helpful for the SRA to set out and clearly establish objectively recognised criteria establishing what it considers to be included in:

- Action in the public interest
- the interests of justice
- “sufficient” reasons to be given in making a disciplinary decision

These criteria should be readily available on the SRA website. We comment that, although the Consultation Paper referred to a Policy Statement for Publication and a Code for Referral to the SDT, some of our members were not able easily to trace these papers on the SRA website. All policy papers of this nature, which could helpfully be combined, should be readily available and should all be subject to prior consultation with the profession and others.

We believe that there should be greater transparency within the adjudication process. This is in accordance with the SRA’s expressed commitment to the principles of better regulation. Clarification of the factors which an adjudicator must and may consider in making any decision will assist regulated persons in understanding the procedure and the information which the SRA seeks. It will also assist the SRA to achieve consistency and avoid allegations of arbitrary or improper decisions.

Publication and Publicity

The SRA Website

As it stands, the single factor which is most likely irreparably to damage the solicitors profession is the SRA website. The dominant homepage – the “For Consumers” homepage – immediately gives a damaging impression to the consumer of legal services by the prominent headings:

- problems with a solicitor
- check a solicitors record

and, in slightly smaller print but still prominent:

- A solicitor owes you money
- Recognising fraud

The impression is overwhelmingly that there should be something for the public to report because solicitors are inherently untrustworthy. The publication of meaningless and, to the layperson, incomprehensible “record checks” in the format now favoured by the SRA merely adds to the impression that solicitors are not part of the real world and are a breed to be regarded with suspicion.

The Current Publication Policy, Rule 3(2) and Rule 11

The SRA will be aware of the concerns repeatedly raised by practitioners in relation to its publication policy. The issue is of particular concern to sole practitioners and small local firms whose reputation is dependent on the good name of one or two individuals but it affects us all.

First, we must point out that Rule 3(2) appears inconsistent with Rule 11. We strongly believe that the wide ranging application of Rule 3(2) is inappropriate as it makes no allowances for circumstances in which it will clearly never be appropriate to publish a decision such as where the regulated person's safety, security or health may be put at risk by publication or where general principles of law would otherwise prevent publication. Furthermore, we object to the position that the SRA may publish when it considers a matter to be in the public interest where the SRA has not clarified the objective criteria which it will use to inform its opinion.

We note that the current publication policy contains, at paragraph 7 some criteria for publication. We do not see that this reflects a full statement of the factors which the SRA will consider in determining whether publication is in the public interest. Our members who regularly act for solicitors who are the subject of proposed publicity have met with differing approaches from SRA personnel and this could lead to arbitrary and unfair practices within the SRA.

There is no place for the SRA to have an unfettered subjective approach to this issue, and we fully endorse the comments of Eady J in the Mosley case [2008] EWHC 1777 (QB) in which he stated [at paragraph 138] that publication in the public interest has to be capable of being tested by objectively recognised criteria. A failure to set out such criteria is effectively to deny regulated persons the ordinary protection of the law. This puts the Article 8 rights of regulated persons in jeopardy which is of particular concern given the SRA's cavalier approach to respect for the human rights of those it regulates.

We believe that it is important to consider the impact of the existing publicity regime before pressing ahead with the proposed expansion of that regime to matters which have previously been confidential. It is important to strike the right balance between the public interest and respect for the professional reputation of a solicitor. We do not believe that the SRA has struck the right balance with the current publication policy and, in particular, we would highlight the following specific concerns:

1. The publications made are not helpful to the public. Many publications use terminology and legal references which the general public will not understand. There is extensive reference to s.12 Solicitors Act 1974 with no explanation of the purpose of the section or its effect.
2. The publications last for a period of three years with no apparent means of review. There should be power for the SRA to review the publication on application, supported by reasoned arguments, in the event of a change in circumstance.
3. There is no evidence to show that the SRA has considered the extent of its obligations under Article 8 ECHR and the Data Protection Act. We are aware that submissions have been made to the SRA in connection with these matters but our members report that responses received lack consistency and proper understanding of the issues raised.
4. The quality and content of the publications must also be called into question; one of our members has noted, on at least two separate occasions, publications which did not appear to relate consistently to the same person where the reasoning for the decision related to a different person or event to that appearing in the other sections of the publication.
5. We are concerned to note that the SRA has devoted resources to creating a searchable database of solicitors' records which does not include findings of the Tribunal. The publications which are searchable are, at best, one sided - particularly those concerning referrals to the Tribunal which make no attempt to provide for the

possibility of a defence to the allegations. It is our belief that the detailed and reasoned findings of the Tribunal are far more informative and helpful to the general public and it is noteworthy that the SRA have excluded them from the database.

6. It is unclear at this stage whether publications will be replaced once they have been superseded by a subsequent decision on the same issue. Early indications are that additional publications will be made which may lead to the public gaining the impression, for example, that practising certificate conditions are in force when in fact they have been removed or amended.

As it stands, CWHLS opposes the publication of reports in accordance with the SRA's current policy - which appears to be reflected in Rule 11. CWHLS has serious concerns about the quality and in particular the misleading nature of the publications made to date. It considers as woefully inadequate the safeguards in place to ensure that the publications are fair, comprehensible, accurate and proportionate, particularly in regard to a solicitor's rights under Article 8 ECHR and the Data Protection Act.

We have noted above that this paper does not include consultation on the publicity policy itself. However, simply to plough ahead with plans to publicise more decisions, the basis of which may be more obscure and/or have a wider impact and which therefore require more careful consideration would be irresponsible. It would appear that we are being presented with the perfect opportunity to take stock of how far we have come and the issues which have arisen in getting there in order to ensure that we can move ahead sensibly.

Rule 8

The requirement in Rule 8(1)(b)(iii) that any penalty must exceed the maximum that can be imposed by the SRA should be deleted. It might be that a case should be referred to the SDT in the public interest even if the likely penalty is small.

In Rule 8(5) it is believed that the SDT has no power to order the SRA not to exercise any investigative or other powers. The words at the beginning are therefore otiose.

Rule 9

The requirement for an appeal "with reasoned arguments in support" to be lodged within 14 days is unreasonable. That period could include Bank or other holidays. When the SRA communicates any decision it should be required to notify the period for appeal being not less than 21 days.

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