

The Solicitors Disciplinary Tribunal

Constituted under the Solicitors Act 1974

RULE CHANGE APPLICATION BY THE SOLICITORS DISCIPLINARY TRIBUNAL

PROCEDURAL RULES IN RELATION TO APPEALS

1. Introduction

1.1 This application is made by the Solicitors Disciplinary Tribunal ("SDT") to the Legal Services Board ("LSB") under the LSB's "Rules for Rule Change Applications – Version 2 (November 2010)". The application is for approval by the LSB of **The Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011** and **The Solicitors Disciplinary Tribunal (Appeals) (Amendment) Rules 2011**, both of which were the subject of an SDT consultation process ending on 8 July 2011. Details of the consultation paper (including a list of consultees), responses and amendments made to the draft Procedural Rules as a result of responses received follow later in this document.

1.2 Queries concerning this application should be addressed to:

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2. Details of the Proposed Alteration

2.1 The SDT is constituted as a statutory tribunal under Section 46 of the Solicitors Act 1974 ("the Act"). The Tribunal currently adjudicates upon alleged breaches of Rules and/or the Solicitors' Code of Conduct 2007, which are designed to protect the public and maintain public confidence in the legal profession by defining standards for honesty, probity, trustworthiness, independence and integrity. The Tribunal also adjudicates upon the alleged misconduct of recognised bodies, registered foreign lawyers and persons employed by solicitors and it hears applications for restoration to the Roll of Solicitors. The Tribunal has 53 members, comprising Solicitor Members and Lay Members appointed by the Master of the Rolls. Solicitor Members must be practising solicitors of not less than ten years' standing and are wholly independent of the Council of the Law Society and have no connection with the Solicitors Regulation Authority ("SRA"), which instigates over 90% of the cases dealt with by the Tribunal. Lay Members must not be either solicitors or barristers.

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- 2.2 Under provisions contained in the Legal Services Act 2007 (“LSA”), the jurisdiction of the Tribunal has been extended. It is now empowered to determine appeals under Section 44E of the Act and Schedule 2, paragraph 14C of the Administration of Justice Act 1985 (“AJA”). Section 46 of the Act enables the Tribunal to make rules about its procedures, and the power to make those rules has been extended so as to apply to its appellate jurisdiction. The Tribunal has existing rules in place, namely the Solicitors (Disciplinary Proceedings) Rules 2007 (“SDPR”). These are used in the exercise of the Tribunal’s first instance disciplinary jurisdiction.
- 2.3 The Tribunal’s appellate jurisdiction will be extended (subject to Parliamentary approval) following the decision of the LSB to grant the SRA’s application to become a licensing authority for the purpose of licensing Alternative Business Structures (“ABS”). The LSB requires licensing rules issued by licensing authorities to make appropriate provision for appeals against decisions made by licensing authorities, including in those cases which may amount to a determination of a person’s civil rights for the purposes of Article 6 (1) of the European Convention on Human Rights. The SRA included provision in its application to become a licensing authority for the SDT to determine such appeals. After consideration the LSB has decided to recommend to the Lord Chancellor that he should make an order under Section 80 of the LSA modifying the functions of the SDT to enable it to hear appeals arising from SRA licensing authority decisions relating to ABS.
- 2.4 The SDT currently does not have procedural rules in place to deal specifically with appeals. Therefore, after careful consideration and detailed consultation with the LSB and the SRA, the Tribunal decided that it needed to make new and separate rules fit for the specific purpose of dealing with appeals.
- 2.5 The new rules, for which approval of the LSB is being sought, are **“The Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011” (“the 2011 Rules”) (Annex 1)**. They were drafted by Sharpe Pritchard, Solicitors and Parliamentary Agents, on the instruction of and in collaboration with Jeremy Barnecutt, the SDT President and Chairman of Solicitors Disciplinary Tribunal Administration Ltd (“SDTA”), and Susan Humble, SDT Clerk and SDTA Chief Executive. Throughout the process the SDT and its solicitors consulted fully with the LSB and SRA to ensure that the 2011 Rules were fit for purpose and met the Regulatory Objectives. The 2011 Rules are based largely on the rules which will be used in appeals to the General Regulatory Chamber of the First-tier Tribunal from licensing decisions of the Council for Licensed Conveyancers in relation to their licensing functions under Part 5 LSA. This step was taken to ensure consistency between the procedures that will apply. However, due to the distinct nature of the SDT and its existing procedures, some appeal rules have also been based on the SDPR, particularly in relation to awards of costs.
- 2.6 The 2011 Rules, if made in the form in Annex 1, will only apply to appeals under Section 44E of the Act and Schedule 2 of the AJA where the SDT already has jurisdiction. These rules need to be implemented as soon as possible as appeals could be submitted at any time. In order to safeguard against any delay in the SDT being given the further jurisdiction in relation to ABS under Part 5 LSA, it is intended that the 2011 Rules will be applied to that jurisdiction by a separate amendment order, **“The Solicitors Disciplinary Tribunal (Appeals) (Amendment) Rules 2011”** for which LSB approval is also sought (Annex 2).

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2.7 The chronology leading up to this application is as follows:

- 17 March 2011 – SRA notifies the SDT that its application to become an ABS Licensing Authority is to be submitted on the basis that the SDT should be designated as the body to determine appeals.
- 30 March 2011 – SDT/LSB hold brief preliminary discussions concerning development of the appeals process.
- 12 April 2011 – SDT decides to make new and separate procedural rules for its appeals jurisdiction.
- 5 May 2011 – LSB publishes its consultation paper “Alternative Business Structures: Appeal Arrangements”.
- 26 May 2011 – Meeting LSB, SRA and SDT to review detailed draft 2011 Rules.
- 2 June 2011 – LSB consultation on appeal arrangements ends.
- 10 June 2011 – SDT “Consultation On The Making Of Procedural Rules In Relation To Appeals To The Tribunal” commences.
- 8 July 2011 – SDT Consultation ends.
- 11 to 19 July 2011 – SDT consideration of responses to consultation resulting in further revision to the draft 2011 Rules.
- 26 July 2011 – Solicitors Disciplinary Tribunal Administration Ltd Board approves 2011 Rules subject to further discussion about certain SDT policy issues at its Board meeting in September 2011. Copies of consultation responses and 2011 Rules sent to LSB and SRA.
- 5 August 2011 – Submission of SDT Rule Change Application.

3. Details of Relevant Existing Rules

3.1 Nature and Effect of the Existing Rules

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The SDT exercises its first instance jurisdiction under the SDPR, and Practice Directions and Policy Notes issued from time to time under SDPR Rule 21 (3) (**Annex 3**). The SDPR were made by the SDT in exercise of the powers conferred upon it by Section 46 of the Act on 14 December 2007 with the agreement of the then Master of the Rolls, Sir Anthony Clarke. They came into force on 14 January 2008. Section 46 (9) of the Act enables the SDT to make rules about the procedure and practice to be followed in relation to the making, hearing and determination of applications and complaints. Under Section 12 of the Act the power to make rules is exercisable by statutory instrument. As indicated at point 2.5 above the SDPR were closely considered when the 2011 Rules were drafted to maintain consistency.

3.2 Nature and Effect of the Proposed Alteration

What is proposed is not an alteration to the SDPR but the introduction of new and separate 2011 Rules, drafted specifically for the SDT's appellate jurisdiction.

3.3 Explanation of why the Applicant wishes to make the Alteration in question

3.3.1 The 2011 Rules are required in order to enable the SDT to exercise its existing and proposed further appellate jurisdiction in relation to the following appeals:

- Section 44E Appeals - appeals by solicitors or solicitors' employees against decisions by the SRA to rebuke a person, impose a financial penalty or to publish details of a rebuke or financial penalty under Section 44D of the Act. Section 44E(2) enables the SDT to make rules under Section 46 in relation to these appeals;
- AJA, Schedule 2, paragraph 14C appeals – appeals by recognised legal services bodies, their managers and employees against decisions by the SRA to rebuke a person, impose a financial penalty or to publish details of a rebuke or financial penalty under Schedule 2, paragraph 14B. Power is given to the SDT to make rules in relation to such appeals as for Section 44E appeals;
- Proposed further appellate jurisdiction under Part 5 of the LSA, dealing with ABS.

3.3.2 The SDT originally considered whether its appellate function could be properly exercised by issuing additional Practice Directions under the SDPR. However it decided that the most effective and efficient way forward, with the Regulatory Objectives and the interests of the public and the profession as paramount considerations, was to make new rules rather than attempting to build on the first instance procedure which had been introduced with a different original purpose in mind. Concern was also expressed that to issue Practice Directions under the SDPR might lead to potential challenge on the grounds of "vires" and that the SDPR might not be fit for the purpose of determining appeals (rather than the first instance disciplinary cases for which they were drafted and approved).

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- 3.3.3 The 2011 Rules are based largely on the rules which will be used in appeals to the General Regulatory Chamber of the First-tier Tribunal from licensing decisions of the Council for Licensed Conveyancers in relation to their licensing functions under Part 5 of the Legal Services Act 2007. This step was taken to ensure consistency between the procedures that will apply. However because of the distinct nature of the SDT and its existing procedures, some rules have also been based on the SDPR, for example, in relation to costs provisions. This explains the thinking behind the drafting, which is the result of careful consideration following thorough consultation with the LSB and SRA to ensure consistency with the SRA's licensing rules and fitness for purpose. It should be made clear that the 2011 Rules are the SDT's Rules i.e. whilst the LSB and SRA have helpfully made suggestions, not all of those suggestions have been adopted. The SDT has been mindful of the wide-range of stakeholders with an interest in its activities. It has endeavoured to balance the needs of those stakeholders with the requirements of natural justice to ensure that the 2011 Rules are independent, fair, proportionate and transparent.
- 3.3.4 The 2011 Rules, if approved in the form in Annex 1, will only apply to appeals under Section 44E and Schedule 2 AJA where the SDT already has jurisdiction. As stated at paragraph 2.6 above, in order to safeguard against any delay in the SDT being given the further jurisdiction in relation to ABS under Part 5 of the LSA, it is intended that the 2011 Rules will be applied to that jurisdiction by the separate amendment order The Solicitors Disciplinary Tribunal (Appeals) (Amendment) Rules 2011.
- 3.3.5 As far as reasonably practicable the 2011 Rules have been checked for unintended knock on effects and conflicts with the SDPR and other applicable law.

4. Regulatory Objectives

4.1 The Regulatory Objectives are:

- Protecting and promoting the public interest;
- Supporting the constitutional principles of the rule of law;
- Improving access to justice;
- Protecting and promoting the interests of consumers;
- Promoting competition in the provision of services;
- Encouraging an independent, strong, diverse and effective legal profession;
- Increasing public understanding of the citizen's legal rights and duties;
- Promoting and maintaining adherence (by authorised persons) to the professional principles.

- 4.2 The 2011 Rules promote the Regulatory Objectives in so far as is consistent with the SDT's obligation to provide an independent, impartial and transparent tribunal service. The SDT has been unable to identify any aspect of the Rules that is inconsistent with or detrimental to the achievement of the Regulatory Objectives. No areas of concern were highlighted during the consultation process. This is unsurprising in view of the fact that the SDT consulted fully with the LSB in relation to the 2011 Rules and would have expected any areas of specific concern

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to have been identified at a much earlier stage of the drafting process. The SDT's paramount duties are to protect the public and to maintain the public's confidence in the reputation of the profession as one in which every member, of whatever standing may be "trusted to the ends of the earth" (*per* Sir Thomas Bingham, Master of the Rolls, in Bolton v Law Society [1994] 1 WLR 512). The SDT takes its independence, impartiality and transparency seriously. It should be remembered that these are procedural rules intended to ensure the effective and efficient determination of appeals in accordance with the principles of natural justice. The procedures that the SDT has put in place are robust. Further rights of appeal from SDT decisions to the High Court remain in place.

4.3 The SDT is satisfied that the 2011 Rules as drafted provide sufficient power to the Tribunal when determining appeals to contribute to the achievement of the Regulatory Objectives. The message that it is not considered part of the SDT's function to promote competition in the provision of services must be reinforced here. An independent, impartial, transparent tribunal service should not make decisions on appeals with the agenda of promoting competition, but only on the evidence placed before it. To do otherwise would be unfair to the parties, lack transparency, and would conflict with other Regulatory Objectives, such as supporting the constitutional principles of the rule of law. The SDT must be permitted to exercise its judicial functions without fear or favour.

5. Better Regulation Principles

5.1 The five principles of good regulation are:

- Transparency;
- Accountability;
- Proportionality;
- Consistency;
- Targeted approach.

5.2 The SDT is not a regulator as such, but it has done the best it can to take each of the above into account when drafting the 2011 Rules. The procedure for appeals is contained within one document and, if approved, will be published on the Tribunal's website. The Rules should be capable of being understood easily by those who are likely to use them. They are to that extent transparent. The decisions made by the SDT will be published save for in the most exceptional circumstances, when reasons for non-publication will be provided to those concerned. There is a right of appeal from SDT decisions to the High Court. An extensive consultation took place before the submission of this application, and responses were taken into account when preparing the 2011 Rules. The SDT considered whether appeals could be accommodated within the SDPR and listened carefully to the views of the LSB in particular when deciding to introduce new appellate function rules. This was a less cost-effective approach for the SDT, as external legal fees and loss of management time were inevitably incurred, but the end result justifies the expenditure and was therefore proportionate. The 2011 Rules have been drafted in such a way as to ensure consistency with the Rules of the First-tier Tribunal which will decide appeals from the decisions of other licensing authorities. Finally individual rules are targeted at the specific requirements of the SDT's appellate function. The 2011 Rules do not contain material irrelevant to appeals.

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6. Desired Outcome

The desired outcome is that the 2011 Rules and the Amendment Order are accepted by the LSB so as to enable the SDT to deal with appeals under its existing jurisdiction effectively, and to ensure that an appeals process is in place ready for the introduction of ABS in October 2011.

7. Other Approved Regulators

The introduction of the 2011 Rules will directly affect areas regulated by other Approved Regulators, namely the SRA (in relation to regulatory powers delegated to it by The Law Society). For full details of the consultation processes, including consultation with the SRA, please see point 9 below. The SRA's consent to publication of its response, which was received after the consultation period had ended, has not yet been received, but the response itself is uncontroversial so is attached to this application.

8. Date Of Implementation

The SDT will take steps to implement the 2011 Rules as soon as possible, subject to and after approval by the LSB.

9. Consultation Processes

9.1 The consultation process undertaken by the SDT prior to making this application is referred to at points 2.7 and 7 above. The following documents are attached (**Annex 4**):

- "Consultation On The Making Of Procedural Rules In Relation To Appeals To The Tribunal", containing a list of consultees at Appendix C (page 30);
- List of those who responded to the consultation plus responses where consent to disclosure has been received;
- Summary of responses identifying post-consultation changes to the draft Rules;
- Draft Rules for ease of reference, showing in red/blue amendments to previous draft Rules following completion of the consultation process.

9.2 In addition to the consultees listed at Appendix C of the Consultation Paper, the consultation was displayed on the SDT's website. Hard copies were available at its public reception area and were widely accessed by those visiting the Tribunal. The SRA also sent a link to the consultation paper to several thousand solicitors on its emailing list. Responses will shortly be displayed on the SDT's website.

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10. Other Explanatory Material

None

Susan Humble
Clerk to the Solicitors Disciplinary Tribunal

Date: 5 August 2011

Annexes

Annex 1 - The Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011 – for approval.

Annex 2 - The Solicitors Disciplinary Tribunal (Appeals) (Amendment) Rules 2011 – for approval.

Annex 3 - Solicitors (Disciplinary Proceedings) Rules 2007.

Annex 4 – Consultation Documents