

**Application made by the Solicitors Regulation Authority
Board to the Legal Services Board under Part 3 of Schedule 4
to the Legal Services Act for the approval of the
SRA (Disciplinary Procedure) Rules [2010]**

This application is made in accordance with the requirements set out in the Legal Services Board's Rules for Rule Change Applications.

Any queries about this application should be made to:

Jackie Corcoran
Legal Adviser
Solicitors Regulation Authority
Ipsley Court
Berrington Close
Redditch
B98 0TD

Tel: 01527 517141 ext 3881

Fax: 01527 883267

Jackie.corcoran@sra.org.uk

Proposed Alteration

1. The proposed alteration is the introduction of the SRA (Disciplinary Procedure) Rules [2010] (the proposed disciplinary rules). These rules will enable the SRA to exercise its new powers to give written rebukes and/or impose a penalty of up to £2000 where it is satisfied that there has been a breach of regulatory obligations or professional misconduct. These could be ordered together and may be published in the public interest.
2. Section 44D(7) of the Solicitors Act 1974 requires the SRA to make rules:
 - prescribing the circumstances in which the SRA may decide to issue a written rebuke or order payment of a penalty;
 - about the practice and procedure to be followed in relation to such action;
 - governing the publication of decisions to issue a written rebuke or fine.
3. The aims of the proposed disciplinary rules are to:
 - make rules that comply with section 44D;
 - be clear and transparent;
 - provide transparency and clarity on other disciplinary action where that will help to resolve areas of uncertainty; and
 - leave other matters to be dealt with by way of detailed guidance and published policy statements.
4. The proposed disciplinary rules are attached as **annex 1** to this application.

Nature and effect of the existing Regulatory Arrangement

5. The proposed disciplinary rules will enable the SRA to exercise its new powers to give written rebukes and/or impose a penalty of up to £2000. These new statutory powers came into force on 31 March 2009. The SRA did not previously have such statutory powers but the issuing of rebukes and reprimands by the SRA, and previously the Law Society, has for a very long time been an integral part of its conduct investigation processes. The terminology has changed over the years and the SRA currently issues reprimands and severe reprimands. These reprimands and severe reprimands are not published except where it has been agreed to do so as part of a regulatory settlement agreement.

Nature and effect of the SRA (Disciplinary Procedure) Rules [2010]

6. The proposed disciplinary rules are required to satisfy our statutory obligations to make such rules under section 44D of the Solicitors Act 1974 and paragraph 14B(7) of Schedule 2 to the Administration of Justice Act 1985. They will provide a rule base for our disciplinary procedures and will enable the SRA to exercise its new powers to give written rebukes and/or impose a penalty of up to £2000 where it is satisfied that there has been a breach of regulatory obligations or professional misconduct. These could be ordered together and may be published in the public interest.
7. The proposed disciplinary rules provide criteria for when disciplinary action will be taken (rule 3(1)) and publication criteria for deciding whether or not to publish a decision (rule 3(2) and the appendix). The rules will provide an effective alternative in circumstances where a formal prosecution to the Solicitors Disciplinary Tribunal (the Tribunal) may not be a proportionate response but where a private reprimand may be insufficient.

Standard of Proof (rule 7(8))

8. The proposed disciplinary rules were made by the SRA Board on 25 June 2009 but the Master of the Rolls and the Lord Chancellor declined concurrence because of the standard of proof provision (rule 7(8)). The Tribunal and the Law Society had expressed concern that the SRA rules would apply the civil standard but that the Tribunal would be bound to apply the criminal standard of proof when dealing with appeals from SRA decisions.
9. In September 2009, the SRA Board was invited to reconsider rule 7(8) in the light of the comments from the Master of the Rolls but it decided in effect to maintain the wording of rule 7(8) which was as follows:

“The standard of proof shall be the civil standard except where the allegation is tantamount to a criminal offence when it shall be beyond reasonable doubt.”
10. Attempts were made to reach a common position with the Law Society with a view to inviting concurrence on such a position, but they were unsuccessful. By December 2009 it was clear that there was no longer time for the rules to be re-submitted to the Master of the Rolls and the Lord Chancellor for concurrence and that it would be necessary instead to seek the approval of the Legal Services Board. In January 2010, the new SRA Board considered

a paper dealing specifically with the standard of proof issue. The SRA Board considered the issues carefully and decided to amend rule 7(8) as follows:

“The standard of proof shall be the civil standard.”

11. A copy of the paper considered by the SRA Board in January 2010 is attached as **annex 2**. This paper sets out the whole issue concerning the standard of proof provision in detail and attaches the relevant correspondence with the Master of the Rolls, the Ministry of Justice and the Law Society. Since the Tribunal presumably continues to be concerned about the possibility of problems arising when it deals with appeals from SRA decisions, it may be appropriate for there to be discussions about that involving the SRA, the Tribunal and the Law Society, overseen by the Legal Services Board.

Rationale for the introduction of the proposed disciplinary rules

12. The proposed disciplinary rules are required to fulfil our statutory obligation under section 44D(7) of the Solicitors Act 1974. These new statutory powers have been given to the SRA to enable it to regulate in the public interest in a more effective way. They provide an effective alternative in circumstances where a formal prosecution to the Tribunal may not be a proportionate response but where a private reprimand may be insufficient. Paragraph 14B of Schedule 2 to the Administration of Justice Act 1985 contains the equivalent powers in relation to a recognised body or a manager or employee of a recognised body.

Statement in respect of the Regulatory Objectives

Protecting and promoting the public interest

13. As stated above, these new statutory powers have been given to the SRA to enable it to regulate in the public interest in a more effective way. The proposed disciplinary rules will allow the SRA to take swift, decisive and proportionate action in the public interest. The ability to publish written rebukes or penalties when the SRA considers it to be in the public interest to do so will assist clients or prospective clients when deciding who to instruct and will provide greater transparency in the regulatory and disciplinary processes. This will clearly help to protect and promote the public interest.

Supporting the constitutional principle of the rule of law

14. The proposed disciplinary rules will help to maintain the high standards of professional conduct required of those regulated by the SRA and these standards seek to support the constitutional principles of the rule of law.

Improving access to justice

15. The proposed disciplinary rules will help to enforce the Solicitors' Code of Conduct and many of the rules within the Code are designed to improve access to justice.

Protecting and promoting the interests of consumers

16. The proposed disciplinary rules will enable the SRA to take swift, decisive and proportionate action and this will benefit consumers. The publication of written rebukes or penalties when the SRA considers it in the public interest to do so will also help consumers when deciding who to instruct.

Promoting competition in the provision of services

17. The SRA considers that the proposed disciplinary rules will be neutral towards this regulatory objective.

Encouraging an independent, strong, diverse and effective legal profession

18. The proposed disciplinary rules will help to enforce the Solicitors' Code of Conduct and many of the rules within the Code are designed to encourage an independent, strong, diverse and effective legal profession.

Increasing public understanding of the citizen's legal rights and duties

19. The SRA considers that the proposed disciplinary rules will be neutral towards this objective.

Promoting and maintaining adherence to the professional principles

20. The proposed disciplinary rules will promote and maintain adherence to the professional principles. The SRA will be able to give written rebukes and/or impose a penalty of up to £2000 where it is satisfied that there has been a breach of regulatory obligations or professional misconduct. This will enable the SRA to enforce its rules of conduct more effectively particularly in relation to less serious matters where a formal prosecution to the Tribunal would not be proportionate. The publication of written rebukes or penalties when the SRA considers it in the public interest to do so will also help to promote and maintain adherence to the professional principles by making solicitors and others who are regulated by the SRA more aware of the types of breaches that occur and the action that can be taken by the SRA.

Statement in respect of the Better Regulation Principles

Proportionality

21. The proposed disciplinary rules are designed to enable the SRA to provide a proportionate response to breaches of regulatory obligations or professional misconduct. This is reflected in rule 3(1)(b) which provides that one of the conditions that must be met before giving a written rebuke or directing a regulated person to pay a penalty is that it is a proportionate outcome in the public interest.
22. Proportionality is also considered in relation to the decision to publish a decision to give a written rebuke or a penalty as one of the factors which would support a decision not to publish is that "in all the circumstances the impact of publication on the individual or firm would be disproportionate".

Accountability

23. The SRA will be accountable for the proposed disciplinary rules as the disciplinary processes will be transparent and some of the decisions will be published. The decisions will also be subject to an internal appeals process and section 44E of the Solicitors Act 1974 provides a right of appeal to the Tribunal against decisions to give a written rebuke which is to be published, penalties and a decision to publish either a written rebuke or a penalty. These appeal processes will also assist in accountability.

Consistency

24. The proposed disciplinary rules have been designed to be consistent with other SRA rules and with the introduction of firm based regulation.

Transparency

25. A full public consultation on the proposed disciplinary rules was undertaken in December 2008. The consultation closed on 23 February 2009. There were 23 responses to the consultation paper and a number of changes were made to the proposed disciplinary rules to reflect comments made in responses to the consultation. One of the questions in the consultation paper asked whether the proposed disciplinary rules were clear and transparent and most of the respondents answered "yes" to this question.
26. The Law Society and the SRA has been criticised in the past for its disciplinary processes not being sufficiently clear and one of the aims when drafting the proposed disciplinary rules was to make them as clear and transparent as possible. We believe that this aim has been achieved.

Targeted

27. The proposed disciplinary rules are targeted at complying with the statutory requirements of section 44D of the Solicitors Act 1974 but the opportunity has also been taken to provide transparency and clarity on other disciplinary action where that will help to resolve uncertainty. We also publish our criteria for decision making.

Statement in relation to desired outcomes

28. The SRA seeks to introduce rules which:
- comply with section 44D(7);
 - are clear and transparent;
 - provide criteria on when disciplinary action will be taken; and
 - provide transparency and clarity on other disciplinary action where that will help to resolve areas of uncertainty.

Statement in relation to impact on other Approved Regulators

29. The proposed disciplinary rules are primarily aimed at solicitors. There is the possibility of impact on persons regulated by other approved regulators as the new statutory powers to give written rebukes and impose penalties of up to £2000 and to publish such decisions where the SRA considers it to be in the

public interest to do so can be exercised against any “regulated person”. This definition extends to an employee of a recognised body, a solicitor or a registered European lawyer or a manager of a recognised body which means that these powers could be exercised against an individual who is regulated by another approved regulator.

30. Parliament intended the SRA to be able to exercise these powers against such individuals as section 44D of the Solicitors Act 1974 applies to “a solicitor or an employee of a solicitor” and the equivalent provision in paragraph 14B of Schedule 2 to the Administration of Justice Act 1985 applies to a “manager or employee” of a recognised body. The Ministry of Justice would have been aware of the impact on other approved regulators.
31. The consultation paper which was issued on 1 December 2008 is attached as **annex 3**. Responses to the consultation paper were received from ILEX, the Bar Standards Board and the Bar Council’s Professional Practice Committee. Copies of these responses are attached at **annex 4**.

Implementation timetable

32. The SRA hopes to implement the proposed disciplinary rules as soon as possible as the new statutory powers came into force on 31 March 2009 and there has already been a considerable delay in the implementation of the proposed disciplinary rules. This delay has been caused by the difficulties surrounding the standard of proof rule (rule 7(8)).
33. The commencement provision in rule 12 of the proposed disciplinary rules states that the rules will come into force on [1 March 2010 or the first day of the month following the approval of the Legal Services Board, whichever is the later]. However, the proposed disciplinary rules will not apply to any matters where the act or omission which gives rise to the SRA finding occurred wholly before the rules came into force.

Stakeholder engagement

34. The SRA sent a pre-consultation draft of the proposed disciplinary rules to the Tribunal and the Law Society in August 2008 and invited their comments. Section 44D(8) of the Solicitors Act 1974 imposes an obligation on the SRA to consult the Tribunal before making rules under subsection (7) so it was considered to be helpful to contact both the Tribunal and the Law Society as early as possible in the process. A number of changes were made to the proposed disciplinary rules in the light of the comments from the Tribunal and the Law Society.
35. The consultation paper was published on the SRA’s website on 1 December 2008 and the consultation closed on 23 February 2009. A number of stakeholders were e-mailed to notify them of the consultation.
36. In April 2009, the SRA’s Rules and Ethics Committee considered a draft paper which included a summary of the responses to the consultation paper and were concerned about the lack of responses from BME practitioner groups. To try to address these concerns, a letter was sent by the Chief Executive to a number of BME and other practitioner groups to give them a further opportunity respond to the consultation paper and following this letter

a response to the consultation paper was received from the Black Solicitors Network.

37. A copy of an extract from the SRA Board paper in June 2009 which contains a summary of the responses to the consultation paper and the response of the SRA is attached as **annex 5**. The full paper and annexes are available at <http://www.lawsociety.org.uk/aboutlawsociety/how/committees/view=viewmeeting.law?MEETINGID=2832&COMMITTEEID=10754>

Further explanatory information

Annex 1 - SRA (Disciplinary Procedure) Rules [2010]

Annex 2 - SRA Board paper (January 2010)

Annex 3 - Consultation paper "New disciplinary powers for the SRA – public rebukes and fines

Annex 4 - Responses to consultation paper from approved regulators

Annex 5 – Extract from the SRA Board paper (June 2009)