

# Legal Services Act: New forms of practice and regulation

## Consultation paper 14

### New disciplinary powers for the SRA – public rebukes and fines

|   |    |
|---|----|
| Introduction .....  | 2  |
| 1. Executive summary .....                                      | 4  |
| 2. Rule 1 – Interpretation .....                                | 5  |
| 3. Rule 2 – Scope .....   | 5  |
| 4. Rule 3 – Disciplinary powers .....                           | 5  |
| 5. Rule 4 – Investigations .....                                | 6  |
| 6. Rule 5 – Seeking explanations .....                          | 7  |
| 7. Rule 6 – Report stage .....                                  | 7  |
| 8. Rule 7 – Decisions .....                                     | 8  |
| 9. Rule 8 – Referrals to the Tribunal .....                     | 8  |
| 10. Rule 9 – Internal appeals .....                             | 10 |
| 11. Rule 10 – Reconsideration .....                             | 10 |
| 12. Rule 11 – Publication .....                                 | 10 |
| 13. Rule 12 – Commencement .....                                | 11 |
| Questions .....   | 11 |
| How to respond .....  | 11 |
| Annex 1 – Draft SRA (Disciplinary Procedure) Rules [2009] ..... | 12 |

For alternative formats, email [contactcentre@sra.org.uk](mailto:contactcentre@sra.org.uk) or telephone 0870 606 2555.

## Introduction

- The SRA will soon have new statutory powers which will help to deliver its key strategic outcome to secure prompt and proportionate action to minimise risk to consumers and the public, and to enable us to publish decisions which would previously have been kept confidential.
- Where the SRA has found a breach of regulatory obligations or professional misconduct it will be able to
  - issue a written rebuke,
  - impose a fine of up to £2,000,
  - publish details of the written rebuke or fine.
- These penalties can be imposed on firms regulated by the SRA and/or on individuals working in those firms, as appropriate.
- We have to make rules which explain when and how we will use these powers.

This consultation invites you to comment on the draft SRA (Disciplinary Procedure) Rules which are annexed to this paper. It is anticipated that the new statutory powers to fine and rebuke will come into force on 1 March 2009, and we hope to be able to introduce rules as soon as possible after that date.

Parliament has decided to give the SRA more modern regulatory powers which will enable the SRA to regulate in the public interest in a more effective way. Section 44D of the Solicitors Act 1974, which was introduced by the Legal Services Act 2007, will give the SRA the statutory power to impose a written rebuke and/or a penalty of up to £2,000 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.

Section 44D requires us to make rules about the way in which these new powers will be exercised and the purpose of this consultation paper is to consult on the draft rules dealing with these new powers.

The SRA as a regulator needs to have the appropriate powers to be able to regulate in a proportionate and risk-based manner. These new powers provide an effective alternative in circumstances where a formal prosecution to the SDT may not be a proportionate response but where a private reprimand may be insufficient. We believe that they will enable us to take swift, decisive and proportionate action in the public interest and that our ability to do this will benefit the consumer. This

proportionate approach should also reduce the overall cost of regulation for the profession and improve public confidence.

The rules have been drafted in accordance with the SRA's strategic principles and objectives which are published on the SRA website. These principles include operating in accordance with the government's Five Principles of Good Regulation which are that regulation should be:

- **Proportionate:** Regulators should only intervene when necessary. Remedies should be appropriate to the risk posed, and costs identified and minimised.
- **Accountable:** Regulators must be able to justify decisions, and be subject to public scrutiny.
- **Consistent:** Government rules and standards must be joined up and implemented fairly.
- **Transparent:** Regulators should be open, and keep regulations simple and user-friendly.
- **Targeted:** Regulation should be focused on the problem, and minimise side effects.

We believe that the draft rules meet these principles and will make the disciplinary process clearer and more transparent. We also intend to publish guidance on our procedures which will provide further details of what normally happens during the disciplinary process in a way that would not be appropriate in the rules.

This consultation is aimed at all those interested in the provision and regulation of legal services, including consumers. The closing date for responses is 23 February 2009.

## 1. Executive summary

1.1 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 impose a written rebuke or fine.

1.2 These draft rules focus on what is required by section 44D (which only relates to the exercise of powers to fine or rebuke) but we have also taken the opportunity to provide more transparency in relation to other SRA procedures such as referral to the SDT. Therefore the approach that has been adopted in drafting the rules is to:

- make rules that comply with section 44D;
- 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.

1.3 The main areas covered by the draft rules are as follows:

- Disciplinary powers (rule 3) – the conditions that must be met when the SRA exercises its powers to fine or rebuke;
- Practice and procedure (rules 4-6) – the practice and procedures in relation to investigations, seeking explanations and the report stage;
- Decisions (rule 7) – the decision making process;
- Referrals to the Tribunal (rule 8) – the procedure for making referrals to the SDT;
- Internal appeals (rule 9) – the procedure for appealing against certain decisions;
- Reconsideration (rule 10) – the circumstances in which a decision may be reconsidered or rescinded; and
- Publication of decisions (rule 11).

The following paragraphs go through each of the draft rules in more detail and explain the thinking behind them.

## 2. Rule 1 – Interpretation

2.1 The impact of the draft rules is affected by some key definitions. The intention is that:

- the full procedural requirements apply only to decisions which include the imposition of the new sanctions (defined as “disciplinary decisions”);
- lesser decisions, such as findings and warnings, findings with advice etc. could be the outcome of the full procedure but the full procedure need not be followed because they are not “disciplinary decisions” but only “SRA findings”;
- decisions to refer to the SDT are not “SRA findings” or “disciplinary decisions” and can be made at any time, as now.

2.2 The definition of “regulated person” is also important as the new powers can be exercised in relation to recognised bodies, managers of recognised bodies (including non-lawyers and other lawyers) and employees as well as solicitors, registered European lawyers and registered foreign lawyers. This is a consequence of the introduction of “firm-based regulation” and legal disciplinary practices (LDPs) under the Legal Services Act 2007.

## 3. Rule 2 – Scope

3.1 Draft rule 2 sets out the scope of the draft rules and provides that they govern the procedure of the SRA in the exercise of its powers pursuant to section 44D of the Solicitors Act 1974 (and paragraph 14B of Schedule 2 to the Administration of Justice Act 1985 which contains the equivalent power in relation to recognised bodies) or to authorise an application to the Tribunal. The rule also sets out the powers referred to in the rule which are to do one or a combination of the following:

- give a regulated person a written rebuke;
- direct a regulated person to pay a penalty not exceeding the maximum permitted by law;
- publish details of a written rebuke or a direction to pay a penalty.

## 4. Rule 3 – Disciplinary powers

4.1 This draft rule sets out the circumstances in which the SRA may make a “disciplinary decision” as required by section 44D(7)(a) of the Solicitors Act 1974. This requirement is included to clarify what matters could be dealt with by the SRA under these powers and what matters should be referred to the SDT.

4.2 The approach taken in the draft (rule 3) is to set out two conditions that must be satisfied before the SRA may give a written rebuke or impose a penalty. The first condition is that the SRA is satisfied that the act or omission was not

trivial or justifiably inadvertent and falls within a broadly worded list of conditions of which only one need be satisfied. These conditions include, for example, that the act or omission was deliberate or reckless or that it continued for an unreasonable period taking into account its seriousness. It is important that this list covers all eventualities and those responding to this consultation may find it helpful to think of examples of misconduct where a published rebuke or fine might be appropriate and assess whether they fall within draft rule 3(1)(a) in particular.

- 4.3 The second condition is that a proportionate outcome in the public interest would be one or a combination of a written rebuke or a penalty (not exceeding the maximum of £2,000). This is intended to ensure that the SRA will not exercise these new powers where it would not be proportionate to do so. In considering whether it is a proportionate outcome, the SRA is likely to take into account whether the act or omission is such that it is unlikely that the SDT would impose a penalty of more than £2,000, or impose other penalties only open to the SDT such as suspension or striking off.
- 4.4 We have deliberately not taken the approach of setting out specific circumstances where powers may (or may not) be exercised. This is because we do not think that it would be sensible to predict all possible forms of misconduct in advance. We believe the proposed approach gives sufficient clarity but with flexibility.
- 4.5 There have been suggestions that the rules should set out particular types of allegations which are so serious that they should always be referred to the SDT, such as allegations involving dishonesty or reckless disregard for regulatory requirements. There are no such restrictions in section 44D which enables the SRA to exercise these new powers where the SRA is satisfied that there has been a breach of regulatory obligations or professional misconduct. The approach in the draft rules is to avoid such restrictions but to deal with the underlying concern through the “proportionate outcome” condition. Views are sought on this approach.
- 4.6 Draft rule 3(2) deals with the circumstances in which the SRA may decide to publish details of a written rebuke or a direction to pay a penalty. It provides that the SRA may make a disciplinary decision to publish details of a written rebuke or a direction to pay a penalty when it considers it to be in the public interest to do so in accordance with a publication policy promulgated from time to time. We have published a policy statement on the publication of regulatory and disciplinary decisions which makes clear that every case is treated on its merits and sets out some of the factors which support a decision to publish and some of the factors which support a decision to keep a decision confidential. It is important to note that a decision to publish details of a written rebuke or fine is itself a “disciplinary decision” for the purposes of these rules. The policy statement may be found on the SRA website.

## 5. Rule 4 – Investigations

- 5.1 This draft rule is designed to address problems that have arisen in the past because of lack of clarity. The draft essentially sets out in rule form what is the current procedure:

- it makes it clear that the parties to the investigation are the SRA and the regulated person, and not any “complainant” (rule 4(1));
  - the exercise of investigative or other powers can be made at any time (rule 4(2)) – this is to deal with the occasional argument that once a decision has been made, for example to refer a matter to the SDT or when a casenote has been prepared, further investigations cannot take place;
  - the disclosure of information for the purposes of an investigation, to enable an informant to comment, or in the public interest (rule 4(3)).
- 5.2 The disclosure provision in draft rule 4(3) is subject to draft subrule (4) which provides that the SRA may restrict disclosure of information to protect another person’s right of confidentiality or privilege. The SRA is given discretion in this subrule to allow for circumstances such as, for example, where privilege has been waived or where an investigation requires the disclosure to law enforcement agencies e.g. in cases of mortgage fraud where there is often no question of breaching privilege, but arguments can arise which delay appropriate action.

## 6. Rule 5 – Seeking explanations

- 6.1 This draft rule sets out the procedure for seeking explanations of the regulated person’s conduct. Again it sets out current procedures in rule form. The draft rule provides that the SRA will give the regulated person the opportunity to provide an explanation and sets out the warning that will be given by the SRA to the regulated person in these circumstances.
- 6.2 The draft rule also provides that the regulated person must provide an explanation within a time period specified by the SRA, which shall be no less than 14 calendar days. It is anticipated that in most cases the time specified will be 14 days, as now, but this allows flexibility in cases where it is clear that more time would be required.

## 7. Rule 6 – Report stage

- 7.1 This draft rule deals with the report stage of the process and provides that before making a disciplinary decision, the SRA will prepare a report for disclosure to the regulated person.
- 7.2 The draft rule also seeks to clarify issues that may arise in relation to such reports. This draft rule provides that the report may:
- include evidence of propensity (rule 6(3)) – this may be important in cases of continuing allegations of a similar nature that have not been pursued individually but which make a pattern clear;
  - include the regulated person’s regulatory and disciplinary history (rule 6(3)); and

- recommend an outcome or advocate a particular position (rule 6(7)).
- 7.3 Draft rule 6(9) makes it clear that the SRA is not required to adopt the procedure in draft rules 5 and 6 in order to make a SRA finding or an application to the SDT. This is because section 44D(7) requires the SRA to make rules about the practice and procedure to be followed in relation to “disciplinary decisions” but there is no requirement to include any provision in relation to SRA findings which do not involve a consequential written rebuke or fine, or to referrals to the SDT.
- 7.4 In cases which may result in a disciplinary decision, it will be necessary to follow the procedure in draft rules 5 and 6. However, there may be certain situations where it is clear from an early stage that it will not result in a rebuke or fine but may require a letter of advice or a warning to the regulated person. The draft rules allow for such decisions to be made by a person authorised by the SRA, who could be a caseworker and in such cases it would not be necessary for the full procedures in draft rules 5 and 6 to be followed. We intend to deal in more detail with the practice in such cases by publishing separate guidance later.
- 7.5 In a number of places the draft rules set out a time period within which a response has to be made. These are minimum periods and are based on what is current practice. We will be able, as now, to give more than the minimum time specified by the rules where it is appropriate and regulated persons can apply for extensions of time.
- 7.6 Draft rule 6(10) allows the SRA to dispense with or vary the procedure and the time limits set out in draft rules 5 and 6 but the SRA must, so far as practicable, notify the regulated person that it has done so (rule 6(11)).

## 8. Rule 7 – Decisions

- 8.1 This draft rule sets out the decision making structure for making a SRA finding and making a disciplinary decision. The decision making principles approved by the SRA Board establish a presumption in favour of decisions being made at the lowest level in the organisation at which fitness-for-purpose can be assured. Therefore, it is proposed that whilst a SRA finding may be made by a person duly authorised by the SRA, a disciplinary decision may only be made by a single adjudicator or an adjudication panel. An adjudicator is defined in the rules as “a person not involved in the investigation or preparation of a case who is authorised by the SRA to take disciplinary decisions.”
- 8.2 This draft rule also provides that the strict rules of evidence shall not apply to decisions of the SRA (rule 7(7)) and that the standard of proof shall be the civil standard (rule 7(8)).

## 9. Rule 8 – Referrals to the Tribunal

- 9.1 As stated above, there is no requirement in s44D to include any provision about referrals to the SDT. However, there has been criticism of a lack of transparency in the SRA’s processes generally and these rules provide an opportunity to provide clarity about a key SRA disciplinary function. The draft

rule regarding referrals is relatively broad and includes a cross reference to the Code for referral to the Tribunal, which is currently published on the SRA website.

- 9.2 The draft rule provides that the SRA may make an application to the Tribunal in respect of a regulated person at any time if the SRA is satisfied that:
- there is sufficient evidence to provide a realistic prospect that the application would be upheld by the Tribunal;
  - the allegation to be made against the regulated person either in itself or in the light of other allegations is sufficiently serious that the Tribunal is likely to order that the regulated person be struck off, suspended, pay a penalty exceeding the maximum that can be imposed by the SRA or be subject to any other order that the SRA is not empowered to make; and
  - it is in the public interest to make the application.
- 9.3 The draft rule provides that a referral may be made when the “allegation to be made against the regulated person either in itself or in the light of other allegations is sufficiently serious...” That is intended to address two issues. Firstly, many SDT cases are made up of several individual allegations, sometimes referred at different times, which might not justify a referral individually but clearly do so collectively. Secondly, the SRA’s power to fine a maximum of £2,000 is taken not to apply to *each allegation* (as the SDT’s current power does) but to each case. This may be to avoid the SRA effectively usurping the SDT’s jurisdiction by, for example, fining a solicitor £20,000 by finding ten allegations proved. It is important therefore to provide for such a case, and particularly more borderline cases (such as where the proper overall outcome is a £1,000 fine on each of three allegations), by making it clear that it is the overall set of allegations that are relevant. It is notable that in future the SDT will have an unlimited power to fine.
- 9.4 The draft rule also makes clear the levels of authorisation (rule 8(3)). Since authorisation of proceedings before the SDT is a “decision to prosecute” and the final decision is made by the SDT, there is less need for separation between investigation and authorisation – the analogy being that final decisions in the criminal cases are by the courts but decisions to prosecute are taken by the police or CPS.
- 9.5 The draft rule also makes it clear that there is no right of appeal against authorisation of SDT proceedings and that investigative powers can be exercised even though a Tribunal application is proceeding. This is a live issue in SDT cases where solicitors have tried to impose the criminal law model, suggesting that, for example, they should not be required to answer questions after proceedings have been commenced against them. We continue to believe that would be inappropriate in the context of disciplinary proceedings.

## 10. Rule 9 – Internal appeals

10.1 This draft rule sets out the internal appeals procedure. It provides that a regulated person may appeal against a SRA finding, a disciplinary decision or both. However there is no appeal under this draft rule against:

- any decision other than a SRA finding or a disciplinary decision;
- a decision on an appeal; or
- a SRA finding or a disciplinary decision which has been made by agreement between the regulated person and the SRA.

10.2 The draft rule provides that an appeal must be made within 14 calendar days or within a time specified by the SRA. The appeal must be in writing and provide reasoned arguments in support.

10.3 The draft rule makes it clear that the internal appeal procedures do not affect the regulated person's right of appeal to the Tribunal under section 44E of the Solicitors Act 1974 or paragraph 14C of Schedule 2 to the Administration of Justice Act 1985. Under these statutory provisions, an order to pay a penalty is appealable as of right to the SDT. A written rebuke is only appealable if it is to be published. A decision that a penalty or rebuke should be published is itself appealable to the SDT.

10.4 Section 44E also provides an unrestricted right of appeal to the High Court (section 44E(6)). If, therefore, the SRA provides an internal appeal process that will mean that there could be effectively four decisions in a particular case: the original decision, internal appeal, SDT, and High Court. There is little doubt that such a process would be very lengthy and that it would apply to cases that the SRA considered were suitable for internal decision. Views are sought on whether, in the light of the statutory rights of appeal, the rules should still include an internal appeal mechanism.

## 11. Rule 10 – Reconsideration

The draft rules include provision for the SRA to reconsider or rescind any decision, in line with current policy. The intention is that it would be possible to reconsider a decision that appears to be clearly problematic or at risk of successful challenge. This will be at the instigation of the SRA but there are cases where the regulated person complains about aspects of a decision and it is clear that the complaint has merit. It would be helpful therefore to be able to reconsider decisions in those circumstances. There is a similar provision for reconsideration of decisions in the SRA Practising Regulations [2009] which have been made by the SRA Board and are awaiting the necessary concurrences.

## 12. Rule 11 – Publication

Section 44D requires the making of rules "governing" the publication of fines or rebukes. Draft rule 3(2) provides that details of a written rebuke or direction to pay a penalty may be published if the SRA "considers it to be in the public interest to do so in accordance with a publication policy promulgated from time to time". As explained in paragraph 4.6 above, the current publication policy makes it clear that every case

is treated on its merits and sets out some of the factors which support a decision to publish and some which support a decision to keep a decision confidential. This draft rule sets out the process involved and the way in which details of written rebukes or fines will be published.

### 13. Rule 12 – Commencement

The relevant statutory provisions are not yet in force but it is believed that the commencement order that will bring these provisions into force will be laid by the end of 2008. It is then hoped that these draft rules would be made and have received the appropriate concurrences in time to allow them to come into force soon after 1 March 2009. There is no intention to apply these rules to matters which were being investigated by the SRA before the rules came into force and this is made clear in the draft.

### Questions

The SRA would welcome views on the following:

1. Are the rules clear and transparent?
2. Do you agree with the approach to the prescribing of circumstances in which the SRA may make a disciplinary decision? (rule 3)
3. Do you agree that disciplinary decisions should be made only by adjudicators? (rule 7)
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? (rule 8)
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? (rule 9)
6. Do you believe that the draft rules will have a disproportionate impact on any group or category of persons?
7. Do you have any other comments on the draft rules?

### How to respond

For information on how to respond, please visit our website.

- Go to [www.consultations.sra.org.uk](http://www.consultations.sra.org.uk).
- Select **New disciplinary powers – public rebukes and fines**.
- Click **How to respond**.

### Submission deadline

The deadline for responses is **23 February 2009**.

# ANNEX 1

## DRAFT SRA (Disciplinary Procedure) Rules [2009]

*Rules dated [the date of the final concurrence or approval]*

*Commencing [ ]*

*Made by the Solicitors Regulation Authority Board, after consultation with the Solicitors Disciplinary Tribunal.*

*Under sections 31, 44D, 79 and 80 of the Solicitors Act 1974 and section 9 and paragraph 14B(7) of Schedule 2 to the Administration of Justice Act 1985, with*

- *the concurrence of the Master of the Rolls under section 31 of the Solicitors Act 1974 and section 9 of the Administration of Justice Act 1985; and*
- *the concurrence of the Lord Chancellor under paragraph 16 of Schedule 22 to the Legal Services Act 2007.*

## Part 1 – General

### Rule 1 - Interpretation

In these rules, unless the context otherwise requires:

- (1) “adjudicator” means a person not involved in the investigation or preparation of a case who is authorised by the SRA to take disciplinary decisions;
- (2) “disciplinary decision” means a decision, following a SRA finding, to exercise one or more of the powers provided by section 44D(2) and (3) of the Solicitors Act 1974 or paragraph 14B(2) and (3) of Schedule 2 to the Administration of Justice Act 1985;
- (3) “discipline investigation” means an investigation by the SRA to determine whether a regulated person should be subject to a SRA finding, a disciplinary decision or an application to the Tribunal;
- (4) “LLP” means a limited liability partnership incorporated under the Limited Liability Partnerships Act 2000;
- (5) “manager” means:
  - (a) a partner in a partnership;
  - (b) a member of an LLP; or
  - (c) a director of a company;
- (6) “recognised body” means a partnership, company or LLP recognised by the Solicitors Regulation Authority under section 9 of the Administration of Justice Act 1985;

- (7) “registered European Lawyer” means a person registered by the Solicitors Regulation Authority under regulation 17 of the European Communities (Lawyer’s Practice) Regulations 2000;
- (8) “registered foreign lawyer” means a person registered by the Solicitors Regulation Authority under section 89 of the Courts and Legal Services Act 1990;
- (9) “regulated person” means:
- (a) a solicitor;
  - (b) a registered European lawyer;
  - (c) a registered foreign lawyer;
  - (d) a recognised body;
  - (e) a manager of a recognised body; or
  - (f) an employee of a recognised body, a solicitor or a registered European lawyer;
- (10) “SRA” means the Solicitors Regulation Authority, the independent regulatory body of the Law Society of England and Wales;
- (11) “SRA finding” is a decision that the SRA is satisfied in accordance with section 44D(1) of the Solicitors Act 1974 or paragraph 14B(1) of Schedule 2 to the Administration of Justice Act 1985 and for the avoidance of doubt does not include:
- (a) investigatory decisions such as to require the production of information or documents;
  - (b) directions as to the provision or obtaining of further information or explanation;
  - (c) decisions to stay or adjourn;
  - (d) authorisation of the making of an application to the Tribunal;
  - (e) authorisation of an intervention pursuant to the Solicitors Act 1974 or the Administration of Justice Act 1985;
- (12) “the Tribunal” means the Solicitors Disciplinary Tribunal which is an independent statutory tribunal constituted under section 46 of the Solicitors Act 1974;
- (13) the singular includes the plural and vice versa.

## Rule 2 – Scope

- (1) These rules govern the procedure for the SRA to:

- (a) exercise its powers pursuant to section 44D of the Solicitors Act 1974 or paragraph 14B of Schedule 2 to the Administration of Justice Act 1985; or
  - (b) subject to rule 6(9), authorise an application to the Tribunal.
- (2) The powers referred to in subrule (1)(a) are to do one or a combination of the following:
- (a) give a regulated person a written rebuke;
  - (b) direct a regulated person to pay a penalty not exceeding the maximum permitted by law;
  - (c) publish details of a written rebuke or a direction to pay a penalty.
- (3) These rules shall not prevent, prohibit or restrict the exercise of any other powers or other action by the SRA.

### Rule 3 – Disciplinary powers

- (1) The circumstances in which the SRA may make a disciplinary decision to give a regulated person a written rebuke or to direct a regulated person to pay a penalty are when the following two conditions are met:
- (a) The first condition is that the SRA is satisfied that the act or omission by the regulated person which gives rise to the SRA finding was not trivial nor justifiably inadvertent and fulfils one or more of the following in that it:
    - (i) was deliberate or reckless;
    - (ii) caused or had the potential to cause loss or inconvenience to any other person;
    - (iii) was or was related to a failure or refusal to ascertain, recognise or comply with the regulated person's regulatory obligations such as, but not limited to, compliance with requirements imposed by legislation or rules made pursuant to legislation, the SRA, the Law Society, the Legal Complaints Service, the Tribunal or the court;
    - (iv) continued for an unreasonable period taking into account its seriousness;
    - (v) persisted after the regulated person realised or should have realised that it was improper;
    - (vi) misled or had the potential to mislead clients, the court or other persons, whether or not that was appreciated by the regulated person;
    - (vii) affected or had the potential to affect a vulnerable person or child;

- (viii) affected or had the potential to affect a substantial, high-value or high-profile matter; or
    - (ix) formed or forms part of a pattern of misconduct or other regulatory failure by the regulated person.
  - (b) The second condition is that a proportionate outcome in the public interest is one or both of the following:
    - (i) a written rebuke;
    - (ii) a direction to pay a penalty not exceeding the maximum permitted by law.
- (2) The SRA may make a disciplinary decision to publish details of a written rebuke or a direction to pay a penalty when it considers it to be in the public interest to do so in accordance with a publication policy promulgated from time to time.
- (3) Nothing in this rule shall prevent the authorisation of an application to the Tribunal in accordance with rule 8.

## **Part 2 – Practice and Procedure**

### **Rule 4 – Investigations**

- (1) The parties to a discipline investigation are the SRA and the regulated person.
- (2) The SRA may exercise any investigative or other powers at any time including those arising from:
  - (a) sections 44B, 44BA, 44BB of the Solicitors Act 1974;
  - (b) rules made by the Society or the SRA for the production of documents, information or explanations.
- (3) Subject to subrule (4), the SRA may disclose any information or documents arising from its discipline investigation to any person when it considers it is in the public interest to do so or in order to facilitate its investigation and in particular to identify and obtain evidence, comments or information.
- (4) The SRA may restrict disclosure of information to protect another person's right of confidentiality or privilege.

### **Rule 5 – Seeking explanations**

- (1) The SRA will give the regulated person the opportunity to provide an explanation of the regulated person's conduct.
- (2) When seeking an explanation from the regulated person as referred to in subrule (1) above, the SRA will warn the regulated person that:

- (a) failure to reply to the SRA may in itself lead to disciplinary action;
  - (b) the reply and other information may be disclosed to other persons pursuant to rule 4(3); and
  - (c) the reply may be used by the SRA for regulatory purposes including as evidence in any investigation, decision by the SRA, or proceedings brought by or against the SRA.
- (3) The regulated person must provide the explanation referred to in subrule (1) or any other information within a time period specified by the SRA, which shall be no less than 14 calendar days and where no explanation or information is received within the specified time, the SRA may proceed to decision in the absence of an explanation.

## Rule 6 – Report stage

- (1) Before making a disciplinary decision, the SRA will prepare a report for disclosure to the regulated person.
- (2) Subject to subrule (6), the report will summarise the allegations against the regulated person, explain the supporting facts and evidence, and attach documentary evidence that the SRA considers to be relevant.
- (3) The report may also include evidence of the regulated person's propensity to particular behaviour and a summary of the regulated person's regulatory and disciplinary history.
- (4) The report will be provided to the regulated person for the regulated person to provide written comments upon it within a time period specified by the SRA, which shall be no less than 14 calendar days.
- (5) The report may be disclosed by the SRA to any other person with a legitimate interest in the matter to enable that person to comment upon it. Subject to subrule (6), any such comments shall be disclosed to the regulated person.
- (6) The SRA may restrict disclosure of part of the report or all or part of the attached documents in the public interest or in the interests of efficiency and proportionality, such as:
  - (a) by only providing to the regulated person or any other person documents that are not already in their possession;
  - (b) when the report or documents include information that is or might be subject to another person's right of confidentiality or privilege.
- (7) The SRA may recommend an outcome or advocate a particular position in the report or otherwise.
- (8) The report shall be referred for consideration within a reasonable time after receipt of any comments or the expiry of any time period specified for the provision of comments.

- (9) The SRA is not required to adopt the procedure in rules 5 and 6 in order to make a SRA finding or an application to the Tribunal under rule 8 below.
- (10) Where the SRA considers that it is just and in the public interest to do so the SRA may dispense with or vary the procedure and the time limits set out in rules 5 and 6.
- (11) Where the SRA dispenses with or varies the procedure or the time limits in accordance with subrule (10), the SRA shall, so far as practicable, notify the regulated person that it has done so.

## **Part 3 – Decisions and Referrals to the Tribunal**

### **Rule 7 – Decisions**

- (1) A SRA finding may be made by:
  - (a) agreement between the regulated person and the SRA;
  - (b) a person duly authorised by the SRA;
  - (c) a single adjudicator; or
  - (d) an adjudication panel.
- (2) A disciplinary decision may be made by:
  - (a) agreement between the regulated person and the SRA;
  - (b) a single adjudicator; or
  - (c) an adjudication panel.
- (3) A SRA finding which does not involve a consequential disciplinary decision may incorporate or be accompanied by:
  - (a) advice to the regulated person as to the regulated person's regulatory obligations;
  - (b) a warning to the regulated person as to the regulated person's future conduct.
- (4) A disciplinary decision may be made by a single adjudicator but the SRA may refer a matter to an adjudication panel for such a decision.
- (5) An adjudication panel shall be properly constituted if at least two members are present.
- (6) Where an adjudication panel is comprised of three or more members, a decision may be made by a majority.
- (7) The strict rules of evidence shall not apply to decisions of the SRA.

- (8) The standard of proof shall be the civil standard.
- (9) Decisions will normally be made on consideration of the report described in rule 6 but an adjudicator or adjudication panel may give directions as necessary as to the provision of evidence or representations whether oral or otherwise.
- (10) The decision shall be made when it is sent to the regulated person in writing. The decision will be accompanied with information in writing about any right of appeal within the SRA and any external right of appeal.
- (11) Where the SRA directs the regulated person to pay a penalty, such penalty shall be paid within a time and in the manner specified by the SRA but shall not become payable until:
  - (a) the end of the period during which an appeal may be made under rule 9 below, section 44E of the Solicitors Act 1974 or paragraph 14C of Schedule 2 to the Administration of Justice Act 1985; or
  - (b) if such an appeal is made, such time as the appeal is determined or withdrawn.

## **Rule 8 – Referrals to the Tribunal**

- (1) The SRA may make an application to the Tribunal in respect of a regulated person at any time if the SRA is satisfied that:
  - (a) there is sufficient evidence to provide a realistic prospect that the application will be upheld by the Tribunal;
  - (b) the allegation to be made against the regulated person either in itself or in the light of other allegations is sufficiently serious that the SDT is likely to order that the regulated person:
    - (i) be struck off;
    - (ii) be suspended;
    - (iii) pay a penalty exceeding the maximum that can be imposed from time to time by the SRA; or
    - (iv) be subject to any other order that the SRA is not empowered to make; and
  - (c) it is in the public interest to make the application.
- (2) The SRA will apply subrule (1) in accordance with a code for referral to the Tribunal as promulgated by the SRA from time to time.
- (3) An application in respect of a regulated person to the Tribunal may be authorised by:
  - (a) agreement between the regulated person and the SRA;

- (b) a person duly authorised by the SRA;
  - (c) a single adjudicator; or
  - (d) an adjudication panel.
- (4) There is no right of appeal against authorisation of an application to the Tribunal.
- (5) Subject to any contrary order of the Tribunal, the SRA may exercise any investigative or other powers at any time before a final hearing of an application at the Tribunal, including those arising from:
- (a) sections 44B, 44BA, 44BB of the Solicitors Act 1974;
  - (b) rules made by the Society or the SRA for the production of documents, information or explanations.

## **Part 4 – Appeals and Reconsideration**

### **Rule 9 – Internal appeals**

- (1) A regulated person may appeal against a SRA finding, a disciplinary decision or both.
- (2) There is no appeal under this rule against:
- (a) any decision other than a SRA finding or a disciplinary decision;
  - (b) a decision on an appeal; or
  - (c) a SRA finding or a disciplinary decision which has been made by agreement between the regulated person and the SRA.
- (3) An appeal by a regulated person must be made within 14 calendar days of the date of the letter or electronic communication informing the regulated person of the decision or within a different time period specified by the SRA.
- (4) An appeal shall:
- (a) be in writing; and
  - (b) provide reasoned arguments in support.
- (5) Appeals will be determined as follows:
- (a) where the decision was made by a person duly authorised by the SRA, the appeal will be heard by a single adjudicator;
  - (b) where the decision was made by a single adjudicator, the appeal will be heard by an adjudication panel;

- (c) where the decision was made by an adjudication panel, the appeal will be heard by a differently constituted panel.
- (6) Nothing in these rules shall affect a regulated person's right of appeal to the Tribunal under section 44E of the Solicitors Act 1974 or paragraph 14C of Schedule 2 to the Administration of Justice Act 1985.

## Rule 10 – Reconsideration

- (1) The SRA may reconsider or rescind any decision including a SRA finding, a disciplinary decision or authorisation of a referral to the Tribunal with the agreement of the regulated person.
- (2) In its absolute discretion the SRA may also reconsider any decision including a SRA finding, a disciplinary decision or authorisation of a referral to the Tribunal when it appears that the person or panel who made the decision:
  - (a) was not provided with material evidence that was available to the SRA;
  - (b) was materially misled by the regulated person or any other person;
  - (c) failed to take proper account of material facts or evidence;
  - (d) took into account immaterial facts or evidence;
  - (e) made a material error of law;
  - (f) made a decision which was otherwise irrational or procedurally unfair;
  - (g) made a decision which was ultra vires; or
  - (h) failed to give sufficient reasons.
- (3) Reconsideration pursuant to this rule may be directed by a duly authorised person who may also give directions for:
  - (a) further investigations to be undertaken;
  - (b) further information or explanation to be obtained from any person;
  - (c) consideration of whether to authorise an application to the Tribunal;
  - (d) the reconsideration of the decision to be undertaken by the original decision maker or adjudication panel or by a different decision maker or a differently constituted adjudication panel.

## Part 5 – Publication and Commencement

### Rule 11– Publication of decisions

- (1) This rule applies to the publication of details of a written rebuke or a direction to pay a penalty.
- (2) The SRA may publish information about other decisions or investigations in accordance with a publication policy promulgated from time to time or when it is in the public interest to do so.
- (3) Publication in accordance with this rule:
  - (a) will normally be on the SRA website;
  - (b) will be in such form as the SRA may from time to time decide;
  - (c) may include provision of a copy of the publishable information upon request by any person;
  - (d) will comprise a short statement of the disciplinary decision including brief details of its factual basis and the reasons for the decision;
  - (e) will identify the regulated person;
  - (f) will provide the practising details of the regulated person at the time of the matters giving rise to the decision and at the time of decision if different.
- (4) The SRA may decide when and how to publish or otherwise disclose all or part of the details of a written rebuke or a direction to pay a penalty.
- (5) The SRA may not publish details of a written rebuke or a direction to pay a penalty:
  - (a) during the period in which an appeal may be made under rule 9 above, section 44E of the Solicitors Act 1974 or paragraph 14C of Schedule 2 to the Administration of Justice Act 1985; or
  - (b) if such an appeal has been made, until such time as it is determined or withdrawn.

### Rule 12 – Commencement

These rules shall come into force on [ ] but shall not apply to any matters where the relevant SRA discipline investigation began before these rules came into force.

**Ends**