

ANNEX 4

Responses to consultation paper from approved regulators

**RESPONSE BY ILEX AND IPS TO SRA CONSULTATION
LEGAL SERVICES ACT: NEW FORMS OF PRACTICE AND REGULATION
CONSULTATION PAPER 14**

New disciplinary powers for the SRA – public rebukes and fines

The Institute of Legal Executives (ILEX) is the professional body for Legal Executives and other members of ILEX. ILEX Professional Standards (IPS) is the professional regulatory body for Legal Executives and other members of ILEX.

The majority of ILEX members work in solicitors practices. They may be made the subject of an order by the SRA under s43 Solicitors Act 1974.

This is a response made by ILEX and IPS to consultation paper 14.

QUESTIONS

Q1 Are the rules clear and transparent?

The regulations are generally clear and concise subject to the following comment.

Q2 Do you agree with the approach to the prescribing of circumstances in which the SRA may make a disciplinary decision? (rule 3)

The conditions set out at rule 3 help to provide some clarity as to when the SRA may make a disciplinary decision. The first condition includes some helpful indicators as to when a case may be deemed to be serious enough to justify a disciplinary decision being made.

The second condition will involve the decision maker making a subjective assessment as to whether the disciplinary decision is a proportionate outcome in the case. This may lead to disputes and appeals as to what is proportionate in the case. Therefore the decision maker should be required to provide his reasons for deciding that the decision is proportionate in the case.

Q3 Do you agree that disciplinary decisions should be made only by adjudicators? (rule 7)

Disciplinary decisions should be made by persons who are at least adjudicators. This will ensure that independence and objectivity is brought to the decision making process.

Rule 7(6) states that a panel of three or more members can make a decision by majority. However, the rules do not clarify whether a decision by a panel of two members must be made unanimously.

Q4 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 Solicitors Act 1974? (rule 8)

It is helpful for the rules to provide for referral to the SDT. The rules will assist the parties to clearly identify the criteria against which referrals can be made to the SDT.

However, Rule 8(5) brings some uncertainty to the situation as it provides that the SRA can investigate and exercise powers in a case after a referral has been made to the SDT. It is accepted that there may be matters separate to those referred to the SDT which require investigation and adjudication after a referral is made. The rule should clarify whether it applies to separate matters or to further investigation of matters already referred to the SDT. If it refers to the latter the SRA should be required to stipulate why the investigation may continue after referral.

Q5 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)

There should be an internal appeal mechanism despite the right to a statutory appeal. An internal appeal may provide an opportunity to resolve a first instance decision without recourse to a lengthy and expensive statutory appeal process. The criteria for appeals should be prescribed as they are for reconsiderations.

Q6 Do you believe that the draft rules will have a disproportionate impact on any group or category of persons?

The rules will allow the SRA to order an ILEX member to be rebuked or to pay a penalty whereas it previously had no power to do so. ILEX members have been subject to s43 orders, as employees of solicitors' practices. However, the introduction of the new rules will extend the remit of the SRA over ILEX members.

A financial penalty could have a significant impact upon ILEX members. They will often be employees of a solicitor's firm which could be responsible for the underlying issues which led to the conduct complained of, eg, by a failure to adequately supervise an employee or to provide adequate training or resources. Under these rules the employee could be left in the position of being rebuked or ordered to make a financial payment when they were not responsible for the underlying issues that led to their conduct.

ILEX members are already subject to substantial double regulation in relation to s43 Orders. These provisions will increase the impact of double regulation substantially. The SRA should adopt the principle that allegations regarding conduct of an individual employee who is regulated by another professional body should be referred to that regulatory body first for initial investigation. The SRA could then take any disciplinary action taken by that regulatory body

into account when deciding whether or not to issue a rebuke or order the payment of a fine.

It is recognised that where misconduct is identified in the course of an investigation of wider misconduct within a practice, the SRA would be better able to investigate.

Q7 Do you have any other comments on the draft rules?

- Draft rule 6(3) allows the draft report to include evidence of the regulated person's propensity to particular behaviour and a summary of their regulatory and disciplinary history. Inclusion of this information at this stage may affect the independence of the decision making process. It is not clear whether these may be simply allegations of similar previous conduct or findings in relation to such conduct. The decision maker could be influenced by the past history of the regulated person without focussing upon whether or not the conduct could be proved in the individual case on the basis of the evidence available in that case. An alternative approach could be that the decision maker is informed of the past history of the regulated person after a finding of misconduct has been made. The past history could then be taken into account in deciding what disciplinary order should be made.
- Draft rule 6(6)(b) permits the SRA to restrict disclosure of confidential or privileged documents. It is not clear whether this refers to restricting disclosure to the regulated person; to an adjudicator; and or to third parties. The regulated person may be placed at an unfair disadvantage where the SRA is able to rely upon documents in reaching its decision which the regulated person cannot have sight of or respond to.
- Draft rules 6(9) and (10) allow part of the procedure to be dispensed with if an SRA finding is to be made or a case is to be referred to the Tribunal or where the SRA considers it is just and in the public interest to do so. This provision is useful but has risks if the procedure is not used and it later appears that the full investigation procedure should have been followed. This situation may lead to more appeals. There should also be clear criteria for not following the full procedure.
- Rule 11(3)(e) states that the publication will identify the regulated person. The SRA may wish to consider whether there will be instances where publication should not identify the regulated person.
- Rule 11(3)(f) states that the publication will provide the practising details of the regulated person at the time the matters giving rise to the decision arose and at the time of the decision. The SRA may wish to consider whether the publication should also include the up to date practising details of the regulated person so that members of the public can clearly identify an individual concerned, particularly if they are considering whether or not to instruct that individual.
- Rule 11(4) appears to contradict rule 11(3).

- Generally the SRA should consider whether these powers will attract a lot of complaints from employers about employees which actually reflect internal employment disputes. ILEX sees a fair number of complaints whether the threat of a complaint is used as a bullying or revenge tactic.

Legal Services Act: New forms of practice and regulation

Consultation Paper 14:

New disciplinary powers for the SRA – public rebukes and fines

Response of the Bar Standards Board

1. Are the rules clear and transparent?

Yes.

2. Do you agree with the approach to the prescribing of circumstances in which the SRA may make a disciplinary decision (rule 3)?

Generally, yes. We question whether Rule 3(1)(a)(vii) and (viii) are necessary or appropriate. These criteria, unlike the others, focus not on the *conduct* of the regulated person, but extraneous matters which are wholly unrelated to the *conduct* of the regulated person. As these are qualifying criteria, we consider that they should concentrate on the *conduct* of the regulated person.

3. Do you agree that disciplinary decisions should be made only by adjudicators (rule 7)?

Yes.

4. Do you agree that it is helpful to provide for referral to the SDT in the rules even though that is not required under s.44D of the Solicitors Act 1974 (rule 8)?

Yes.

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)?

Yes.

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

No.

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

In relation to publication of decisions (Rule 11), the SRA might consider the question of the extent to which its proceedings are regarded as confidential and the extent to which any obligation of confidence can or should be imposed on any person involved in the process, whether as complainant or regulated person. Rule 11 provides the circumstances in which the SRA may publish information about its decisions or investigations.



Response by the Bar Council's Professional Practice Committee (PPC) to SRA CONSULTATION PAPER 14 – Public Rebukes and Fines

1. The PPC can see some value in the new powers to be provided to the SRA, although the terminology seems a little old-fashioned – the 'rebuke'. "Admonishment" or even "censure" might be more in keeping with modern vocabulary.

3. The rationale for the powers is as follows:

"These powers provide an effective alternative in circumstances where a formal prosecution to the SDT may not be an appropriate response but where a private reprimand may be insufficient."

4. This seems to be a rather overcomplicated approach - as evidenced by the distinction drawn between 'disciplinary decisions' which include the imposition of the new sanctions, and what are described as 'lesser decisions', that's to say, ".....findings and warnings, findings with advice etc (sic)..." The Notes explaining Rule 1 make the system seem unnecessarily complicated.

5. Rule 3 sets out the conditions precedent to a written rebuke or imposition of financial penalty. This Rule is drafted in terms which strike the PPC as rather curious as what appears to be a de minimis filter, is introduced, requiring the SRA first be satisfied that the act or omission giving rise to the SRA finding was "Not trivial nor justifiably inadvertent." The words seem unnecessary in the light of what follows in the body of Rule 3, that is to say, the 9 'factors' set out. Of the 9 factors, 2 seem to jar. Introducing the issue of a vulnerable person or child seems unnecessary, particularly so when the issue could be dealt with by a modest amendment to (ii) by the addition perhaps of 'or distress' after the words 'potential to cause loss or inconvenience

6. Similarly with factor (viii) and its reference to high value or high profile matters. It appears to place a premium on value, where arguably there ought to be none, in the light of the other factors set out, which manage to avoid introducing this air of special pleading.

7. Rule 6, dealing with the Report stage, provides for disclosure to the regulated person, but it then goes on at 6(5) to provide the SRA with carte blanche to disclose it "to any other person with a legitimate interest in the matter to enable that person to comment upon it". The Rules do not appear to allow the regulated person any opportunity to oppose such disclosure.

8. Rule 7 on “Decisions” may need to be clarified. It provides that an SRA finding and a disciplinary decision may be made by “agreement between the regulated person and the SRA”. It may also be made by a single adjudicator or panel in the case of finding and decision, with the addition of “a person duly authorised by the SRA”, in the case of the SRA finding. A decision would need to be made by some person or persons as opposed to being made “by agreement”.

9. Rule 7(10) states that “The decision shall be made when it is sent to the regulated person in writing”. The act of sending will not transform the decision into a fully formed and binding one.

10. Rule 9 deals with internal appeals. It seeks to preclude any appeal against a SRA finding or decision where it was made “by agreement”. It is difficult to see why that provision is proposed, rare though an appeal might be, there may be some where a real issue arises as to the basis of the agreement. This is in contrast to Rule 10 where, on the issue of reconsideration, an absolute discretion is allowed the SRA to reconsider any finding, decision or authorisation of a referral to the Tribunal where any of 8 wide ranging factors may be present.

11. Finally, the Rules do not seem to indicate to whom any fine or penalty is paid. One of the stated aims of these proposed rules is greater transparency (page 3/21), so it might be sensible to say who gets the penalty.

12. In summary, the PPC considers that the two new powers are useful, but the procedure appears to be quite involved and to have some internal flaws and inconsistencies. This is important not just for the public but also for the solicitors for whom any disciplinary finding is unattractive, just as for the Bar.

Professional Practice Committee
Bar Council
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