

## "Approving Rule Changes and Issuing Directions: Solicitors Disciplinary Tribunal"

### Legal Services Board Consultation Paper On The Powers Provided By Sections 178 and 179 Of The Legal Services Act 2007

#### Response Of The Solicitors Disciplinary Tribunal

##### Introduction And Comment

1. The Solicitors Disciplinary Tribunal ("SDT") is pleased to have this opportunity to respond to the Legal Services Board Consultation Paper on the powers provided by sections 178 and 179 of the Legal Services Act 2007 ("the Act") in so far as they relate to SDT rule changes and the issuing of directions.
2. The SDT wishes to make a number of pertinent comments before answering the specific questions raised in the Consultation Paper. These comments form an integral part of the SDT's answers to the questions that follow.
3. SDT Members and Staff take pride in the performance of their public duty, namely the delivery of an effective, efficient, timely Tribunal service. The whole-hearted commitment of SDT Members and Staff to high standards of judicial and administrative impartiality, independence and integrity is crucial to the provision of that service. The Better Regulation principles set out at section 3(3) of the Act, namely transparency, accountability, proportionality and consistency, are very familiar to the SDT, having been put into practice by its Members and Staff on a daily basis during the Tribunal's distinguished history.
4. There has never, in the 36 years of the SDT's existence in its current format, been any suggestion that it has failed to perform any of its functions either to an appropriate standard or at all. Its judicial decisions supported by detailed reasoned findings of fact and law are published widely. The SDT's processes and procedures are open and transparent. A failure to perform would be clearly visible to all and quickly addressed at the SDT by appropriate remedial action.
5. Section 3(2) of the Act requires the LSB so far as is reasonably practicable to act in a way: (a) which is compatible with the regulatory objectives and (b) which the LSB considers most appropriate for the purpose of meeting those objectives. The SDT has considered the "regulatory objectives" described in section 1(1) of the Act. As a statutory tribunal carrying out a judicial function, there are certain of the objectives which it would be inappropriate for the SDT to engage with. For example, objective (e) refers to "promoting competition in the provision of services" and objective (f) to "encouraging an independent, strong, diverse and effective legal profession". Further, the regulatory principles to which the LSB is legally required to have regard are not principles which are directly applicable to SDT rules, although the SDT will of course have regard to those principles when making new rules or enforcing its current rules.
6. The SDT must continually balance the, often conflicting, needs and objectives of its varied stakeholders in a fair and impartial manner. Many individuals, groups and organizations are or can be affected by the SDT's actions, for example; parties to proceedings and their advocates, families and friends,

witnesses, former and existing clients, partners, colleagues and employees of respondents, and, of course, the general public and the legal profession in the widest sense. The SDT also has an obligation to the solicitors' profession, the Law Society, and the LSB to manage its budget sensibly and cost-effectively, but without in any way damaging or hindering the provision of the Tribunal service.

7. At paragraphs 23 and 24 of the Consultation Paper reference is made to the Memorandum of Understanding ("MoU") dated 21 May 2010 between the LSB, the SDT and the Law Society. It is inaccurately stated that the MoU requires the Tribunal to develop Key Performance Indicators ("KPIs"). At paragraph 5.15 of the MoU, the SDT has committed to developing "a methodology to measure its performance, and will report to the LSB on its performance at the same time as it submits its Annual Budget Application". This is not the same as a **requirement** to develop KPIs. KPIs are a commonly used management tool, particularly in a financial, target-based environment, but other less target-driven methodologies for performance measurement do exist.
8. It can be persuasively argued that it is wholly inappropriate for the SDT, as a judicial body, to adopt KPIs. There is a major distinction to be drawn between measuring and reporting on the SDT's performance - which it already does in its Annual Report, a public document accessible to all on the SDT website - and a requirement that it develop KPIs so that its performance can be monitored by the LSB.
9. Development and implementation of Best Practice procedures and processes by the SDT are crucial for ensuring that the Tribunal builds positively upon its already strong foundations. The SDT is committed to the principle of continuous improvement for the mutual benefit of its stakeholders. The SDT is further committed to the development of its own independent, meaningful benchmarks to assist its Management with the objective measurement of that continuous improvement. In order to be meaningful however, performance measurement must reflect the organizational goals of the SDT, which may overlap with, but do not and should not necessarily mirror the regulatory objectives of the LSB.
10. The SDT does not believe that it benefits the Tribunal's stakeholders in any way for it to commit to entirely arbitrary targets and/or performance measurements. It is important that the SDT and its Staff do not become distracted by over-emphasis on measurement of what and how the Tribunal does what it does, to the potential detriment of the continued effective and efficient delivery of its service. There is as ever a pragmatic balance to be struck.
11. In answer to the specific questions raised, the Tribunal responds as follows:

**Question 1 – "Do Respondents Agree With Our [The LSB's] Approach Regarding The Application Of The Rules To The Tribunal Under Section 178 Of The Act?"**

12. The SDT does not consider it appropriate for it to have regard to all the regulatory objectives, professional principles and Better Regulation principles when it makes new rules. It fully recognizes the benefits of the LSB having the opportunity to comment on those new rules before they are made.

Question 2 – “Do The Proposed Rules (At Appendix 1) Accurately Reflect The Application Of The Rules To The Tribunal?”

13. The proposed Rules in Appendix 1 appear accurately to reflect the application of the Rules to the SDT.

Question 3 – “Do Respondents Agree With Our [The LSB’s] Approach Regarding The Application Of Our Statement To The Tribunal Under Section 179 Of The Act?”

14. The SDT does not agree that any KPIs can or will help the LSB to determine whether it is performing its functions to an adequate standard. No indication is given as to how the LSB proposes to assess what it describes as the SDT’s performance. Whilst the SDT can, does and will continue to report on the number of cases it has determined and the costs employed in doing so, there is no objective way of defining every single case which comes before it, every such case being different and requiring a judicial determination of a matrix of distinct and individual sets of facts and evidence.

Question 4 – “Do Respondents Agree With Our Proposals For Assessing The Failure Of The Tribunal To “Perform Any Of Its Functions To An Adequate Standard (Or At All)?”

15. The SDT does not agree with the proposals.

16. The proposals appear to be directed primarily towards expedience i.e. forcing the SDT into the existing framework for monitoring other Approved Regulators. The SDT does not fall into the same category as other Approved Regulators and should be approached by the LSB in a different, more appropriate, way. The SDT is an **independent** statutory tribunal created to fulfil a specific judicial function, which it currently performs very effectively.

17. The LSB readily accepts that there is no definition of “adequate standard”. There is also no definition of what is to be regarded as “failure”. When considering an organization such as the SDT, with its wide range of stakeholders for whom it provides a judicial function, defining those terms objectively will be difficult to accomplish in a way that is fair to all concerned.

18. The SDT accepts that, like all judicial bodies, it is accountable in the widest sense to its stakeholders for the way in which it carries out its functions i.e. to be fair, impartial and so on. The acceptance of accountability is evidenced by the SDT’s commitment to developing “a methodology to measure its performance”.

Question 5 – “Does The Draft Statement (At Appendix 2) And The Representation Rules (At Annex 1 Of The Draft Statement) Accurately Reflect The Application Of The Statement And Representation Rules To The Tribunal?”

19. The SDT questions whether it is or should be part of the function of the LSB to “improve regulatory performance” by the SDT; see paragraph 1.9 of Appendix 2.

20. Appendix 2, paragraph 1.9 refers to the LSB's approach to compliance and enforcement, namely to seek an appropriate balance between informal and formal action. The LSB states that it seeks to improve regulatory performance so that:

- Consumers are more confident in accessing the legal services market and can make better informed decisions about purchases; and
- Cultures and systems of quality assurance are embedded throughout the legal services sector to give consumers confidence in the services they purchase.

It is important to note that consumers do not purchase services from the SDT. The SDT does not of course object to improved regulatory performance. Indeed improved regulatory performance would, it is to be hoped, lead to the reduction in the number of cases coming before the Tribunal. However it is difficult to see how monitoring the SDT's performance in the manner envisaged by the LSB will contribute in a way that is meaningful to the LSB's objectives described at the two bullet points above.

21. The SDT strongly opposes any proposal such as that set out in the final line of paragraph 1.20 of Appendix 2 that its performance should be monitored by the LSB "against its Key Performance Indicators". The SDT must continue to operate free from the control or influence of others, including the LSB i.e. retain full judicial independence.

### **Conclusion**

22. The SDT takes very seriously its prime duty to protect the general public and maintain the reputation of and public confidence in the solicitors' profession. Tribunal members, supported in the administration of cases by the SDT's Staff, have to make very difficult decisions which may have a significant impact on the lives of many individuals. This is a weighty responsibility, which Tribunal Members and Staff discharge in a highly accomplished and professional manner. It is essential that the Tribunal is permitted to continue to make those weighty decisions without actual or perceived interference from external bodies.

Dated: 28 October 2010