

**Note of Meeting to discuss SRA application for approval of amendments to
Regulatory Arrangements – SRA Disciplinary Procedure Rules (2010)**

Held on Wednesday 31 March 2010, 2.30 – 4pm, at Legal Services Board offices

Attended by Legal Services Board (LSB), The Law Society (TLS), Solicitors Regulation
Authority (SRA) and Solicitors Disciplinary Tribunal (SDT)

Attendees

LSB Chris Kenny (CK) – Chair

Crispin Passmore (CP), Chris Handford (CH) and Emily Lyn (EL)

SRA Jackie Corcoran (JC)

David Middleton (DM) – by phone

TLS Russell Wallman (RW)

Elliot Vigar (EV)

SDT Jeremy Barnecutt (JB)

Key Points of Discussion

LSB Rule Approval Powers and Process

- CK welcomed the attendees and explained that the meeting was not intended to be a decision making or negotiation process. Its purpose was for the LSB to inform itself on the detail of the SRA's application for approval of its Disciplinary Procedure Rules (2010). The aim of the meeting was to ensure that the LSB was better informed about the full range of issues surrounding the application.
- CH provided an overview of the LSB's rule approval process. Key points included:
 - The LSB approval process is deliberately designed to be a 'front loaded' process whereby applicants are required to do all of the required work before submitting the application, rather than an iterative process (as was the previous process which was administered by the Ministry of Justice, often with the advice of the Legal Services Consultative Panel). This is intended to facilitate a clear and expedient system.
 - Responsibility for making decisions is that of the front line Approved Regulators. Applications must set out the intended nature and effect of proposed arrangements and applicants must demonstrate that decisions are evidence based with impacts properly considered, consultation to have been undertaken in advance and responses taken into account. In addition to a

policy justification, analysis against the Regulatory Objectives and Better Regulation principles must be set out.

- LSB role is to make sure that the process has been followed, rational conclusions reached and arrangements appear to achieve the intended outcome. It is not to ensure that the conclusions are those that the LSB or other interested parties would have reached.
 - A lack of consensus does not invalidate an applicant's proposal or the process by which it was produced
 - LSB role is not one of arbitration and authority is to approve (in full or in part) or refuse the application. An application can only be refused if the LSB can demonstrate that due process has not been followed or is satisfied that the approval would fall within paragraph 23 (5) of Schedule 4 of the Legal Services Act 2007 ("the Act").
- CK commented that the LSB expects that meetings of this kind would be an occasional tool within the rule approval process in relation to particularly complex applications as opposed to a regular occurrence.
 - RW expressed support for the process not being one of arbitration and noted that it considered this type of meeting to be a rarity. TLS would not expect this kind of meeting to be held on every occasion that it did not agree with an applicant's proposals. TLS asked the LSB to follow the former Master of the Rolls Lord Donaldson's view that applications should be approved except for the following reasons – lack of consultation; proposed rule is ultra vires; an application is not considered something that a reasonable regulator would do (which includes consideration of Better Regulation principles and the Regulatory Objectives); the application is in some way unlawful.
 - The LSB has now made four decisions on applications, all of which have been published on its website.

SRA Position

DM gave an overview of the SRA position. Key points included:

- The powers introduced under section 44D of the Act marks the first time that there has been a statutory basis for the SRA to impose financial penalties (of up to £2000). The powers also provide for written rebukes to be issued and to be published.
- The SRA has conducted thorough open consultation on its proposals and the only issue with the proposals that is still in contention is the Standard of Proof to be applied.
- After consideration of the modern approach of other regulators and House of Lords rulings, the SRA Board has taken a principled position to apply the Civil Standard of Proof in these rules. They do not agree that case law prevents this provided that there is "heightened examination" in more serious cases. The Board is unlikely to agree to row back from this position.

- The SRA consider that this is an internal issue but presents potential issues given the appeal route to the SDT, which uses a different Standard of Proof (the Criminal standard). The SRA believe that the SDT should adopt the civil standard and this could be dealt with by the SDT inserting the Civil Standard of Proof into its rules.

Roundtable Discussion

The discussion started with both the SDT and TLS each putting forward its response to the SRA position.

SDT response

- The SDT expressed its preference for the SRA rules not to deal with the Standard of Proof: an explicit Standard of Proof different to that of the SDT could give rise to appeals and challenges which would be potentially problematic.
- The SDT believe that they are bound by authority to use the Criminal Standard of Proof (*Re vs. A Solicitor, Campbell vs. Hamlet*). Therefore there is no reason to set out the Standard of Proof in the SDT rules.
- The SDT suggested that the SRA rules differentiate between 'regulatory breaches' (as opposed to professional misconduct) and were clear that the Civil Standard would only apply to the former. The SDT believe that regulatory breaches are less bound by the case law.

TLS response

- TLS consider there to be merit in considering the SDT's suggestion of making a distinction between 'regulatory breaches' and 'professional misconduct'.
- It was noted by TLS that solicitors find being found guilty of professional misconduct extremely distressing and that this would be exacerbated by publication of the finding. They consider that what are perceived to be 'regulatory breaches' do not carry the same moral connotation for solicitors.
- It was noted that TLS were disappointed by the failure of the SRA's original consultation to highlight the significance of the issues around the Standard of Proof. This has since been rectified by the SRA but it would have been preferable for this to have happened earlier.
- From a policy perspective, TLS stated that the SRA position was understandable. However, in the absence of primary legislation, all of those involved are bound to follow the law. The law says that the Criminal Standard should apply for disciplinary matters in relation to solicitors. The objections are therefore on a legal rather than public policy basis. It was noted that it would be foolhardy for the LSB to ignore the legal opinion of the Master of the Rolls.
- Overall TLS is hopeful that there is scope to get an agreed distinction between things that require proof beyond reasonable doubt and things that don't. They would welcome examples of regulatory matters which would be hampered by the Criminal Standard of Proof.

A general discussion followed covering several issues.

Distinction between regulatory breach and professional misconduct/disciplinary offence

- The SDT consider it to be unlikely that the SRA will be challenged if they use the Civil Standard of Proof on what could be termed 'regulatory breaches' in the rules. Solicitors are more likely to challenge the Standard of Proof on issues of professional conduct.
- The LSB queried the extent to which a distinction could be made on these lines and asked whether the distinction was actually about the risks to consumers, and therefore a scale of 'seriousness' of the particular breach.
- The SRA considered that there would be problems with drawing such a distinction as s.44D of the Act makes explicit reference to 'professional misconduct.'
- The LSB asked about whether such a distinction was technically possible given the case law that exists. If the law deems the Standard of Proof for solicitors to be the Criminal Standard, how can a distinction be made which allows the Civil Standard for certain types of 'regulatory breach'? TLS explained that the law applies explicitly to matters defined as 'professional misconduct' and therefore a distinction which allows for a different Standard of Proof could be drawn.
- The SRA considered that a scale of seriousness was more appropriate as to adopt the Criminal Standard for relatively minor offences would be disproportionate.
- The LSB questioned whether the distinction between a regulatory breach and professional misconduct was a legal distinction.

Silence on the Standard of Proof

- The SRA considered that its rules should clearly state the Standard of Proof that would be applied and therefore considered the SDT's suggestion that they stay silent on the Standard of Proof to be undesirable. This would not be transparent and clarity would be required as soon as the SRA needed to apply the rules.

Standard of Proof applied by other regulators

- The SRA highlighted that other professions, such as doctors and dentists, are now tried under the Civil Standard in disciplinary proceedings.
- The LSB asked whether other regulators make a distinction between regulatory breaches and professional misconduct. The group were not sure but it was noted by TLS that the Bar use the Criminal Standard (although this is almost wholly for what would be considered disciplinary issues).

Practical issues – SDT and SRA using different Standard of Proof

- The LSB asked whether it would be possible for the rules to go ahead as drafted and for fixes to be made along the way to address issues resulting from the SDT using a different Standard of Proof to the SRA.
- The SRA considered that if the rules were to go ahead with the SDT using a different Standard of Proof on appeals, this could cause problems. It considers however that the appellant body (SDT) should therefore use the same standard. This could be managed by a rule change for the SDT which would allow a different Standard of Proof for appeals than is used by the SDT in other types of cases.
- The SDT considered that if the rules were to go ahead as drafted it would cause problems for them. The SDT felt that these issues could possibly be alleviated if the distinction between 'regulatory breach' and 'professional misconduct' was made. However, they would need to consider their position fully in the light of the position reached by the Board on the SRA application.

Number of Appeals

- TLS considered that there were unlikely to be a large number of appeals due to the cost of taking a case to the SDT and the possibility of a higher penalty from the SDT ruling. However, it was noted that publication by the SRA may lead to more appeals. It was noted that the Master of the Rolls decision not to agree the rules was focused on the appeal issue.
- The LSB queried whether the passing of the Act has changed the basis on which the Master of the Rolls had made his decision. TLS considered that it had not and that this was exactly the basis upon which the advice was given.
- In response to a question from the LSB, the SRA confirmed that publication of decisions would be on a case by case basis.
- There was some discussion as to the basis for appeals, i.e. would it be a rehearing or a review of the SRA decision making process. It was agreed that this is a matter for the SDT rules.

Impact on the SDT and next steps

- TLS commented that the SDT would need to know what it is planning to do before the rules are introduced. Alternatively there may need to be a time gap to allow the SDT to react and complete necessary rule changes.
- The SDT said it was difficult to predict how it would respond to the SRA's rules at this stage as it would need to look at the SRA rules once finalised and decide how to react. It was noted that the SDT could potentially operate on a procedural basis.
- It was noted that SDT rule changes would require LSB approval.

LSB Sum up

CK closed the meeting by explaining next steps and the LSB's timescales for considering the application.

- The LSB is currently working on the assumption that its full Board will make the decision at the end of April and committed to informing attendees if this date changes.
- CK asked that attendees, should they have anything further to add to the discussion, to do so as soon as possible to allow the LSB time to consider.
- It was agreed that a note of the meeting would be circulated for accuracy before being posted on the LSB website.