Society of **Black Lawyers**
the pursuit of equality in justice

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15 March 2012

BY EMAIL

Dear Mr. Kenny

Equality Duty Objectives for 2012-13

The Society of Black Lawyers (SBL) welcomes the opportunity to comment on the Legal Services Board's proposed equality objectives for 2012-13.

Overall, the SBL is broadly in favour of the proposed objectives and we understand the rationale for not changing the objectives too radically.

For the last 18 months, the SBL has been investigating allegations of inequality and disproportionality on the part of the Solicitors Regulation Authority (SRA) in its treatment of Black, Asian and minority ethnic (BAME) solicitors. We attach a report of our preliminary findings and areas of concerns as part of our response to your consultation on the LSB's equality objectives for 2012-13.

Inherent in the equality duty, which all approved regulators must meet, is the issue of transparency and accountability. As you will see from our 'Breaking the Silence' report, the SBL is particularly concerned about the way in which the SRA carries out its regulatory, investigative, prosecution and adjudication (RIPA) functions. Holding the SRA accountable in real terms appears to be a significant issue. Further, we cannot see how the SRA can

play a meaningful role in fostering a 'more diverse workforce' within the legal sector generally (and within the solicitors' profession particularly), when the diversity profile of their own staff, particularly in relation to African and Caribbean employees, remains so poor.

The LSB's equality objectives should include a review of the staff diversity profile of the approved regulators. It cannot be right that approved regulators should be allowed to preach about something, which they themselves ought to practice but in reality, do not.

The proposed objectives are silent on monitoring and holding accountable, the way in which approved regulators undertake their regulatory functions or activities. This, in our view is a significant omission, particularly in the case of the SRA. In 2006, and internal SRA report could not explain why ethnic minority solicitors were five times more likely to be investigated, suspended or struck off than their white counterparts. In July 2008, an independent investigation conducted by Lord Herman Ouseley into allegations of racism, discrimination and victimisation within the SRA found extensive evidence of institutional racism within the regulatory body.

In 2007, Asian solicitors comprised 5.5% of the professional population, yet were the targets of 18% of interventions. Black solicitors faced even starker disproportionality: at only 1.6% of the population, their professional lives were disrupted by 15% of the interventions. Lord Ouseley's report also revealed similarly biased statistics in other areas of SRA activity. It identified three primary factors contributing to these discriminatory effects:

- It noted that negative ethnic stereotyping played a perceptible role in discretionary decisions made by SRA personnel. BME solicitors were often assumed to be guilty, and consequently suffered the enormous burden of exonerating themselves.

- The report decried a multifaceted deficit of leadership within the SRA. The regulator had failed to take meaningful steps to address discrimination after a previous report documented the problem in 2006 and equality and diversity were addressed

superficially if at all. SRA staff seemed irritated and defensive, as if addressing discrimination were a nuisance to them. In the absence of positive and active leadership, the SRA had become an environment in which racial discrimination – whether the product of an individual employee's bias or in the form of institutional predisposition – could flourish unchecked, carelessly destroying lives in the process. Ultimately, the Lord Ouseley found that both the SRA's outcomes and its operation left it "open to the potential charge of institutional racism."

- The SRA targeting of solo practitioners and small firms. In 2007, all of the SRA's interventions were into firms with four or fewer partners. Since the majority of BME solicitors practice in small firms, they are more likely to face investigation and intervention. In contrast, the large and predominantly white "Magic Circle" firms enjoy virtual immunity from regulation because the SRA has neither the expertise nor the clout to surmount the considerable defensive resources available to such large firms.

The SBL believes that there has been little change in the SRA's behaviour and that it is falling short of its equality duty and the principles set out in Section 28(3) of the Legal Services Act 2007. We would very much welcome an opportunity to meet with you in order to discuss our concerns and the 'Breaking the Silence' report in more detail.

I look forward to hearing from you.

Yours sincerely,

D. P. Herbert

Peter Herbert OBE
National Chair

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Breaking the Silence:

Who is regulating the regulator?

Preliminary findings and case studies on inequality, disproportionality and alleged wrongdoing by the Solicitors Regulation Authority

March 2012

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The Society of Black Lawyers (SBL) is the oldest organisation of African, Asian and Caribbean lawyers, jurists, legal executives and law students in the United Kingdom. Founded in 1969 by Sibghat Kadri QC and the late Rudy Narayan, the SBL is also a civil rights advocacy organisation, which exists to:

- Promote equality and diversity within the legal profession;
- Act as a representative and strategic voice for ethnic minority lawyers, legal executives, law students and academics; and
- Campaign to improve access to justice and quality legal services for ethnic minority and disadvantaged communities.

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Introduction

1. For the last 18 months, the Society of Black Lawyers (SBL) has been engaged in an on-going dialogue with ethnic minority solicitors about their experiences of dealing with the Solicitors Regulation Authority (SRA). Our enquiries and research in this particular area has intensified as an increasing number of solicitors, of all ethnic backgrounds, have begun to share their personal and professional experiences with us about the way in which the SRA has been carrying out its regulatory, investigative, prosecution and adjudication (RIPA) functions.

2. The SRA claims that it is "committed to setting, promoting and securing in the public interest, standards of behaviour and professional performance necessary to ensure that consumers receive a good standard of service and that the rule of law is upheld."[1] However, we have found a number of common themes running through the cases that have been reported to us by solicitors, namely:

    - A consistent failure on the part of the SRA to disclose information in their possession, which directly undermines the case that they are bringing against the accused solicitor;

    - Instances of the SRA making allegations against solicitors, particularly in relation to interventions[2] or where dishonesty is being alleged, which their investigators and caseworkers knew or ought to have known, were either unjustified or unsubstantiated;

    - The SRA's intervention power, which is derived from the Solicitors Act 1974 (as amended),[3] is without parallel in any other area of English law. In over 70 years since the power was introduced, there have been more than 5,000 interventions and several challenges to these interventions in the courts. Only one challenge has ever been successful[4], and this was later overturned on appeal[5]. The SBL is of the view that reform is needed. In particular, the eight day limitation period within which solicitors must commence proceedings to challenge an Intervention Notice

[1] Solicitors Regulatory Authority, Annual Report 2009-2010
[2] An intervention by the SRA closes a law firm with immediate effect.
[3] http://www.legislation.gov.uk/ukpga/1974/47/schedule/1
[4] Sheikh v, The Law Society of England and Wales [2006] EWCA Civ 1577; (2006) 103(47) LSG 27
[5] Sheikh v Law Society of England & Wales, Court of Appeal - Civil Division, November 23, 2006, [2007] 3 All ER 183,[2006] EWCA Civ 1577

is so short a time as to be unreasonable. It precludes effective access to the courts and the right to a fair trial.

- Inconsistencies in the internal decision-making process within the SRA in relation to ethnic minority solicitors when compared to white solicitors. The SBL has identified cases where for example, forensic investigation reports (FIRs) have found clear breaches of the Solicitors Accounting Rules (SAR) and anti-money laundering rules in the case of a white solicitor and yet case officers only recommended a reprimand and failed to refer the matter to the police. There is evidence, which suggests that the solicitor was afforded a great deal of leniency by the SRA because they needed him to give evidence in their case against an ethnic minority solicitor.

- Questions arising from the role of the Solicitors Disciplinary Tribunal (SDT) and whether it is in fact impartial, independent and transparent. We are aware of one instance in which the chairman of the SDT was forced to recuse himself from presiding over a case due to a clear conflict of interest between his professional conduct in private practice and his involvement as a member of the SDT in deciding the case;

- The SDT rarely grants applications by accused solicitors for an adjournment of proceedings, even when the solicitor is tied up in separate litigation with the SRA in the courts. Obtaining disclosure from the SRA via the SDT and the courts appears to be an equally mammoth task. Disclosure is a vital procedural tool, which enables the accused solicitor to properly defend him/herself and to have a fair trial. However, the SBL has found that the SDT and the courts invariably reject most applications made by accused solicitors for disclosure of documents by the SRA. In addition, despite the introduction of the Freedom of Information Act 2000, which came into force in January 2005, the Act does not yet apply to the SRA or its parent body, the Law Society of England and Wales. The Law Society's Freedom of Information Code of Practice[6] specifically excludes the release of documents or information relating to specific investigations, disciplinary cases or applications arising from its regulatory role. The SBL believes that this is inconsistent

[6] http://www.lawsociety.org.uk/documents/downloads/foicode.pdf

with the SRA's duty under the Legal Services Act 2007 to protect and promote the public interest.

- An 'inequality of arms' exists between accused solicitors and the SRA, with legal representation being a real and significant issue for accused solicitors, both before the SDT and the courts. 90% of all SDT cases are instigated by the SRA, which always has legal representation. The SBL has found that accused solicitors are appearing before the Tribunal without legal representation because their insurers are refusing to meet these costs. In relation to those solicitors that have been fortunate enough to obtain representation, we found that a significant number had received a woefully inadequate service. Stories of accused solicitors being left 'high and dry' at the door of the Tribunal by their representatives were not uncommon and many representatives were reluctant to put up a robust defence of their clients against the SRA for fear that a vigorous performance at the SDT would attract unwelcome attention from the SRA to their own practices.

- The SRA is represented by only a handful of solicitors and Counsel. It is, to all intents and purposes, a very small and exclusive club, lacking in transparency, accountability and diversity. The SBL believes that all the individual solicitors who are instructed by the SRA to prosecute cases on its behalf are exclusively white. Further, when one looks more closely at the diversity profile of the panel firms, it is even more telling. As at 13 October 2011, the 15 firms on the SRA's prosecuting panel employed 1009 solicitors (or 'regulated professionals') in total. Of these, only 46 (5%) were Asian and 6 (1%) were Black. We have been told that 5 of the panel firms are signatories to the Law Society's Diversity and Inclusion Charter[7]. This fact provides very little comfort or reassurance as the figures clearly speak for themselves.

- The diversity profile of the SRA's own staff provides further insight. As at 17 September 2011, 10%[8] of the SRA's staff were of Asian or Asian British heritage. The percentage of Black or Black British employees at the SRA was 0.8%[9].

[7] http://www.lawsociety.org.uk/practicesupport/equalitydiversity/inclusioncharter.page
[8] 46 out of 608 employees.
[9] 5 out of 608 employees. 12 (2%) employees were of mixed heritage. 36 (5.9%) employees declined to state their ethnicity or ethnicity was unknown.

- We have found that the Judiciary, at all levels, appears to display a clear bias against solicitors who seek to challenge interventions or bring claims for race and/or religious discrimination or misconduct. The SDT is almost exclusively white, male and middle class, appointed as they are, by the Master of the Rolls - a position that has always been occupied by white men.

- A very limited number of Adjudicators and law firms have conduct of all SRA interventions and this has led to the development of a small group of firms who have a vested interest in protecting the status quo.

- The SRA will argue that it has embarked upon a series of initiatives, designed to improve the diversity and equal treatment experienced by Black, Asian and minority ethnic (BAME) solicitors, but there has been no change in the rate of interventions and disciplinary action experienced by BAME solicitors.

- The true cost to the SRA of defending legal actions brought by solicitors alleging discrimination and/or misconduct has been hidden from the profession. Win or lose, the SRA makes sure that targeted solicitors never get their costs back. If the SRA fails in one attempt to discredit and damage a solicitor, it keeps going until the targeted solicitor runs out of funding, or until the SRA finds something – no matter how trivial – ostensibly to justify its acts.

3. It is hard not to conclude that the SRA is institutionally racist and is not being held accountable for its actions. It has far worse rates of disparity of treatment than those found in police stop and search statistics across the country. As a regulator, it appears to be acting with impunity against solicitors in small practices and this is having a disproportionate impact on BAME solicitors. At the same time, the SRA steers clear of tackling the larger law firms, even when major breaches of the Solicitor Practice or Accounting Rules are brought to light.

4. Why should we be concerned about alleged wrongdoing and acts of discrimination by the SRA? The SBL believes that members of the legal profession are entitled to have trust and confidence in the body that has been established to regulate them. Section 28(3) of the Legal Services Act 2007 states that:

"[An] approved regulator must have regard to –

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed."

We believe that the SRA is falling short of the clear duty, which it has to carry out its RIPA functions in accordance with these principles. Moreover, we remain deeply concerned about the predatory nature of the SRA and its use of privacy orders, injunctions and civil restraint orders to silence those solicitors who take up the challenge to 'break the wall of silence' about SRA injustices because they believe that they have become its victims.

5. In his letter from a Birmingham jail in Alabama in April 1963, The Reverend Dr. Martin Luther King Jr wrote that 'injustice anywhere is a threat to justice everywhere'. Allegations of serious professional misconduct can destroy careers, reputations, families and lives. The SBL believes that solicitors facing such allegations should be afforded the same rights and safeguards as those members of the public who lawyers represent and defend within the criminal justice system every day. Anything less is an injustice.

Recommendations

1. An independent commission should be established to conduct a detailed and wide-ranging review of the way in which the SRA carries out its RIPA functions. In particular, the commission's terms of reference and work must include:

    - The ability to investigate issues and allegations of disproportionality, discrimination and misconduct on the part of the SRA;

    - A review of the intervention process and rules, with a view to reforming the process and ensuring that the rights of solicitors and their clients are properly protected;

    - A call for oral and written evidence from the legal profession and from former clients of intervened firms; and

    - The publication of a set of recommendations with implementation timescales for the reform of the SRA.

2. The SRA is not an independent body. It continues to operate as part of the Law Society of England and Wales. Immediate steps should be taken to establish the SRA as an independently constituted body, entirely separate from the Law Society.

3. Neither the SRA nor the Law Society are currently covered by the Freedom of Information Act 2000. Immediate steps should be taken by the Government and the Information Commissioner to rectify this.

Case Studies

SOLICITOR A

Solicitor A ran his own firm for 20 years until the SRA intervened in 2004 without warning, on the grounds of "reason to suspect dishonesty". The specific allegations were not put to him and he was given no opportunity to rebut them. Solicitor A also alleges that the SRA concealed almost 150 material documents in his case.

Many of the files examined by the SRA disclosed laudable or excellent work carried out by Solicitor A. For example, he had exposed fraudulent activity being committed against the Child Support Agency (CSA) and had prevented a mortgage fraud. Solicitor A had also heavily discounted fees or given low-income clients credit for several years, which enabled them to have legal representation. The SRA however, did not disclose this. Instead, Solicitor A alleges that he was falsely and dishonestly accused of overcharging and stealing from clients.

All Solicitor A's attempts to seek redress in the courts to halt and later set aside the intervention failed with the judge at a crucial hearing, refusing to even read the evidence, which proved that the SRA had behaved unlawfully. With no practice as a result of the intervention and no means of earning an income, Solicitor A ran out of funds and was unable to afford further legal representation. Ruined financially and his family life almost destroyed, Solicitor A suffered a nervous breakdown and was forced by the SRA to retire from the profession in 2009 due to his ill health. Now partially recovered, Solicitor A has issued a fresh claim against the SRA for Misfeasance in Public Office and breach of his Human Rights. A hearing is scheduled to take place in March.

SOLICITOR B

Solicitor B set up and ran a thriving legal practice where a significant part of his work was legally aided.

Some years ago there was concern over fraudulent legal aid claims/billing by a small minority of dishonest solicitors, particularly in the immigration field. The Legal Aid Board (LAB: now the Legal Services Commission) attempted to crack down on this. However, instead of investigating firms impartially and fairly, the LAB frequently attacked small firms at random.

In Solicitor B's case, they queried without justification a handful of his bills, out of a much larger number, and wrote a formal letter, which was copied to the SRA, disallowing his fees. A week later and without any communication or warning, the SRA intervened into Solicitor B's practice on the grounds of "reason to suspect dishonesty", the implication being that he was one of those dishonest solicitors milking legal aid. At most, the dispute between Solicitor B and the LAB was a genuine civil one, which should have been resolved by the LAB using well established procedures. Solicitor B followed those procedures, including appealing against the LAB's decision to disallow his bills. He won and when the LAB still refused to pay Solicitor B sought a Judicial Review of their decision and won. Eventually, the LAB admitted that their disputing of his fees was without any justification. Solicitor B then sued them for damages.

In the meantime, Solicitor B had issued a challenge against the SRA to the intervention. However, since Solicitor B no longer had a practice as a result of the intervention, he had no means of earning an income and eventually ran out of funds to fight his case. His challenge was struck out on the frequent ground used by the SRA that by then, there were no files left to hand back to the solicitor.

The LAB made an offer to settle Solicitor B's claim against them for damages, which was a fraction of the financial damage and loss that he had actually suffered. Now in his mid fifties, Solicitor B has lost his firm, a substantial income, all his capital and has no home of his own. All because of the reckless and unfounded allegations of the LAB, which were acted upon by the SRA who failed to carry out a proper investigation of the allegations in the first place.

SOLICITOR C

Solicitor C was the Principal Solicitor of his own firm. In 2008, Solicitor C discovered that an employee in his immigration department had misappropriated client monies whilst working at a previous firm. Solicitor C immediately reported the matter to the SRA. The employee was arrested by the police and later convicted and given a custodial sentence. Solicitor C cooperated fully with the police investigation and his assistance led to the conviction of the employee. However, whilst the police praised Solicitor C's efforts, the SRA took a different view.

Although the SRA investigated the conduct of the employee from the immigration department, it took no further action against the employee. However, unknown to Solicitor C,

the SRA had been following the actions of another employee, who was later arrested and charged with fraud. SRA undertook six investigations of the firm from 2008-2011, again Solicitor C co-operated fully. Within that three year period, the SRA compelled Solicitor C to take on two additional partners and imposed erroneous conditions on his Practising Certificate. Despite Solicitor C accepting these conditions, the SRA referred the matter to the SDT alleging "lack of supervision" of the two employees. The SDT suspended Solicitor C for one year and ordered that he never be a principal/partner of a firm again. He was also ordered to pay £20,000 costs. Solicitor C has lost over £250,000 to date due to the imposition of partners and increased insurance costs. He is challenging the decision in the High Court.

SOLICITOR D

In April 2008 Solicitor D joined a firm that unbeknown to him, the SRA had been investigating the Principal for two years. They caught him committing breaches of the rules over and over again - he had stolen client monies on an industrial scale. The SRA took no action for well over a year, enabling him to carry on stealing.

When Solicitor D became aware of what the Principal was up to, Solicitor D closed the firm, reported it to the SRA and called in the police. Solicitor D's reward was that nine months later, the SRA came after him and shut his own new firm, even though the new firm had nothing to do with the old one, and they knew that it was the Principal that had caused the losses. Solicitor D believes that as a result of the SRA's inaction prior to him joining the firm, over £250,000 of client monies were stolen by the Principal. The SRA's closure of the firm led to the loss of 30 jobs and the disruption of approximately 2,000 clients' cases.

Following the intervention, the SRA was unable to find even a hint of dishonesty against Solicitor D. They therefore brought an SDT case against him based on alleged minor accounting breaches. Solicitor D is a 42 year old married man with a 5 year old daughter. The effect on his family has been devastating as they have lost everything. Solicitor D is unable to secure employment within the profession and the SRA has released misleading statements to the press.

SOLICITOR E

Solicitor E established and built a thriving practice, which employed approximately 20 members of staff and had a turnover of at least £1 million. A significant proportion of the firm's income was derived from Legal Aid, although she also acted for international commercial clients.

During an SRA inspection, it was noted that on a few immigration files, junior members of staff had made mistakes on a few bills sent to Legal Aid Board (LAB), which resulted in the LAB being overcharged. However, Solicitor E had already discovered the mistakes and had notified the LAB, asking them to make an adjustment, i.e. deduct the overcharged amounts from her next periodic payment from the LAB to the firm.

Solicitor E informed the SRA's investigator of the discrepancy and the action that she had taken to rectify the matter. Despite this, the SRA intervened on the ground of "reason to suspect dishonesty", without warning, and without showing her the forensic investigation report first. The SRA concealed from its report (thus deceiving the Adjudication Panel which ordered the intervention) that the investigator had contacted the LAB prior to the intervention, and that the LAB had confirmed that Solicitor E had indeed informed them of the overpayment and the corrected amounts and they had absolutely no complaint.

Solicitor E lost her whole practice and suffered a nervous breakdown. Her staff were put out of work and clients prejudiced.

SOLICITOR F

Solicitor F was a partner in a practice that he was winding down, with view to retirement. The SRA inspected and then intervened in the practice on grounds of "reason to suspect dishonesty" without warning or showing Solicitor F their forensic investigation report first.

The SRA alleged that Solicitor F had taken money for fees without sending bills to clients. Solicitor F challenged the intervention and the SRA was forced to disclose that they had checked with some clients, all of whom had confirmed that they had received bills from Solicitor F. Therefore, the SRA had deliberately made a knowingly false allegation against the solicitor, destroying his reputation and practice in the process.

SOLICITOR G

The SRA intervened in Solicitor G's practice on the grounds of suspected dishonesty in relation to clients' accounts. However, no client monies were missing and in fact, the client account had a £20,000 surplus. The SRA also concealed its forensic investigation report from Solicitor G. The Intervention Panel, which was supposedly considered over 200 pages of evidence in 40 minutes, was staffed by SRA personnel.

At the High Court hearing in 2011 to set aside the Intervention, the High Court judge refused to consider evidence that proved that the SRA had behaved unlawfully. He ruled that it did not matter whether the SRA had behaved unlawfully. In October 2011, Solicitor G appeared before the SDT. As it routinely does, the SDT refused to order disclosure by the SRA and refused to allow an adjournment so that Solicitor G could obtain legal representation.

Jeremy Barnecutt, the current President and Chairman of SDT, chaired the SDT panel hearing the case, even though Solicitor G alleged that he had a serious personal and professional conflict of interest. It was only after Solicitor G made a forceful application for Mr. Barnecutt to recuse himself that he stood down. The other two panel members who had been appointed by Mr Barnecutt refused to recuse themselves. The SDT denied Solicitor G any opportunity to cross examine SRA witnesses or advance her defence. Solicitor G was suspended for one year and ordered to pay costs of £75,000. She has now commenced legal action against the SRA for race discrimination.

SOLICITOR H

The SRA brought 5 separate cases against Solicitor H in the space of 3 years, alleging conflict of interests because used his own marketing company to sell his own services.

Subsequently, David Middleton (Operations Director of the SRA) caught on tape admitting that SRA panels were a "rubber stamp". Former SDT President Anthony Isaacs, subsequently admitted on tape that he knew there was no conflict of interest, but that the SDT always acted 'in support of SRA'.

When Solicitor H sued the SRA in High Court, the judge ruled that the SRA's acts, however improper, were exempt from civil action.

During the SRA investigation, Solicitor H alleged that SRA officers including Mr Middleton, deliberately lied to a foreign attorney general about him: they lied that Solicitor H was suspected of fraud and tax evasion. They lied that they wanted papers belonging to clients – including American clients – located in that jurisdiction, for criminal prosecution purposes, giving an undertaking that they would only be used for those purposes. When these matters were brought before the SDT, Mr Isaacs ruled that none of this mattered and that the SRA could use the illegally obtained evidence.

In 2011, Solicitor H lodged a lawsuit in the California courts in the United States, against the SRA and its officers.
