SRA BOARD
15 January 2010

CLASSIFICATION – PUBLIC

Legal Services Act 2007 – SRA (Disciplinary Procedure) Rules
EXECUTIVE SUMMARY

Summary

1. This paper invites the SRA Board to decide on the appropriate standard of proof to be provided for in the SRA (Disciplinary Procedure) Rules, which govern the SRA's ability to impose sanctions in cases not referred to the Solicitors Disciplinary Tribunal (SDT). The Rules were made by the SRA Board on 25 June 2009 but the Master of the Rolls and the Lord Chancellor declined concurrence because of the standard of proof provision (rule 7(8)). The SDT and Law Society had expressed concern that the SRA rules would apply the civil standard but that the SDT would be bound to apply the criminal standard of proof when dealing with appeals from SRA decisions.

2. Attempts were made to reach a common position with the Law Society with a view to inviting concurrence on such a position, but they were unsuccessful. The rules as approved by the Board will need to be put to the Legal Services Board for approval.

Recommendations

1. To resolve in the public interest that the standard of proof in the Solicitors (Disciplinary Procedure) Rules should be the civil standard, in accordance with modern regulatory practice and the need to protect the public interest. (The full reasons for this are given in paragraph 22 of this paper.)

2. To amend the Solicitors (Disciplinary Procedure) Rules as made by the Board in June 2009 by removing rule 7(8) and replacing it with:

   "The standard of proof shall be the civil standard."

3. To further amend the rules to show a commencement date of "[1 March 2010 or the first day of the month following the approval of the Legal Services Board, whichever is the later]".

4. To agree that the rules as amended be submitted to the Legal Services Board for approval.

5. To agree that, as a matter of public policy, the appropriate standard of proof before the SDT should also be the civil standard.

6. To consider as an interim measure the procedural solution set out in paragraphs 35 and 36.

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Annexes

Annex 1	**SRA (Disciplinary Procedure) Rules**
Annex 2	**Schedule of the standard of proof applied by other regulatory bodies – prepared by Capsticks LLP**
Annex 3	**Letter from SDT**
Annex 4	**Extract from SRA skeleton argument in Richards v The Law Society (Solicitors Regulation Authority)**
Annex 5	**Correspondence following the SRA Board's decision to make the SRA (Disciplinary Procedure) Rules [2009], subject to the necessary concurrences**
Annex 6	**Correspondence between David Middleton of the SRA and Russell Wallman of the Law Society**

Author David J Middleton
Date 4 January 2010
This paper is for policy decision

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Legal Services Act 2007 – SRA (Disciplinary Procedure) Rules

1. The Legal Services Act 2007 provided new powers which when in force enable the SRA to make findings of breach of regulatory obligations or of professional misconduct and impose a written rebuke and a penalty of £2000. These could be ordered together. Either may be the subject of publication in the public interest.

2. An order to pay a penalty can be appealed as of right to the SDT. A written rebuke can only be appealed if it is to be published. A decision that a penalty or rebuke should be published can itself be appealed to the SDT). The new powers are inserted as sections 44D and 44E of the Solicitors Act 1974.

3. In dealing with an appeal, the SDT has its full powers available. In theory, a solicitor who appeals against a rebuke could be struck off. This might operate as a disincentive to the pursuit of appeals.

4. Section 44D(7) *requires* the SRA to make rules:

   a) *prescribing* the circumstances in which we may decide to issue a written rebuke or order payment of a penalty

   b) *about* the practice and procedure to be followed in relation to such action

   c) *governing* the publication of decisions to impose a written rebuke or fine.

5. SRA Board made the disciplinary rules on 25 June 2009: **Annex 1**. At the time, the concurrence of the Master of the Rolls and Lord Chancellor was required. Following a submission from the Law Society, the MR and the Lord Chancellor declined concurrence because of one provision – rule 7(8) which states the standard of proof to be applied in SRA decisions.

6. Essentially the SRA Board's view was that the civil standard of proof (the balance of probabilities) is consistent with modern regulatory practice. During consultation, the Solicitors Disciplinary Tribunal stated that it applies the "quasi-criminal standard of proof" (beyond reasonable doubt) and that it is bound to do so as a matter of law. Whilst it would in principle be possible for the SRA and SDT to apply differing standards of proof to conduct of different levels of seriousness, two factors are relevant to the SDT's concern:

   A. If it is bound as a matter of law to apply the criminal standard, when dealing with appeals, the SDT will have to apply a different standard to that applied in the first decision by the SRA;

   B. While it may be argued that because the SRA has statutory power to set the appropriate standard of proof for its decisions the SDT should simply apply the same standard, this is complicated by the ability of

the SDT to impose a higher penalty, including suspension and strike off.

7. To try to accommodate the SDT's concerns, the Board had amended rule 7(8) from a simple balance of probabilities test to the wording that can be seen in **Annex 1** namely:

   "The standard of proof shall be the civil standard except where the allegation is tantamount to a criminal offence when it shall be beyond reasonable doubt."

8. After the MR invited the SRA Board to reconsider its position, it decided in effect to maintain the above wording.

9. The issues for the new Board are:

   A. What standard of proof should be stated in the rules? The options include:
      - The current wording;
      - Reversion to the simple civil standard;
      - Adoption of the criminal standard – "The standard of proof shall be beyond reasonable doubt";
      - Variation of the current wording by maintaining a prima facie civil standard with additional exceptions such as that express allegations of dishonesty must be proved beyond reasonable doubt – further details are provided below.

   B. If the Board considers that the civil standard is appropriate (with or without exceptions), does it wish to seek the LSB's approval to that now in view of the potential inconsistency problem? There would be a risk of delay in implementation whilst the LSB presumably engaged with the SDT and/or Law Society. Alternatively, does the Board wish to adopt an interim solution of effectively applying the same test as the SDT whilst engaging with the LSB and others to achieve a common position in the longer term?

The standard of proof in regulation

Other regulators

10. Capsticks Solicitors LLP were asked to undertake research and a schedule of the standard of proof applied by regulatory bodies appears as **Annex 2**. As the Board will see, there is a clear trend towards applying the civil standard. This approach has also been encouraged by the Government as evidenced by the Health and Social Care Act 2008 which made provisions for the civil standard of proof to be used in all fitness to practise hearings for all health and social care regulators. A previous Board member drew attention to the fact that the Regulatory Enforcement and Sanctions Act 2008 enables Ministers to give regulators the power to impose fixed financial penalties using the criminal standard of proof, but that applies to matters which would otherwise be dealt with by prosecution in the criminal courts and, in our view, is not analogous.

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Solicitors

11. The SRA and its predecessors have expressly applied the civil standard to internal decisions for many years. The standard was applied flexibly in accordance with case law at the time. So far as can be recalled, there was no legal challenge to this such as by way of judicial review. Internal findings of misconduct have not however involved the imposition of financial penalties or publication of the decision.

12. The SDT's reasons for its concern about the civil standard are contained in its letter at **Annex 3**. Similar points were made by other consultees but for the moment the significance of the SDT comment is its view that it is "currently obliged to apply … the quasi criminal 'beyond reasonable doubt' test". That is not accepted by the SRA and an attempt was made in *Richards v SRA* (2009) [1] to argue that the correct standard is the civil one. On the facts, the court declined to deal with the issue. Advice from leading counsel is provided for the Board with a confidential paper and a detailed exposition will not be attempted here.

13. It is also relevant to note that whatever the common law position may be, the SDT could and arguably should specify the standard of proof in its rules. Rules the SDT makes are now subject to the approval of the LSB under section 178 of the Legal Services Act 2007.

14. Essentially, the SDT is bound to apply the criminal standard where "what is alleged is tantamount to a criminal offence" in view of the case of *Re A Solicitor* [1993] QB 69 in which Lord Lane CJ stated:

> "It seems to us, if we may respectfully say so, that it is not altogether helpful if the burden of proof is left somewhere undefined between the criminal and the civil standard. We conclude that at least in cases such as the present, where what is alleged is tantamount to a criminal offence, the tribunal should apply the criminal standard of proof..."

15. The Board may find that the extract from the SRA's skeleton argument in *Richards v SRA* attached as **Annex 4** provides a useful overview of the standard of proof issue and the relevant case law, although in the event the court declined to deal with the issue. The judgment includes the following about the standard of proof:

> "there is a curious difference of view on this point between the Law Society and the Solicitors' Regulation Authority, to which end the Law Society was permitted to intervene in this appeal. The Law Society maintains that the appropriate standard of proof in solicitors' disciplinary proceedings is the criminal standard. The Solicitors Regulation Authority maintains that it should be the civil standard. At the outset of the hearing yesterday we declined to hear argument on this point… Further, Mr Dutton Queen's Counsel for the Solicitors' Regulation Authority came close to accepting -- although he was not allowed to argue the point completely -- that this court is bound by the decision of this court presided over by Lord Chief Justice Lane in *Re A*

[1] [2009] EWHC 2087 (Admin): http://www.bailii.org/ew/cases/EWHC/Admin/2009/2087.html

Solicitor (1993) QB 69, as considered and applied by the Privy Counsel in *Campbell v Hamlet* (2005) 3 All ER 1116. Insofar as these two authorities might arguably leave some minor room for manoeuvre in cases where the alleged misconduct does not have criminal overtones, that is better debated and decided in a case where the standard of proof makes a difference, and probably in the House of Lords. We strongly doubt whether the House of Lords would give leave for appeal in this case for the very reason that the debate is academic."

The Law Society, the Master of the Rolls and the Ministry of Justice

16. Following the Board meeting in June 2009, correspondence between the SRA, MR, the Ministry of Justice and the Law Society failed to resolve the issue. The correspondence is at **Annex 5.**

17. David Middleton then met the Law Society's Director of Government Relations, Russell Wallman to try to reach a common SRA/Law Society view on this issue, with the possibility then of an approach to the SDT. Relevant correspondence is attached as **Annex 6**. The outcome of discussion was that the SRA would produce a re-draft, reflecting a position which the Law Society might be comfortable with. This was not intended to reflect the SRA's position as such. The re-draft is in paragraph 15 of a discussion paper prepared for the Law Society by David Middleton (**Annex 6, p3-8**):

    "The standard of proof shall be the civil standard save for the following which must be proved beyond reasonable doubt:

    a) An express allegation of dishonesty

    b) An allegation which does not involve dishonesty but which is otherwise tantamount to a criminal offence and which if proved is likely to result in the regulated person being struck off or suspended".

18. The Law Society response of 30 November 2009 is at **Annex 6, p9-10** and suggests that the "beyond reasonable doubt" test should apply where there is:

    - an express allegation of dishonesty;
    - an allegation which does not involve dishonesty but which if proved is likely to result in the regulated person being struck off or suspended;
    - an allegation which is likely to lead to a condition on a Practising Certificate which will substantially affect the solicitor's ability to practice.

19. The letter also raises the possibility of the rules being silent on the standard of proof.

20. There are difficulties with the Law Society position. Firstly, the reference to practising certificate conditions is inappropriate and mixes specific disciplinary findings and sanction with separate, usually risk-based controls. Secondly, as noted above, the SDT considers itself bound to apply the criminal standard when the allegation is tantamount to a criminal offence. Subject to the SDT

making a rule about the standard of proof, the SRA agrees. That is why the phrase was added to the draft rules. The phrase is not in the draft provided by the Law Society and the redraft would lead to inconsistency.

21. The suggestion that the rules be silent on the standard of proof is unlikely to be acceptable. Failure to provide for the standard of proof in rules is non-transparent and leads to the unnecessary legal dispute, uncertainty and cost. Also, the first case to be decided under the new rules will require the application of a standard of proof of some description and silence is of no assistance. Indeed, it would be necessary for a decision to be taken separately as to the appropriate standard of proof and it would be arguably improper to do so without including it in the rules.

Public policy

22. There is little doubt that the trend in regulatory matters is strongly to a civil standard of proof. It is also applied in police misconduct cases and by the Financial Services and Markets Tribunal. The reasons for this policy approach generally and in relation to the limited fining powers of the SRA include:

A. Disciplinary proceedings are protective and regulatory – liberty is not at stake;

B. The criminal standard of proof is not appropriate to relatively minor findings of misconduct;

C. Very serious cases that have a major impact on individual's lives, businesses and livelihoods are taken every day in civil cases by application of the civil standard of proof;

D. The civil standard is well capable of dealing with serious allegations by what the case law refers to as a need for "heightened examination", to "look closely into the facts grounding an allegation of fraud before accepting that it has been established" and "appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established";[2]

E. The SRA and its predecessor bodies have applied the civil standard of proof for many years;

F. While some may have views about the quality of internal decisions, overall the standard has been applied without significant difficulty or controversy;

G. Resolving cases by SRA internal decision is more timely and cost-effective for all concerned when compared to prosecuting at the SDT;

[2] The comments are all from Lord Carswell's judgment in *Re D* [2008] UKHL 33.

H. The SRA's increasing emphasis on regulation of firms and overall proportionality is likely to be facilitated by the new powers being exercisable;

I. Requiring the SRA to move from a "balance of probabilities" test to "beyond reasonable doubt" is likely to:

- Reduce public protection and/or increase public frustration with the disciplinary system;
- Result in many more referrals from the public and profession being rejected at an early stage because there is no prospect of proof to that standard or because it would be disproportionate to try to prove the allegation to that standard, which would impact on public perception of the ability of the SRA to regulate;
- Alternatively, result in a need for much more detailed, lengthy and costly investigation to prove allegations for the purposes of an internal sanction.

J. Although the new powers enable the imposition of fines up to £2000 and the publication of findings of misconduct resulting in a "rebuke", there is no inherent objection in principle to findings which lead to the exercise of such powers being reached by application of the civil standard of proof because:

   i. There is a statutory appeal as of right to the SDT against such findings or sanction;

   ii. The powers are relatively modest in that:

      1. They do not directly endanger a person's right to practise;

      2. The power to fine is low in itself – in comparison to the SDT's former power to fine £5,000 per allegation and its new power to levy unlimited fines;

      3. The power to fine is currently interpreted as being potentially a cumulative maximum rather than being exercised for each proved allegation.

23. This leaves the problem of the SDT applying a different standard of proof.

The SDT

24. The most desirable way for the overall issue to be resolved would be for the LSB, SDT, SRA and Law Society to agree a standard of proof to be applied in both the SDT and SRA, to be incorporated in the SRA rules that are the subject of this paper and added to the SDT rules. The features of this approach include:

A. It resolves any inconsistency;

B. It provides transparency both overall and where it is currently lacking in the SDT rules;

C. It is likely to take time because the SDT would presumably carry out a consultation exercise;

D. Agreement is unlikely if the SDT considers that it should apply the criminal standard in all cases;

E. Agreement may be possible if the SDT accepts (and the SRA Board agrees) a compromise position such as variations discussed with the Law Society as mentioned above, and which are brought together below.

25. It should be noted that some of the objections to the Law Society's suggested wording in its letter of 30 November 2009 fall away if the SDT is prepared to make a rule – for example, there would be no need to use the formulation "tantamount to a criminal offence" if a rule were made and the common law position effectively overridden.

26. One option for the Board would be to inform the LSB, SDT and Law Society that an agreed approach is desirable and that the SRA is prepared to discuss formulations such as those above and that it does not consider it appropriate to seek approval to rules until the issue has been resolved. The significant disadvantage in that approach is that the SRA's new powers and sanctions will not come into effect.

27. If the Board is strongly in favour of the civil standard of proof it may take a similar approach with a view to the process of discussion resulting in agreement that it is the correct standard to be applied. Alternatively, the Board could approve the rules with the wording it decides upon, to be submitted to the LSB. That in itself would presumably begin the process of discussion.

28. It is recommended that the Board focus on deciding its policy view on what the appropriate standard of proof should be regardless of the procedural difficulties, since that will then inform how to approach next practical steps. The primary options for the wording are:

A. "The standard of proof shall be the civil standard."

B. Current wording - "The standard of proof shall be the civil standard except where the allegation is tantamount to a criminal offence when it shall be beyond reasonable doubt."

C. "The standard of proof shall be the civil standard save that express allegations of dishonesty shall be proved beyond reasonable doubt."

D. "The standard of proof shall be the civil standard save for the following which must be proved beyond reasonable doubt;

(i) An express allegation of dishonesty;
(ii) An allegation which does not involve dishonesty but which if proved is likely to result in the regulated person being struck off or suspended.”

E. The standard of proof shall be the civil standard save for the following which must be proved beyond reasonable doubt;
(i) An express allegation of dishonesty;
(ii) An allegation which does not involve dishonesty but which is otherwise tantamount to a criminal offence and which if proved is likely to result in the regulated person being struck off or suspended.”

F. The SDT position – “The standard of proof shall be beyond reasonable doubt.”

29. The Board’s decision on this will inform the next stage. Options A, C and F would be the clearest to apply.

30. For internal SRA decisions, Option D has the same effect as Option C because the SRA has no power to strike off or suspend (in the current context).

31. Although Option B was developed to try to deal with the common law position it is not very satisfactory in view of the vagueness of the phrase “tantamount to a criminal offence” (and the proliferation of relatively minor offences in recent years). It would probably be workable if the SDT were to accept it as the right test as a matter of law (and that would involve the SDT accepting that it is not bound to apply the criminal standard in all cases).

32. The difference between options D and E is that the latter requires not only that the allegation may give rise to a striking off or suspension but that it *also* must be tantamount to a criminal offence. This has the added advantage that misconduct that could be characterised as tantamount to a criminal offence (a possible defence tactic to raise the standard of proof) would not be caught unless it would give rise to a striking off or suspension.

33. The clearest option that accommodates concern about serious allegations being proved to the criminal standard is option C because it leaves very little room for argument about whether the criminal standard should be applied or not. Serious allegations not involving dishonesty that would not be caught by option C but would be caught by a “tantamount to a criminal offence” test might include cases of violence. These would however still require “heightened examination” even when applying the civil standard of proof. It may also be fairly said that the consequences of a conviction for violence, such as imprisonment, are potentially much more serious than a disciplinary finding and that that difference is fairly reflected in a different standard of proof.

34. The various possible exceptions to the civil standard have arisen with a view to accommodating the SDT and Law Society’s concerns. If the Board considers that the proper standard of proof for disciplinary cases dealt with internally and at the SDT should be the civil standard, it would be appropriate

to decide on the simple civil standard and then seek to persuade others that the SDT should make a rule to like effect.

A procedural solution?

35. While it is not directly relevant to the Board's decision about the standard of proof to be provided in the rules, there may be a procedural answer to the problem of potential inconsistency. If there is reasonable consensus that the SRA's relatively modest powers to fine and rebuke could properly be subject to the civil standard of proof and the SDT accepted that it could apply the same standard in dismissing or allowing an appeal, the only issue arising would be the standard to be applied if the SDT was considering application of its stronger powers – to strike off, suspend or fine over £2,000.

36. It might be possible to devise a two-track procedural approach. Simple appeals would proceed for review on the civil standard of proof on the basis that they are a creature of statute and are distinguishable from cases by which the SDT is bound by *Re a Solicitor*. Cases in which the SDT, by its own motion or on the application of either party, considered that it might be necessary to increase the sanction would require application of whatever standard of proof were applied by the SDT in freestanding prosecutions. The procedural model to apply is perhaps evident from the extract from the CPR - a direction that instead of a review there would be a re-hearing, with oral evidence and/or other evidence that was not part of the SRA decision.

Recommendation

The Board is invited:

1. To resolve in the public interest that the standard of proof in the Solicitors (Disciplinary Procedure) Rules should be the civil standard, in accordance with modern regulatory practice and the need to protect the public interest. (The full reasons for this are given in paragraph 22 of this paper.)

2. To amend the Solicitors (Disciplinary Procedure) Rules as made by the Board in June 2009 by removing rule 7(8) and replacing it with:

    "The standard of proof shall be the civil standard."

3. To further amend the rules to show a commencement date of "[1 March 2010 or the first day of the month following the approval of the Legal Services Board, whichever is the later]".

4. To agree that the rules as amended be submitted to the Legal Services Board for approval.

5. To agree that, as a matter of public policy, the appropriate standard of proof before the SDT should also be the civil standard.

6. To consider as an interim measure the procedural solution set out in paragraphs 35 and 36.

SRA BOARD
15 January 2010

ANNEX 1

SRA (Disciplinary Procedure) Rules [2010]

Rules dated [the date of the final concurrence]

commencing [12 March 2010]

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 of and paragraph 14B of Schedule 2 to the Administration of Justice Act 1985, with the approval of the Legal Services Board.

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 an 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 an 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 SRA under section 9 of the Administration of Justice Act 1985;

(7) "registered European Lawyer" means a person registered by the SRA under regulation 17 of the European Communities (Lawyer's Practice) Regulations 2000;

(8) "registered foreign lawyer" means a person registered by the SRA 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, the Administration of Justice Act 1985 or the Courts and Legal Services Act 1990;
(f) a letter of advice from the SRA to the regulated person.

(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 sub-rule (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 if the SRA considers it to be in the public interest to do so.

(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 three 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 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 significant 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 professional or 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; and

(c) the third condition is that the act or omission by the regulated person which gives rise to the SRA finding was neither trivial nor justifiably inadvertent.

(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 the publication criteria in the appendix to these rules.

(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 Law Society or the SRA for the production of documents, information or explanations.

(3) Subject to sub-rule (4), the SRA may disclose any information or documents (including the outcome) arising from its discipline investigation:

(a) to an informant;
(b) to a regulated person who is under investigation;
(c) to any person in order to facilitate its investigation and in particular to identify and obtain evidence, comments or information;
(d) to other regulators, law enforcement agencies, or other persons in the public interest.

(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 sub-rule (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 sub-rule (1) or any other information within a time period specified by the SRA, which shall be no less than 14 calendar days from the request for an explanation 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 sub-rule (7), 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 regulatory and disciplinary history of the regulated person and of any other person that the SRA considers relevant.

(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 from the date on which the report has been sent to the regulated person.

(5) The regulated person will also be invited to make submissions on whether any decision which is made by the SRA, in respect of the matters in the report, should be published. Any such submissions must be made within a time specified by the SRA, which shall be no less than 14 calendar days from the date on which the report has been sent to the regulated person.

(6) 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. Any such comments shall be disclosed to the regulated person if they are to be included in the documents referred for adjudication.

(7) 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) by not providing to a person other than the regulated person whose conduct is to be considered the report or documents if they include information that is or might be subject to another person's right of confidentiality or privilege.

(8) The SRA may recommend an outcome or advocate a particular position in the report or otherwise.

(9) The report and comments received 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.

(10) The SRA is not required to adopt the procedure in rules 5 and 6 in order to make an SRA finding or an application to the Tribunal under rule 8 below.

(11) 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.

(12) Where the SRA dispenses with or varies the procedure or the time limits in accordance with sub-rule (11), 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) An 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) An 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 except where the allegation is tantamount to a criminal offence when it shall be beyond reasonable doubt.

(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 Tribunal is likely to order that the regulated person:

(i) be struck off;
(ii) be suspended;
(iii) be subject to an order revoking its recognition;
(iv) pay a penalty exceeding the maximum that can be imposed from time to time by the SRA; or
(v) 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 sub-rule (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 Law 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 all or any part of an SRA finding, a disciplinary decision or both.

(2) There is no appeal under this rule against:

(a) any decision other than an SRA finding or a disciplinary decision;
(b) a decision on an appeal; or
(c) an 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 longer 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 decided by a single adjudicator;
(b) where the decision was made by a single adjudicator, the appeal will be decided by an adjudication panel;
(c) where the decision was made by an adjudication panel, the appeal will be decided by a differently constituted panel.

(6) Appeals will be limited to a review of the decision which is being appealed, taking into account the reasoned arguments provided by the regulated person. Failure to provide reasoned arguments either at all or in sufficient or clear terms may result in summary dismissal of the appeal.

(7) All powers available to the SRA on adjudication are exercisable on appeal and for the avoidance of doubt this means that an appeal decision may include findings or sanctions more severe than those made or applied in the decision being appealed.

(8) 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.

(9) Subject to any rule made by the Tribunal pursuant to section 46(9)(b) of the Solicitors Act 1974, an appeal to the Tribunal by a regulated person must be made within 21 calendar days of the date of the letter or electronic

communication informing the regulated person of the decision or, if there has been an internal appeal, within 21 calendar days of the date of the letter or electronic communication informing the regulated person of that decision.

Rule 10 – Reconsideration

(1) The SRA may reconsider or rescind any decision including an 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 an 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.

(4) Nothing in these rules requires the SRA to commence or continue with any proceedings or prospective proceedings in the Tribunal or any other court or tribunal. A duly authorised person may rescind a decision to take proceedings in the Tribunal.

Part 5 – Publication and Commencement

Rule 11– Publication of decisions

(1) This rule governs the publication of details of a written rebuke or a direction to pay a penalty.

(2) Subject to sub-rule (4), publication in accordance with this rule:

(a) will include a short statement of the disciplinary decision including brief details of its factual basis and the reasons for the decision;
(b) will identify the regulated person;

(c) will take reasonable steps to avoid the publication of information relating to other identifiable persons;
(d) 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;
(e) will be in such form as the SRA may from time to time decide;
(f) may include provision of a copy of the publishable information upon request by any person;
(g) will be made promptly after the decision has been made, provided that the SRA may delay or withhold publication in the public interest.

(3) The SRA may vary or dispense with any of the requirements in sub-rule (2) in the public interest.

(4) 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.

(5) For the avoidance of doubt, the SRA may also publish information about other decisions or investigations.

Rule 12 – Commencement

These rules shall come into force on 1 August 2009 but shall not apply to any matters where the act or omission which gives rise to the SRA finding occurred wholly before these rules came into force.

SRA BOARD
15 January 2010

APPENDIX
Publication Criteria (Rule 3(2))

1. In deciding whether or not to publish a decision to give a regulated person a written rebuke or direct the regulated person to pay a penalty, the SRA will take into account all relevant circumstances including the following factors when relevant.

2. Each case will be decided on its own merits.

3. The following support a decision to publish:

   (a) the circumstances leading to the rebuke or penalty, or the rebuke or penalty itself, are matters of legitimate public concern or interest;

   (b) the importance of transparency in the regulatory and disciplinary process;

   (c) the existence or details of the rebuke or penalty will or might be relevant to a client or prospective client of a regulated person in deciding whether to instruct or continue to instruct the regulated person, or as to the instructions to be given;

   (d) the existence or details of the rebuke or penalty will or might be relevant as to how any other person will deal with a regulated person;

   (e) the seriousness of the finding against the regulated person;

   (f) the rebuke or penalty has been given to a regulated person who has previously been the subject of disciplinary or regulatory decisions whether private or published;

   (g) the rebuke or penalty arises from facts that affected or may affect or have affected a number of clients or other persons;

   (h) the rebuke or penalty arises from facts that relate to the administration of justice.

4. The following support a decision not to publish:

   (a) publication would disclose a person's confidential or legally privileged information;

   (b) publication would disclose a regulated person's confidential medical condition or treatment;

   (c) publication may prejudice legal proceedings or legal, regulatory or disciplinary investigations;

   (d) publication would involve a significant risk of breaching a person's rights under Article 8 of the European Convention on Human Rights;

(e) in all the circumstances the impact of publication on the individual or the firm would be disproportionate.

5. In deciding whether to publish, the SRA may also take into account:

   (a) the overall disciplinary and regulatory history of another regulated person when relevant;

   (b) whether any disciplinary or regulatory action by another body is being or has been taken against the regulated person.

6. The factors set out above are not exhaustive and do not prevent the SRA from taking into account other factors that it considers to be relevant.

7. The SRA will from time to time publish indicative guidance about the application of these criteria.

SRA BOARD
15 January 2010

Annex 2
Solicitors Regulation Authority:
Briefing Note on the Standard of Proof applied by regulatory bodies

Regulator	Standard of Proof	Comments / Source
Accountancy and Actuarial Discipline Board	"balance of probabilities"	Para 11 of the Scheme adopted by the Accountancy Investigation and Discipline Board on 13/5/04.
Bar Standards Board	"the criminal standard of proof when adjudicating upon charges of professional misconduct and the civil standard of proof when adjudicating upon charges of inadequate professional service"	Para 11(1) of the Disciplinary Tribunal Regulations 2009 (in force from 31/3/09).
Chartered Institute of Public Finance and Accountancy	"satisfied that any facts are more likely than not to be true"	Para 11.1 of the Disciplinary Regulations amended on 4/08/08.
General Chiropractic Council	"civil standard of proof"	Gage v GCC [2004] EWHC 2762 (Admin) at para 26.
General Dental Council	"balance of probabilities"	Para 57(4) of the GDC (Fitness to Practise) Rules 2006.
General Medical Council	"that applicable in civil proceedings"	Para 34(12) of the GMC (Fitness to Practise) Rules 2004 (as inserted by the GMC (Fitness to Practise) (Amendment relating to Standard of Proof) Rules 2008.

General Optical Council	"standard of proof applicable in civil proceedings"	Para 50A of the GOC (Fitness to Practise) Rules 2005 (as inserted by the GOC (Fitness to Practise) (Amendment in relation to Standard of Proof) Rules 2008.
General Social Care Council	"balance of probabilities"	Para 22(1) of Schedule 2 of the GSCC (Conduct) Rules 2008.
General Teaching Council	"that applicable to civil proceedings, namely the balance of probabilities"	Para 27(1) of the Disciplinary Procedure Rules 2008.
Health Professions Council	"civil standard of proof"	Referred to in the HPC Case Management and Directions Guidance. Para 10(b) of the HPC (Conduct and Competence Committee) (Procedure) Rules 2003 also provides that the rules on the admissibility of evidence are those that apply in civil proceedings.
Institute for Learning	"civil standard of proof, namely the balance of probabilities"	Para 28.1 of the Disciplinary Procedure Rules 2008.
Institute of Legal Executives	"proved beyond reasonable doubt"	Para 67(1) of the Investigation Disciplinary and Appeals Rules. Note though that we are aware that ILEX is shortly intending to move to the civil standard.
Nursing and Midwifery Council	"that applicable in civil proceedings"	Introduced for cases first heard after 3/11/08 by s.112 of the Health and Social Care Act 2008.
Royal College of Veterinary Surgeons	"satisfied to the highest civil standard of proof so that it is sure"	Para 23 of the Veterinary Surgeons and Veterinary Practitioners (Disciplinary Committee)

		(Procedure and Evidence Rules) 2004. Described in para 13 of the Disciplinary Committee Guidance issued on 19/12/07 as being "tantamount to applying the criminal standard".
Royal Institute of Chartered Surveyors	"balance of probabilities"	Para 42 of the Disciplinary, Registration and Appeal Panel Rules 2009 (in force from 1/4/09).
Royal Pharmaceutical Society of Great Britain	"the civil standard of proof"	Para 45(3) of the RPSGB (Fitness to Practise and Disqualification etc) Rules 2007.

NB: This Briefing Note does not purport to cover all regulatory bodies in the UK, but does include the larger organisations across a range of disciplines. ILEX is moving to the civil standard, so the Royal College of Veterinary Surgeons will soon be the only body in the Note applying the criminal standard.

John Witt
Capsticks Solicitors LLP
5th June 2009

SRA BOARD
15 January 2010

Letter from SDT dated 17 February 2009

The Solicitors Disciplinary Tribunal

Constituted under the Solicitors Act 1974

RECEIVED

19 FEB 2009

PETER WILLIAMSON

PJW/352

Mr. P. Williamson
Chair of the SRA Board
Solicitors Regulation Authority

DX: 19114 Redditch

17th February 2009

Dear Mr. Williamson

Draft SRA Disciplinary Rules

The Solicitors Disciplinary Tribunal ("SDT") is invited to respond to consultation required by Section 44D (8) of the Solicitors Act 1974 as amended by the Legal Services Act 2007. Section 44 D confers on The Law Society ("the Society") certain powers to impose penalties upon solicitors and employees of solicitors and make public that such penalties have been imposed. Penalties may include the imposition of fines up to a current limit of £2,000. Whilst the SDT in this response draws attention to what it thinks may cause some difficulties for the SDT in future, and which may impinge on its jurisdiction, it must also do so with a reservation that the views expressed can in no way bind the due exercise in future of any judicial decision. The consultation specifically relates to a draft entitled Draft SRA (Disciplinary Rules) [2009] which was published by the Solicitors Regulation Authority ("SRA") on or about the 1 December 2008 and which called for responses by the 23 February 2009.

SDT Responses

1 The SDT believes that this is the first occasion since 1974 on which disciplinary powers have been vested in the Society (and by delegation to the SRA) and the SDT therefore thinks it important to seek to ensure that the Rules themselves are not open to some challenge . The SDT is also anxious to ensure, so far as possible, that the SRA deal with low level breaches of the rules in an efficient and sensible process which does not increase the risk of findings by the SRA being appealed to the Tribunal. This would defeat the purpose of introducing such procedures in the first place and lead to increased cost and doubtful public advantage.

2 The proposed disciplinary procedures of the SRA, for understandable and good reasons, will usually be decided on paper and the SRA is the maker of the rules of conduct, the investigator of breaches, the prosecutor of breaches and the body which determines penalties. Such a procedure certainly insofar as it relates to a finding of professional misconduct must, so it seems to the SDT, engage common law principles of fairness of process and compatibility with

the Human Rights Act. A right of appeal against a finding of the SRA to the SDT is therefore necessary to ensure the validity of the SRA procedures. Whilst it may not be immediately necessary to determine this question, it is the SDT's view that such an appeal would require a re-hearing in public with at the least the opportunity for a Respondent to put forward his arguments to the Tribunal orally if necessary, the more so in any case involving an allegation of professional misconduct as opposed to a simple breach of rules. The SDT must therefore express some doubt if a mere review by the Tribunal of an SRA decision would be sufficient to meet common law and HRA requirements.

3. It is a consequence of this view that the SDT believes it would be obliged in any re-hearing of the matter on appeal to apply the standard of proof which it is, by law, currently obliged to apply namely the quasi criminal "beyond reasonable doubt" test. It is not for the SDT to object to the SRA's decision that it should reach its conclusions on the basis of a balance of probabilities i.e. the normal civil standard of proof and the SDT would observe that, in proceedings which are very substantially fact driven, particularly in cases of breaches of the rules, there is usually little difference between the two standards of proof. For example, a transfer of client money in breach of the rules can usually be demonstrated as a fact. The position however in relation to an allegation of professional misconduct is more problematical and the standard of proof could be more critical. As a result, if the SDT is correct in its view that in order to be compliant with rules of natural justice and the HRA an appellant is entitled to a re-hearing, then the difference in the standard of proof between the two jurisdictions may provide encouragement to regulated persons to appeal in any case where there is no acceptance of the penalty; the more so if it is felt that publication of a finding which names the person is likely to be seriously damaging to the person's reputation and practice.

4 The SDT also thinks it is the case (and not contentious so far as the SRA is concerned) that the SRA is seeking to exercise its jurisdiction in relation to cases which are not sufficiently serious to justify reference to the SDT. This is important as it would be unfortunate if the SRA adjudicated on a matter and administered a low level penalty in circumstances where, in the public perception, the matter was serious and ought to have been adjudicated before the SDT. It is for this reason that the SDT has some considerable qualms about the formulation of conditions as to the exercise by the SRA of its jurisdiction. It would seem to the SDT much preferable that the powers set out in Rule 3 should be limited to circumstances where

(a) the SRA does not seek to exercise those powers in relation to trivial or justifiably inadvertent behaviour and

(b) the SRA is satisfied that the conduct is not sufficiently serious to justify a reference in the public interest to the SDT.

5 Also, as a matter of drafting, Rule 3 is not entirely consistent with Section 44D(1)(a). By providing in this Rule a list of nine categories of errant conduct, the SRA is providing grounds for objection which it would be much

better not to court. For example, it would be unsatisfactory that there should be some argument about whether or not a regulated person's conduct did or did not affect or have the potential to affect a vulnerable person or child or whether a matter was substantial, high value or high profile. None of these requirements is necessary for the conferring of jurisdiction on the SRA under Section 44D. Furthermore some of the matters set out under Rule 3(a) (i) to (ix) imply a seriousness which should require a reference to the SDT and not dealt with under the SRA's "in house" procedures.

6 In connection with publication of details of a written review or direction to pay a penalty it occurs to the SDT that it may be thought useful to incorporate a power to publish the facts of the case without identifying the regulated person, either in relation to a particular case or a number of cases. In Rule 11 consideration could be given to altering in paragraphs 11 (3) (e) and (f) the word "will" to "may".

7 In relation to Rule 3(2) the SDT considers that the SRA should have a duty to bring cases of serious professional misconduct (including serious breaches of the Rules which should be so regarded,) before the SDT unless, in the public interest, the SRA is satisfied that it is appropriate and proper to exercise its jurisdiction within the limits laid down by law. It is now well established that the reasonable period within which proceedings before the SDT should be initiated will normally commence on the date on which the reference to the SDT is made by the SRA. In order to forestall arguments not infrequently advanced before the SDT on this issue, it may be thought appropriate for the SRA to accept the obligation to bring proceedings before the SDT within a fixed short period of the reference subject to a right to apply to the SDT ex parte for extension of the period. The SDT of course acknowledges its own obligation to comply with the requirement that cases are heard within a reasonable period.

Further matters for consideration:

(i) In Rule 5(2)(b) and 5(3) the distinction between the "explanation" and "other information) is obscure

(ii) In Rules 5(3) and 6(4) should it say "within 14 days from the request for an explanation".

(iii) In Rule 6(5) we have some concern that the SRA can rely on recommendations not included in the report or comments of third parties which under Rule 6(6) are not disclosed to the regulated person. Should not the SRA obtain the consent of any person to disclose comments and their source and any necessary waiver of privilege or confidentiality? Should such consent not be obtained can it be justifiable to rely on comments of which the regulated person is unaware?

(iv) In Rule 6(7) disclosure of the Report should we think be the invariable practice unless the circumstances for withholding disclosure are specified in the Rules

(v) Rule 6(10) – similar comment to 4 above. The SRA should not, we think, be entitled to disregard its proposed procedures because it believes it is acting justly or in the public interest. It would be preferable to follow its normal procedures unless it has exceptional specified reasons for not doing so.

(vi) As noted above the SDT considers that the SRA should have a duty to bring cases before the SDT if the conditions in Rule 8(1)(b) are met unless it would not be in the public interest to do so. The SDT questions the desirability of a code contemplated in paragraph 8(2) which is not incorporated into the Rules. This Rule could also deal with an appeal to the SDT from a decision under the SRA's procedures by requiring the regulated person to initiate an application before the Tribunal within say 28 days of the SRA decision or if relevant the determination of any internal appeal under Rule 9. Alternatively the SDT could deal with this by way of a practice direction or in its own procedural rules with the approval of the Legal Services Board. As Rule 9 now only deals with internal appeals it is suggested that Rule 9(6) if not incorporated into Rule 8, should be a separate Rule.

(vii) Rule 9. There are arguments both ways for an additional internal appeal but it will still not satisfy a requirement for an independent and impartial adjudication and on balance (and specifically in answer to question 5 of the consultation) the SDT would favour there being no internal appeal which may add unnecessary cost for both the accused and the SRA, and potentially for the SDT

(viii) In Rule 10 is it the case that reconsideration can lead to an alteration to the decision which is adverse to the regulated person? If so, we think this may need to be made clear

(ix) Rule 11 – the drafting is somewhat confusing and ought we think to state that the decision to publish must be based on clear and justifiable grounds stated in the Rules rather than in a policy document which may from time to time be altered. This is particularly important because of the damage which is potentially done to the reputation of the regulated person and his practice and the financial consequences that may follow. Possibly publication should be limited to cases where there is an express finding of serious professional misconduct rather than a mere rule breach. The SDT of course acknowledges the argument that publication is desirable in the interests of transparency, though it could also be argued that publication should not be seen as some additional penalty to be imposed on the regulated person and the damage done by publication may deprive the public of the services of someone who may have breached a Rule but whose legal competence is not in question. Because publication may have serious consequences for the regulated person, it does seem likely that the SRA's decision to publish could often be a reason for its decision to be appealed. Perhaps the seriousness of the misconduct needs to be defined in the Rules as a justification for naming and shaming rather than the SRA relying on its decision that to do so would be in the public interest and proportionate of which it would be the sole judge.

(x) Also in Rule 11 paragraphs (3) and (4) appear to be inconsistent and it would seem preferable that (3) should be followed but with derogation in specified circumstances.

(xi) Does there need to be a definition of "duly authorised person"?

The SDT would answer the specific questions in paragraph 11 of the Consultation Paper as follows:

1 Yes, subject to the above comments
2 Yes to the extent suggested above (see 3 and 4 above)
3 A matter for the SRA to decide
4 Yes as suggested in comment under Rules 8 and 9
5 We have mixed views and must leave the decision to the SRA
6 No comment
7 No

Yours sincerely

Mrs S. C. Elson, MBE
Clerk

SRA BOARD
15 January 2010

EXTRACT FROM THE SKELETON ARGUMENTS IN RICHARDS V THE LAW SOCIETY (SOLICITORS REGULATION AUTHORITY)

G. STANDARD OF PROOF

1. By Ground 6 of his appeal Mr Richards maintains that the Tribunal was wrong to apply the civil standard and to state that the test it applied would be indistinguishable from the criminal standard. The SRA makes three points in response:

   (1) The correct standard of proof in proceedings before the Solicitors Disciplinary Tribunal, and in any event in proceedings involving allegations of the sort actually in issue in this case, is the civil standard. The Tribunal was therefore correct in directing itself to apply this standard; however it misdirected itself by concluding that it should apply this standard to such a high level as to make it indistinguishable from the criminal standard. Nevertheless, this misdirection was actually favourable to Mr Richards and therefore does not provide any basis for his seeking to disturb the Tribunal's decision on this appeal.

   (2) If, contrary to the above, the Tribunal was wrong and the criminal standard applied, the Tribunal's error lay only in nominally mischaracterising the proceedings as "civil" rather than "criminal"; in substance the Tribunal applied the criminal standard, in that it applied a standard "*indistinguishable*" from it (see Tab 7, ¶154, p. 21). The misdirection was therefore technical only and does not provide any basis for disturbing the Tribunal's decision.

   (3) In any event, Mr Richards has not identified (either in the Grounds of Appeal, within his Skeleton Argument or Supplementary Skeleton Argument,) any findings of fact which he maintains could have been affected by any misdirection concerning the standard of proof. As above, the facts were largely agreed and/or a matter of documentary record and the task of the Tribunal lay principally in the <u>interpretation</u> of those facts; a task to which the standard of proof does not apply.

2. It is submitted that points (2) and (3) are conclusive and, once accepted, do not require the Court to enter into point (1), or to express a view as to the standard of proof. Nevertheless, since the issue has been raised by Mr Richards, and since the direction of the Courts might assist the Tribunal, it is proposed to tackle the point in some detail.

3. Regarding the correct standard of proof, the SRA makes, in summary, the following points:

   (i) The authorities relied on by Mr Richards do not resolve the issue as to the standard of proof which is not the subject of any statutory provision or procedural rule and has not been authoritatively determined by the Courts.

   (ii) Proceedings before the Tribunal are civil not criminal in nature; this is an important distinction of substance and the starting point should be that the civil standard applies.

   (iii) Further, Tribunal proceedings have a protective, regulatory function which requires that a respondent's interests be balanced against those of the general public and of the profession as a whole. The civil standard correctly strikes this balance and, due to its flexibility, permits a tribunal to take proper account of the gravity of the allegations and the consequences for the solicitor were they to be made out.

   (iv) The civil standard is the correct standard of proof in modern regulatory proceedings; it is applied in a very significant number of other professional disciplinary tribunals and it would be anomalous if a different rule were to apply to legal professionals.

   (v) The argument that a different standard of proof should nevertheless apply to the most serious allegations requires re-consideration in light of recent authorities and the modern approach to professional regulation. To the extent that there is binding authority on this matter it is limited to the principle that where criminality (or conduct tantamount to it) is alleged, the criminal standard applies. No such allegations were made in the proceedings against Mr Richards.

4. These points will be taken in turn.

(i) There is no binding statutory or judicial authority applicable to this case

5. There are no statutory or internal procedural rules establishing what standard of proof applies before the Tribunal. The position therefore falls to be determined by the common law, albeit by reference to the distinctive nature and procedural features of Tribunal proceedings. By his Skeleton Argument Mr Richards relies on the following:

   (1) The speech of Lord Brown in Campbell v Hamlet [2005] 3 All ER 1116 at [16] – [21];

   (2) Comments in Cordery "On Solicitors", November 2007 (Issue 39) at J[2051] and

   (3) Comments in The Solicitors Handbook (2008) at para. 1424.

6. In addition he refers the Court to: Re B (Children) [2008] UKHL 35; and Re D (Secretary of State for Northern Ireland intervening) [2008] UKHL 33.

7. The case of Hamlet concerned an appeal to the Privy Council arising out of disciplinary proceedings against a solicitor in Trinidad and Tobago. One of the issues on appeal was whether the disciplinary tribunal had applied the correct standard of proof to the allegations.

8. Lord Brown (who delivered the advice of the Privy Council), stated (at ¶16) that he entertained "*no doubt*" that the criminal standard was the correct standard to be applied in all disciplinary proceedings concerning the legal profession. In support of this conclusion he placed reliance on a line of authority concerned not with disciplinary proceedings, but the making of various restrictive orders (*viz.* sex-offender orders, football banning orders and anti-social behaviour orders), in which the seriousness of the matters in issue had been cited as justifying the application of the criminal standard.

9. Lord Brown also considered (at ¶20) the case of Re A Solicitor [1993] QB 69 where the Court of Appeal held that the criminal standard should apply in solicitors disciplinary

proceedings "*at least in cases such as the present, where what is alleged is tantamount to a criminal offence*". Lord Brown noted that it was at least arguable that the conduct alleged in the Hamlet proceedings was tantamount to criminality. However, he put his advice on a wider basis, drawing attention to a passage in Re A Solicitor where the Court had referred to the Bar Code of Conduct requirement that the criminal standard be applied when determining allegations of misconduct against Barristers and had noted that "*it would be anomalous if the two branches of the profession were to apply different standards in their disciplinary proceedings*".

10. Hamlet is a Privy Council decision and therefore, whilst persuasive, not binding upon this Court. With respect, it is submitted that the reasoning in that case as to the applicable standard of proof was deficient in a number of respects.

 (1) First, the Committee did not properly address itself to the distinctive nature of professional disciplinary proceedings: in particular it did not identify whether they were essentially civil or criminal in nature. This was no doubt because it was not referred to any of the authorities, set out below, which have examined this issue in some detail.

 (2) Second, the Committee also did not give proper weight to the particular regulatory function of disciplinary proceedings, which (as below) should be of central concern when identifying the proper standard of proof. This was, again, no doubt because it was not referred to, and therefore did not have the opportunity to consider, the practices of a wide variety of other professional disciplinary bodies which actually apply the civil standard. In particular, although the Committee cited a passage from Re A Solicitor, referring to the standard applied in Bar disciplinary proceedings, the Committee was not in a position, from the material before it, to identify that the Bar was the exception, rather than the rule, and that a very significant number of professional disciplinary tribunals actually apply the civil standard.

 (3) It is submitted that, as a result, the Committee gave undue importance to authorities which arose in non-disciplinary contexts and which were

concerned with orders placing restrictions on individual liberties (*viz.* sex-offender orders, football banning orders and anti-social behaviour orders).

11. It is submitted that Hamlet is therefore not a strong authority and, for the reasons of principle set out below, should not be followed, or at least should not be followed in its entirety: see ¶75 below.

12. As regards, the comments in Cordery and The Solicitors Handbook (2008), these are essentially merely citations to Hamlet and it is submitted that they add nothing of substance. There is in fact compelling academic authority going in the opposite direction with both Harris "Disciplinary & Regulatory Proceedings" (5th Edn, ¶12.08) and Phipson "On Evidence" (16th Edn, ¶6-56) supporting the view that, in the absence of express rules to the contrary, the civil standard of proof should apply to proceedings before a disciplinary tribunal.

13. As to the decision in Re A Solicitor itself (cited in Hamlet, as above) it is accepted that this is a Court of Appeal authority and therefore binding on this Court. However, the ratio of that case is confined to circumstances in which the misconduct alleged is "*tantamount to a criminal offence*", in which case the criminal standard applies. In light of recent authority on the flexibility of the civil standard and for the reasons of principle referred to below, it is anticipated that the decision in Re A Solicitor will in due course require reconsideration by a higher Court. However for the purposes of this appeal, it is sufficient that nothing in the nature of a criminal offence has been alleged against Mr Richards such that the authority of Re a Solicitor is not engaged.

14. Regarding, the other authorities cited in Mr Richards' skeleton, namely Re B (Children) [2008] UKHL 35; and Re D (Secretary of State for Northern Ireland intervening) [2008] UKHL 33, the SRA awaits some indication from Mr Richards as to the passages upon which he relies and the principles he proposes to derive from them. It is noted that there are (very brief) dicta in Re D referring to the application of the criminal standard in professional disciplinary proceedings; however the case did not concern disciplinary proceedings and it is submitted that these dicta are in effect merely allusions to the decision in Hamlet and do not add to the strength of that authority.

15. In summary, it is submitted that none of the authorities cited by Mr Richards bind this Court in relation to the standard of proof that should properly have been applied in the proceedings brought against Mr Richards. In light of this, it is submitted that the Court is free to, and should consider the arguments of principle set out below.

(ii) Tribunal proceedings are civil proceedings; the starting point should therefore be the civil standard

16. Tribunal proceedings are civil and not criminal in nature. Criminal proceedings involve a formal accusation made on behalf of the state, or by a private prosecutor, that a defendant has breached the criminal law in proceedings which may culminate in the conviction and condemnation of the defendant: see Customs and Excise Commissioners v City of London Magistrates Court [2000] 1 WLR 2020, 2025. Tribunal proceedings plainly do not answer this description, not least since they do not enforce criminal laws of general application but, on the contrary, are concerned with upholding standards of conduct specific to a particular professional group.

17. The essentially civil character of the Tribunal's jurisdiction is reflected in its rules of evidence. Specifically:

    (1) Rule 10 of the Solicitors (Disciplinary Proceedings) Rules 2007 (the "2007 Rules") provides that, at the Tribunal's discretion, the strict rules of evidence will not apply in Tribunal proceedings.

    (2) Rule 13(1) of the 2007 Rules provides that, subject to certain amendments, the Civil Evidence Act 1968 and Civil Evidence Act 1995 apply to Tribunal proceedings just as they would to a conventional civil dispute. As a result, a respondent to Tribunal proceedings does not enjoy the same protection against the introduction of hearsay evidence afforded to a defendant in criminal proceedings.

18. It is submitted that these rules permit a flexibility over the admissibility of evidence that is unknown to the criminal courts[1] and can only be consistent with Tribunal exercising a civil jurisdiction. The civil character of Tribunal Proceedings has in fact been considered and accepted on several occasions by the English Courts:

    (1) In Pine v Law Society [2001] EWCA Civ 1574, the Court of Appeal noted (at ¶8) that it was common ground between the parties that allegations of conduct unbefitting a solicitor were not charges of a criminal offence.

    (2) In Holder v Law Society [2005] EWHC 2023 (Admin), the Divisional Court recorded that it had been accepted by the parties that the Tribunal proceedings were not criminal proceedings. (The proceedings in question concerned the alleged dishonest misappropriation of client funds and conduct unbefitting).

    (3) In Macpherson v Law Society [2005] EWHC 2837 (Admin), the Divisional Court squarely rejected (at ¶7) the Appellant's submission that proceedings before the Tribunal were criminal in nature (*"[i]t is simply not the case the proceedings before the SDT are criminal in nature"*).

    (4) In Simms v Law Society [2005] EWHC 408 (Admin), the Divisional Court accepted that allegations of dishonesty had to be established to a high standard of proof, but went on to observe that: *"[...] the fact remains that the proceedings are civil in character. This is made clear in Rule 16 of the Solicitors (Disciplinary Proceedings) Rules 1994[2], which apply the Civil Evidence Acts 1968 and 1972 to those proceedings"*.

19. It is submitted that assistance can also be drawn from the case-law of the European Court of Human Rights (**"ECHR"**) in which it has considered the meaning of criminality for the purposes of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (**"the Convention"**). Specifically:

[1] The rules on the admissibility of hearsay evidence in criminal proceedings have been recently amended, however they remain more restrictive than in civil proceedings: see Criminal Justice Act 2003, ss. 114-136.

[2] This was the provision in the historic rules corresponding to Rule 13(1) of the Solicitors (Disciplinary Proceedings) Rules 2007 (as above).

(1) In the case of Brown v United Kingdom (1998) 28 EHRR 233, a solicitor was fined £10,000 for conduct unbefitting by the Solicitors Complaints Tribunal. Mr Brown applied to the ECHR alleging that the proceedings had been criminal and had involved the improper application of a retrospective penalty. The ECHR rejected the submission that the proceedings were criminal, reasoning, in summary, that[3]:

(a) under domestic law the proceedings were treated as disciplinary rather than criminal, and did not involve the police or prosecuting authorities.

(b) the charges related to matters of professional behaviour and organisation, in which emphasis was given to the standards of conduct befitting a solicitor. Accordingly, they were of an essentially disciplinary nature, applying to persons within a specific, professional group, rather than to the general public.

(c) having reviewed the sanctions available to the SCC (*viz.* suspension, striking-off and the imposition of a £5,000 fine for each offence), the ECHR noted that the fines were penal and deterrent, rather than compensatory in nature, however this did not alter the essentially disciplinary character of the proceedings. (It is also noticeable, although it did not arise for comment in Brown, that the ECHR takes the view that criminal proceedings will be those characterised by: "*deprivations of liberty liable to be imposed as punishment*" Engel v Netherlands (1979-1980) 1 EHRR 647 (at p. 679, para. 82). A Respondent's liberty is clearly never at threat in Tribunal proceedings.)

(2) Very similar reasoning was applied in Wickramsinghe v United Kingdom [1998] EHRLR 338 in the case of a doctor facing proceedings before the General Medical Council (**"GMC"**) for alleged sexual indecency towards his patients. The

[3] The three stages in the ECHR's reasoning in Brown (*viz.* (i) characterisation of proceedings under domestic law; (ii) whether the offence applies only to a specific group or is of general application; and (iii) the severity of the penalty,) represent a standardised three-stage test laid down by the ECHR in the case of Engel v Netherlands (1976) 1 EHRR 647 (see ¶81), and which has been consistently applied since.

Tribunal rejected the submission that the proceedings were criminal, noting amongst other things that:

> *"As to the nature of the offence, the Commission observes that professional disciplinary matters are essentially matters which concern the relationship between the individual and the professional association to which he or she belongs, and whose rules he or she has agreed to accept. They do not involve the State setting up a rule of general applicability by which it expresses disapproval of, and imposes sanctions for, particular behaviour, as is generally the case with "criminal" charges."*

(3) Considerations of this sort have also been applied by the English Courts in cases relating to proper characterisation (civil or criminal) of proceedings before the Financial Services and Markets Tribunal (**"FSMT"**). The FSMT has a disciplinary function in that it enforces rules binding on persons authorised to carry on regulated activities[4]. However, it is also competent to impose sanctions against members of the general public if it finds that they have carried out certain prohibited activities, including "*market abuse*" within the meaning of s.118 FSMA. In the case of <u>Davison & Tatham v Financial Services Authority</u> (FS & M Tribunal, 16 May 2006,) the FSMT held that market abuse allegations were criminal charges for the purposes of the Convention. In reaching this decision it emphasised that:

> *"[....] the <u>provisions in sections 118 and 123 of the 2000 Act [concerning market abuse] apply generally to the public at large</u>, as is demonstrated by the fact that a penalty has been imposed on Mr Davidson who is not a regulated person. <u>The penalty is not imposed as a disciplinary matter</u>. Also the sizes of the penalties imposed on the Applicants are clearly of a substantial, punitive and deterrent nature rather than of a compensatory nature. // For these reasons we conclude that the penalties for market abuse the subject of these references are criminal charges for the purposes of the Convention."*[5]

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[4] It is well established that the FSMT applies the <u>civil</u> standard of proof to these disciplinary proceedings: see <u>Hoodless and Blackwell v Financial Services Authority</u> (FS & M Tribunal, 3 October 2003, at ¶21); <u>Legal & General v Financial Services Authority</u> (FS & M Tribunal, January 13 2005 at ¶19).

[5] See also, the case of <u>Arif Mohammed v Financial Services Authority</u>, (FS & M Tribunal, 29 March 2005) (the FSMT noted that the civil standard of proof generally applied to its proceedings (regarding which, see further below), but noted that "*[...] the Tribunal recognises that specific considerations arise in [market abuse] cases, including the fact that (as in the present case) <u>enforcement action may be taken against persons who are not regulated by the FSA</u>*").

20. The fact that proceedings are civil does not predetermine that the civil standard of proof must inevitably apply; however, it does provide an important context when identifying the appropriate standard. The distinction between criminal and civil proceedings is not formalistic, but (as above), highly principled and it is submitted that there is no proper basis for applying to Tribunal hearings a standard of proof which has been formulated for use within a criminal context within which quite different considerations arise.

(iii) Tribunal proceedings have a protective, regulatory function and the civil standard strikes the correct balance between the objectives of regulation and the interests of the regulated

21. Tribunal proceedings are not only civil proceedings, they are also public interest proceedings which fulfil a protective, regulatory function. This was authoritatively acknowledged by Sir Thomas Bingham MR (as he then was) in the frequently cited case of Bolton v Law Society [1994] W.L.R. 512. In the course of explaining and justifying the harsh sanctions imposed by the Tribunal the Master of the Rolls identified three considerations underpinning the Tribunal's awards (see p.518F-H):

(1) Penalty: ("*to punish [the solicitor] for what he has done and to deter any other solicitor tempted to behave in the same way*");

(2) Public protection ("*to be sure that the offender does not have the opportunity to repeat the offence*");

(3) Reputational defence: ("*to maintain the reputation of the solicitors profession as one in which every member, of whatever standing, may be trusted to the ends of the earth*").

22. The importance of points (2) and (3) has, if anything, only increased in the years since Bolton was decided. The growing public dependence upon professionals possessed of specialised skills and knowledge goes hand in hand with a recognition both that clients are entitled to demand minimum standards of professional service and that they require protection in their dealings with professionals in view of the stark asymmetries of knowledge and influence typical of those relationships.

23. The above considerations were thrown into stark relief by the events giving rise to the Shipman Inquiry. Following that Inquiry, it was considered that the use of the criminal standard in some medical disciplinary proceedings was a "*bar*" or "*impediment*"[6] to effective regulation, and the legislature stepped in to require the application of the civil standard[7].

24. Where (as is the present case) there is no express statutory or regulatory provision, the leading academic commentator supports a presumption in favour of the civil standard should apply:

> "*Where the criminal standard of proof is stipulated in the regulator's rules the case has to be proved, as in a criminal trial, beyond reasonable doubt. Provisions of this sort were not uncommon in the past, but they are becoming increasingly difficult to justify in today's consumerist society. The civil standard of proof on balance of probabilities applies where it is specified in the rules and may be assumed to apply where no standard of proof is specified*"
>
> (Brian Harris OBE, QC, "On Disciplinary & Regulatory Proceedings", 5th Edition, 2009).

25. It is submitted that this is the correct approach. Not only are disciplinary proceedings civil by nature but, due to their regulatory nature, the respondent's interests must be balanced both against those of the general public and of the profession as a whole. It is submitted that the civil standard strikes the correct balance and, in particular, it permits appropriate weight to be given both to the gravity of the allegations and the consequences for the solicitor were they to be made out. The civil standard has been the subject of a number of very recent decisions within the appellate courts and it is essential that its characteristics, in particular its flexibility, are properly understood.

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[6] See the White Paper on "Trust, Assurance and Safety – The Regulation of Health Professionals in the 21st Century", in which it was emphasised that "*Professional regulation is a protective jurisdiction which must put patient safety first. There is currently a perception, particularly in cases relating to doctors' fitness to practise, that the criminal standard of proof adopted by the General Medical Council's (GMC's) fitness to practise proceedings acts as a bar or an impediment to the referral of complaints to the GMC. It is considered that this results in a culture of hesitancy and reluctance to refer cases to the GMC, which currently gives rise to delay and inaction in dealing with cases where doctors are causing concern. The perception that it is not worth taking action due to the perceived difficulties in proving allegations to the required standard of proof potentially weakens public confidence in the health regulators and threatens public health safety. // It is intended that the use of the sliding civil scale will go some way towards removing this perceived bar or impediment, thus encouraging the earlier referral of complaints and concerns to the regulator, which should result in earlier intervention for the health professional concerned and in increased patient safety*".

[7] S. 60A Health Act 1999 (as inserted by s.112, Health and Social Care Act 2008); see further below.

26. It is now well established that there is a single, unchanging civil standard of proof, namely proof on the balance of probabilities and that this standard does not alter according to the seriousness of the allegations in issue: see In Re. B (Children) (Care Proceedings: Standard of Proof) [2009] 1 A.C. 11 (at ¶13 *per* Lord Hoffmann). However, in formulating this standard the appellate Courts have been at pains to emphasise that although the standard itself is fixed, a Court is required carefully to consider both the seriousness of the allegation, and the consequences that would flow from its being established, when considering the inherent probabilities of the case and, accordingly, when determining how cogent the evidence should be before any particular allegation is made out.

27. The classic statement of this principle was provided by Lord Nicholls in In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 (at pp 586– 587)[8]:

> *"When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established[9] ... No doubt it is this feeling which prompts judicial comment from time to time that grave issues call for proof to a standard higher than the preponderance of probability."*

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[8] This was a House of Lords appeal concerned with, *inter alia,* the proper standard of proof to be applied on an application by a local authority for a care order on the grounds that a child was suffering, or was likely to suffer, significant harm (s. 31(2), Children Act 1989).

[9] A colourful example of improbability was provided by Lord Hoffmann in Secretary of State for the Home Department v Rehman [2003] 1 AC 153 (at ¶55): *"It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not."*

28. More recently, in Re. D (Secretary of State for Northern Ireland intervening) [2008] UKHL 33, Lord Carswell (with whom their other Lordships agreed) adopted the following observations of Richards LJ in R (N) v Mental Health Review Tribunal (Northern Region) [2006] QB 468 as expressing the proper state of the current law:

> *"Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."* (emphasis added).

29. Once this flexibility within the civil standard is properly understood it is submitted that it permits a Court/Tribunal suitable scope to determine what evidence is required to make out an allegation of professional misconduct. In particular, where serious wrongdoing is alleged and/or where serious sanctions are likely to follow a Court may quite properly give weight to the inherent unlikelihood that a professional person would have behaved in the manner alleged. Any concern that the civil standard leaves a professional open to unfounded findings of professional misconduct is therefore misplaced.

30. If it is to be argued that the higher criminal standard should nevertheless be applied to Tribunal proceedings, it can justifiably be asked "*why?*" The two (inter-related) answers which, it is anticipated, might be advanced are: (1) because of the seriousness of the allegations which may be involved; and (2) because of the potentially serious consequences (including striking-off) that may flow from those proceedings.

31. As to the seriousness of the *allegations*, these will inevitably vary from one case to another. Some proceedings involve allegations of fraud, dishonesty and gross breaches of trust; others are concerned with relatively minor rule breaches. The fact that serious allegations may arise in some cases cannot justify the application of the criminal standard to the disciplinary jurisdiction as a whole. More fundamentally, however, the English Courts are frequently called to adjudicate upon the most serious allegations in civil disputes without at any stage disapplying the civil standard. It is well established

that when an allegation of criminal wrongdoing is made within a civil dispute the proper standard of proof remains the balance of probabilities: Hornal v Neuberger Products Ltd [1957] 1 QB 247. This principle has been tested and found good in even the most serious cases, for example when determining whether a wife had feloniously killed her husband: Re Dellow's Will Trusts [1964] 1 WLR 451, Ch D (as Ungoed-Thomas J noted "*There can hardly be a graver issue than that*"). It is submitted that the public opprobrium attaching to a finding of dishonesty or other wrongdoing by a High Court Judge is at least as acute as that associated with a comparable finding by a disciplinary tribunal. It cannot be the case therefore that the seriousness of the allegations arising in disciplinary proceedings justifies the application of the criminal standard.

32. As to the seriousness of *consequences*, the first point to note is that, having specifically considered the sanctions available to the Solicitors Complaints Tribunal, the ECHR concluded that they did not justify characterising the proceedings as criminal, such as to attract the additional protections under Convention Article 6(2). Clearly, in an extreme case, a Respondent to Tribunal proceedings may face professional ruin and irreparable reputational loss. However, the truth of the matter is that the situation of an unsuccessful party to a substantial and high-profile civil dispute may be no less catastrophic. Indeed, given the cap on the Tribunal's power to award fines, the immediate financial consequences of losing a major civil claim may well be more acute. The Tribunal's power to strike-off may be specific to its regulatory function, however the consequences of a civil judgment may, in practice, be no less disastrous to the parties concerned. For example, an employee found by a court or employment tribunal to have defrauded his employer may be for all practical purposes unemployable within his industry sector; particularly if (by analogy with a profession), it is a relatively small and/or well integrated field of employment.

(iv) The civil standard is already applied in a very significant number of other professional disciplinary tribunals; it would be anomalous if a different rule were to apply to legal professionals.

33. The issue of what standard of proof properly applies to Tribunal proceedings cannot be addressed in isolation and the Court should have regard to the wider network of

disciplinary bodies of which the Tribunal forms part. There is now specific provision for the following to be determined on the civil standard of proof:

(1) proceedings before the Accountancy and Actuarial Discipline Board ("**AADB**")[10]

(2) proceedings before the disciplinary panel of the Royal Institution of Chartered Surveyors ("**RICS**")[11].

(3) proceedings before any regulatory body concerning a person's fitness to practice as one of the following[12]: medical doctor[13], dentist, nurse, midwife, optician, pharmacist, pharmacy technician, osteopath, chiropractor, arts therapist, chiropodist, podiatrist, clinical scientist, dietician, occupational therapist, operating department practitioners, orthoptist, paramedic, physiotherapist, prosthetist, orthotist, radiographer, speech and language therapist or hearing aid dispenser;

(4) proceedings brought against teachers before the Professional Conduct Committee or Professional Competence Committee of the General Teaching Council for England[14] ("GTCE");

(5) misconduct proceedings against members of the police force[15];

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[10] See r. 11, AADB Scheme 2007.

[11] See r. 42, RICS, Disciplinary, Registration and Appeal Panel Rules 2009.

[12] This is provided for compendiously within s. 60A Health Act 1999 (inserted by s.112, Health and Social Care Act 2008). Even prior to this enactment, the civil standard was already applied by the General Dental Council, the Health Professions Council, the Royal Pharmaceutical Society of Great Britain, the Pharmaceutical Society of Northern Ireland, the General Chiropractic Council and the General Osteopathic Council. The criminal standard was applied by the General Medical Council, the General Optical Council and the Nursing and Midwifery Council.

[13] This is provided for within the General Medical Council's procedural rules: see r. 34(12), General Medical Council (Fitness to Practise) Rules 2004; inserted by r. 2 General Medical Council (Fitness to Practise) (Amendment in Relation to Standard of Proof) Rules Order of Council 2008/1256 Sch.1 para.1.

[14] See r. 27(1), General Teaching Council for England, Disciplinary Procedure Rules 2008.

[15] See r. 34(14)(a) Police (Conduct) Regulations 2008; replacing the 2004 Regulations, which contained a similar provision (*viz.* reg. 27(3), Police (Conduct) Regulations 2004).

(6) proceedings brought against social workers before the Conduct Committee of the General Social Care Council[16].

34. In addition, although there is no relevant statutory provision or procedural rule, it is well established that the Financial Services & Markets Tribunal applies the civil standard of proof to proceedings brought before it[17].

35. It is submitted that the above demonstrates a widely held assessment that the civil standard sets the appropriate threshold for professional disciplinary proceedings. It is true that by reg. 11(1) of the Bar's Disciplinary Tribunal Regulations 2009 the criminal standard applies to allegations of professional misconduct. However, it is submitted that this is the exception not the rule; moreover, it is an exception that appears increasingly isolated and anomalous in the modern regulatory environment. It is submitted that the basic question to which the current appeal gives rise is whether legal professionals should be treated differently from those operating in other regulated professions. It is submitted that there is no reason, whether of principle or policy, why they should.

(v) The binding authority in support of the criminal standard is limited to cases where criminality (or conduct tantamount to it) is alleged. No such allegations have been made in the proceedings against Mr Richards.

36. As above, the Court of Appeal's decision in Re A Solicitor is confined to circumstances in which the misconduct alleged is "*tantamount to a criminal offence*". In light of the arguments of principle identified above it is anticipated that this decision will require to be reconsidered by a higher Court. However for the purposes of this appeal, it is

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[16] See Schedule 2 para 12(2) of the General Social Care Council (Conduct) Rules 2003 and the same paragraph in the 2008 Rules.

[17] See Hoodless and Blackwell v Financial Services Authority (FS & M Tribunal, 3 October 2003, at ¶21); Legal & General v Financial Services Authority (FS & M Tribunal, January 13 2005 at ¶19). In both cases the submission that the civil standard applied was unopposed. As above, the FSMT has held that where the allegations are of market abuse under s. 118 FSMA, they are criminal within the meaning of Article 6 of the Convention. Nevertheless, the FSMT has held that the civil standard is "*sufficiently strong*" to be used in market abuse cases: see Davidson and Tatham v Financial Services Authority (FS & M Tribunal, 16 May 2006, at ¶197). See also Parker v Financial Services Authority (Case 036; 2006) which applied Davidson and Tatham, cited Re H, and emphasised that given the seriousness of the allegations if there was a sliding scale, the slide must be very close to the upper end of the scale).

sufficient that nothing in the nature of a criminal offence has actually been alleged against Mr Richards. The authority of Re A Solicitor is therefore simply not engaged.

Public – Item 6
Annex 5

SRA BOARD

15 January 2010

Correspondence following the SRA Board's decision to make the SRA (Disciplinary Procedure) Rules [2009], subject to the necessary concurrences

(a) Letter from The President to the Right Honourable The Lord Clarke of Stone-cum-Ebony dated 2 July 2009 – page 1;

(b) Letter from Antony Townsend to Bridget Prentice of the Ministry of Justice dated 7 July 2009 (without enclosures) – page 3;

(c) Letter from Antony Townsend to the Right Honourable The Lord Clarke of Stone-cum-Ebony dated 7 July 2009 (without enclosures) – page 5;

(d) Letter from Peter Williamson to the Right Honourable The Lord Clarke of Stone-cum-Ebony dated 7 July 2009 – page 7;

(e) Letter from John Sorabji, Legal Secretary to the Master of the Rolls to Antony Townsend dated 8 July 2009 – page 9;

(f) Letter from Antony Towsend to John Sorabji, Legal Secretary to the Master of the Rolls dated 9 July 2009 – page 12;

(g) Letter from John Sorabji, Legal Secretary to the Master of the Rolls to Antony Townsend dated 10 July 2009 – page 13;

(h) Letter from Desmond Hudson of the Law Society to Antony Townsend dated 10 July 2009 – page 16;

(i) Letter from Bridget Prentice of the Ministry of Justice to Antony Townsend dated 16 July 2009 – page 17.

From the President

The Right Honourable The Lord Clarke of Stone-cum-Ebony
Master of the Rolls
Royal Courts of Justice
Strand
London
WC2A 2LL

2 July 2009

Dear Tony

SRA Disciplinary Proceedings Rules

I am writing to ask you to refer back for reconsideration one aspect of the SRA's Disciplinary Procedure Rules which will shortly be sent to you for approval.

The SRA rules provide in Rule 7(8) that the standard of proof of these cases should be the civil standard, except for cases in which the allegation is tantamount to being a criminal offence, in which case it would be beyond reasonable doubt. In practice, SRA are unlikely to deal with many cases where the allegation is tantamount to a criminal offence, since those will have to be referred to the Solicitors Disciplinary Tribunal.

Our concern about the proposed provision concerning standard of proof is that we think it an important matter of principle that the standard applied by SRA should be the same as the standard which SDT would apply in dealing with any appeals. Not only would it be inappropriate for different standards to apply at first instance and on appeal, such an approach would be bound to lead to a significant increase in the number of appeals. SDT themselves made these points in responding to the SRA's consultation, but SRA do not appear to have given them full weight. Indeed, rather than accepting what SDT say about the standard of proof applied to SDT proceedings, the report considered by the SRA Board appeared to quote selectively from individual SDT cases so as to suggest that the position was not as the then SDT President had described it in his response on behalf of the Tribunal.

We have very recently become aware that the question of the appropriate standard of proof in solicitors' disciplinary proceedings may be addressed in a forthcoming appeal to the Divisional Court from a decision of SDT. We recognise that (assuming the issue is indeed addressed during those proceedings) the position may change following the decision in that case. But we do not think it proper for the SRA to assume that their propositions in that appeal will succeed, by incorporating into these rules the standard of proof for which they contend. Indeed, it is doubtful whether the Rules themselves need to specify the standard of proof.

We would be grateful, therefore, if you could consider referring back this paragraph of the rules to SRA for reconsideration. Whilst we also have some concerns about the

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approach the SRA are taking to publication of decisions, we would not ask you to withhold approval from that aspect of the Rules.

I would be happy to discuss this with you if that would be helpful.

I am copying this letter to the Lord Chancellor, to the President of the Solicitors Disciplinary Tribunal, and to the Chair of the Board of the Solicitors Regulation Authority.

With kind regards.

Yours sincerely

Paul Marsh
President

cc: Lord Chancellor
President, Solicitors Disciplinary Tribunal
Chair, Solicitors Regulation Authority

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ANNEX 2 Item b

SRA/AJT/BP 2009

Bridget Prentice
Ministry of Justice
102 Petty France
London
SW1H 9AJ

7 July 2009

Dear Bridget

Legal Services Act 2007 – seventh set of changes to SRA rules and regulations

On 4 June I wrote with our request for the Secretary of State's approval and concurrence, and the Lord Chancellor's concurrence, in a sixth set of changes to the SRA's rules and regulations to implement changes made by the Legal Services Act 2007.

We are now seeking the Lord Chancellor's concurrence in the SRA (Disciplinary Procedure) Rules [2009], made by the SRA Board on 25 June. You will see that we are hoping, if possible, to have the rules in force by 1 August.

I enclose:

- three copies of the SRA (Disciplinary Procedure) Rules [2009] marked for the Lord Chancellor's concurrence **[document A]**;
- consultation paper 14 **[document B]**;
- SRA Board paper 21 May 2009 – items 6 and 6A **[document C]**;
- extract from the minutes of the SRA Board meeting held on 21 May 2009 **[document D]**;
- SRA Board paper 25 June 2009 – item 7 **[document E]**;
- presentation to the SRA Board on 25 June 2009 **[document F]**; and
- extract from the draft minutes of the SRA Board meeting held on 25 June 2009 **[document G]**.

You may wish to liaise with the Master of the Rolls, whose concurrence is also required. We have sent copies of all the documents to the Master of the Rolls, the President of the Law Society and the President of the Solicitors Disciplinary Tribunal.

If the Lord Chancellor decides to concur in the rules, please keep one signed copy of **document A** for your records and return one signed copy to me.

3

If you have any queries about the rules, or the procedures involved, do please phone Jackie Corcoran on 01527 517141, and she will be happy to give you answers.

Thank you again for all your help in this project.

Yours sincerely

Antony Townsend
Chief Executive, SRA

Encs

cc President, The Law Society;
President, Solicitors Disciplinary Tribunal.

ANNEX 2 Item c

SRA/AJT/MR 2009

The Rt. Hon. The Lord Clarke of Stone-cum-Ebony
Master of the Rolls
Royal Courts of Justice
The Strand
London
WC2A 2LL

7 July 2009

Dear Lord Clarke

Legal Services Act 2007 – seventh set of changes to SRA rules and regulations

On 4 June I wrote with our request for your concurrence in a sixth set of changes to the SRA's rules and regulations to implement changes made by the Legal Services Act.

We are now seeking your concurrence in the SRA (Disciplinary Procedure) Rules [2009], made by the SRA Board on 25 June. You will see that we are hoping, if possible, to have the rules in force by 1 August.

I **enclose**:

- two copies of the SRA (Disciplinary Procedure) Rules [2009] marked for your concurrence **[document 1]**; you will see that the preamble cites only the primary legislation and not the secondary legislation (article 4 of the Legal Services Act 2007 (Commencement No. 4, Transitory and Transitional Provisions and Appointed Day) Order 2009), as that is the style now requested by the MoJ's lawyers;
- consultation paper 14 **[document 2]**;
- SRA Board paper 21 May 2009 – items 6 and 6A **[document 3]**;
- extract from the minutes of the SRA Board meeting held on 21 May 2009 **[document 4]**;
- SRA Board paper 25 June 2009 – item 7 **[document 5]**;
- presentation to the SRA Board on 25 June 2009 **[document 6]**; and
- extract from the draft minutes of the SRA Board meeting held on 25 June 2009 **[document 7]**.

You may wish to liaise with the Lord Chancellor, whose concurrence is also required. We have sent copies of all the documents to the MoJ, the President of the Law Society and the President of the Solicitors Disciplinary Tribunal.

If you decide to concur in the rules, please keep one signed copy of **document 1** for your records and return one signed copy to me.
If you have any queries about the rules, or the procedures involved, do please phone Jackie Corcoran on 01527 517141, and she will be happy to give you answers.

Thank you again for all your help in this project.

Yours sincerely

Antony Townsend
Chief Executive, SRA

Encs

cc President, The Law Society;
President, Solicitors Disciplinary Tribunal.

6

ANNEX 2 Item d

The Right Honourable The Lord Clarke of Stone-Cum-Ebony
Master of the Rolls
Royal Courts of Justice
Strand
London
WC2A 2LL

7 July 2009

Dear Tony

SRA (Disciplinary Procedure) Rules

I have been provided by the Law Society with a copy of The President's letter of 2 July 2009. I thought I should clarify the SRA's position in relation to standard of proof under the SRA (Disciplinary Procedure) Rules.

The question of what standard of proof ought to be applied by the Solicitors Disciplinary Tribunal ("SDT") is not provided for in statute. The leading authority is a decision of the Divisional Court in *In re a Solicitor* [1993] QB 69. That decision provides that the criminal standard of proof applies to the proceedings of the SDT "at least in cases such as the present, where what is alleged is tantamount to a criminal offence". In relation to internal reprimands by the SRA (and previously the Law Society) the civil standard has been applied.

The SRA (Disciplinary Proceedings) Rules are made pursuant to Sections 44(D) and 44(E) of the Solicitors Act 1974 as introduced by the Legal Services Act 2007. These sections provide a power for the SRA to fine and/or rebuke a solicitor for misconduct. Section 44(E) provides that any person who is the subject of such a disciplinary order by the SRA may appeal to the SDT. On such an appeal the SDT has the power not only to uphold the disciplinary order but also, if it thinks fit, to impose a more serious disciplinary sanction in accordance with its statutory powers. Had the SDT been confined to an appellate jurisdiction it might have been expected to apply the standard of proof selected by the SRA when making its rules under Section 44(7) governing the exercise of its disciplinary powers. However, the SDT's power to impose a more serious sanction clearly makes it desirable that there should be a general consistency of approach between the SRA and the SDT in relation to the standard of proof.

Section 44D(7) provides that the SRA must make rules prescribing the circumstances in which it will decide to make a disciplinary order and the practice and procedure it will adopt. Rules were considered and formally adopted by the SRA Board on 25 June 2009. One of the issues considered by the Board was what, if any, provision should be made in the rules in relation to the standard of proof. After some deliberation the Board adopted the following formulation:

> *"The standard of proof shall be the civil standard except where the allegation is tantamount to a criminal offence when it shall be beyond reasonable doubt."*

The principal reason the Board adopted this wording was that we considered that the SDT was bound by the decision of the Divisional Court in *In re a Solicitor*.

Having listened to the discussion amongst Board members it is my view that the Board would have wished to adopt the civil standard in respect of all decisions but felt unable to do so because of this existing authority. In discussion the Board felt that it would be anomalous for the legal profession to have a higher standard of proof for regulatory and disciplinary matters than, say, the medical profession. The adoption of a criminal standard of proof in all disciplinary proceedings of a professional regulator is increasingly anomalous. After discussion it was felt that, in light of *In re a Solicitor*, the Board should adopt a standard which complied with the decision of the Court in that case. Had it not been for that decision the Board would have wished to adopt the civil standard of proof for all matters.

The question of what standard of proof should be adopted by the SDT is likely to be considered by the Divisional Court this coming Thursday and Friday in relation to an appeal (*Richards v The Law Society*) into which the Law Society has sought to intervene in its representative capacity. It may be sensible to review matters in the light of the outcome of that case.

I am sending copies of this letter to The President and to the Lord Chancellor and the President of the SDT.

Yours sincerely

PETER J WILLIAMSON
Chair of the SRA Board

cc Lord Chancellor
President, Solicitors Disciplinary Tribunal
President, The Law Society

(8)

ANNEX 2 Item e

MASTER OF
THE ROLLS

JOHN SORABJI

THE LEGAL SECRETARY TO THE MASTER OF THE ROLLS

Mr A Townsend

Chief Executive

Solicitors Regulation Authority

8 Dormer Place

Leamington Spa

Warwickshire

CV32 5AE

08 July 2009

Dear Mr Townsend

SRA (Disciplinary Procedure) Rules 2009

I write on behalf of the Master of the Rolls in respect of your letter, dated 07 July 2009. The Master of the Rolls notes that you seek his and the Lord Chancellor's concurrence in the making of the abovementioned rules (the 2009 Rules).

As you are aware the President of The Law Society wrote to the Master of the Rolls on 02 July 2009 outlining The Law Society's concerns about these rules. He drew attention, specifically, to draft rule 7(8), which specifies that the standards of proof applicable to relevant disciplinary matters is to be the civil standard except where allegations are tantamount to a criminal offence, in which case the criminal standard is to apply. He also raised concerns that if the SRA were to apply this standard at first instance it might well differ from that applied by the Solicitors Disciplinary Tribunal (the SDT) on any appeal.

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These concerns echoed those raised by the SDT in its response, dated 17 February, to the SRA's consultation on the draft 2009 rules. The SDT in that response made the point that, as a matter of law, it would have to apply the quasi-criminal 'beyond reasonable doubt' test on any appeal. While it is not clear what that standard might be it is apparent that its concern was that it would have to apply a different standard from the one that might be applied by the SRA.

The Master of the Rolls notes that in considering the issue raised by the SDT, and others during the consultation, the SRA Board took account of a number of points viz., that the SDT has not been consistent in its approach to the standard of proof applicable to matters before it, that the general trend is for regulatory bodies to apply the civil standard, and that its, and its predecessor's, approach had long been established as one which applied the civil standard to regulatory matters. He further notes that the SRA noted that an appeal from an SDT decision was to be heard before the Divisional Court, which would raise the issue of the appropriate standard to be applied by the SDT and that this might have an impact on this matter.

The Master of the Rolls is concerned that the discussion and consultation about this issue has apparently been conducted without any consideration of authorities, which he considers call into question the current approach. He is particularly concerned that no consideration appears to have been given to the Divisional Court's decision in *Re a Solicitor* [1993] QB 69, in which Lord Lane CJ held that the appropriate standard of proof for all solicitors' disciplinary matters is the criminal standard. This decision, he notes, has recently been cited approvingly by the Privy Council in *Campbell v Hamlet* [2005] UKPC 19 at [20] – [22]. Lord Brown in that decision stating, at paragraph 21, that Lord Lane CJ's decision at [1993] QB 69 at 81, '*clearly warranted the Law Society Disciplinary Committee henceforth applying the criminal standard in all cases rather than merely in those . . . "where what is alleged is tantamount to a criminal offence.*'

It appears to the Master of the Rolls that these decisions raise serious questions about the SRA's proposed approach in the 2009 Rules. They certainly suggest that the SDT would have to apply the criminal standard on any appeal from a disciplinary decision taken by the SRA irrespective of the standard which the SRA itself applied. It may well be the case that the Divisional Court in the appeal which is presently before it will give consideration to these authorities and will shed further light on the matter.

The Master of the Rolls is further concerned that the SRA appears to have approached the rule-making process on the basis that the new powers were akin to regulatory powers. He

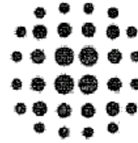
notes what was said in paragraph 46 of the SRA Board Paper, dated 25 June 2009, in this respect. While it is well-established that in the exercise of regulatory powers the SRA has applied the civil standard, the powers set out in the 2009 Rules are disciplinary powers. The SRA appears not to have taken account of the difference in principle between regulatory and disciplinary powers.

In the circumstances, the Master of the Rolls is unable to concur in the 2009 Rules. He would suggest that before he, or his successor, is in a position properly to consider concurrence the SRA Board should reconsider Rule 7(8) and should do so in light of the above, and any other relevant, authorities. The Divisional Court's decision on the appeal that is presently before it, following consideration of the relevant authorities such as those cited above, should also at the least be considered by the SRA before further steps are taken. Finally, the Master of the Rolls would suggest that the SRA should reconsider this matter by considering the difference between regulatory and disciplinary powers. It may well be the case that the SRA needs to obtain Counsel's opinion before proceeding.

Yours sincerely

John Sorabji

cc The President of The Law Society
The President of the Solicitors Disciplinary Tribunal
Geraint Davies on behalf of the Lord Chancellor, The Ministry of Justice



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John Sorabji
Legal Secretary to the Master of the Rolls
The Royal Courts of Justice
The Strand
London WC2A 2LL

By email: John.Sorabji@judiciary.gsi.gov.uk

9 July 2009

Dear Mr Sorabji

SRA (Disciplinary Procedure) Rules 2009

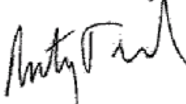
Thank you for your letter of 8 July 2009. I am grateful that the Master of the Rolls has been able to consider this matter so promptly.

I am concerned to reassure the Master of the Rolls that the SRA Board decision was made in full knowledge of the authorities. We should perhaps have made it clear in our letter that the Board was provided in its confidential papers with an opinion from leading counsel which dealt with both of the cases you mention and indeed several others. It was the finding of Lord Lane CJ in In re a Solicitor that caused the Board to add the reference to allegations 'tantamount to criminal offences'. A primary concern of the Board was difficulty in discerning the public policy reasons for solicitors' disciplinary cases to be treated differently from those of other professions, the ultimate purpose of all such cases being to protect the public.

We do also understand the distinction between disciplinary and regulatory action. I expect it is common ground that regulatory action involves protective steps such the imposition of practising certificate conditions which do not generally involve final findings of disputed fact, often being based, for example, on protecting the public pending the outcome of disciplinary proceedings. We have applied the distinction in the hundreds of internal disciplinary findings we have made over many years leading to reprimands (and the occasional judicial review).

I agree that the outcome of Richards may assist and will write again when that is known.

Yours sincerely



Antony Townsend
Chief Executive, SRA

cc by email The President of The Law Society
The President of the Solicitors Disciplinary Tribunal
Geraint Davies on behalf of the Lord Chancellor, The Ministry of Justice

(2)

ANNEX 2 Item g

MASTER OF
THE ROLLS

JOHN SORABJI

THE LEGAL SECRETARY TO THE MASTER OF THE ROLLS

Mr A Townsend

Chief Executive

Solicitors Regulation Authority

8 Dormer Place

Leamington Spa

Warwickshire

CV32 5AE

10 July 2009

Dear Mr Townsend

SRA (Disciplinary Procedure) Rules 2009

I write on behalf of the Master of the Rolls in respect of your letter, dated 08 July 2009 and in respect of Mr Williamson's letter, dated 07 July 2009, which was received via email this morning.

The Master of the Rolls notes the points that both you and Mr Williamson make in your letters. He is reassured to hear that the SRA considered Lord Lane CJ's decision in *In Re a Solicitor* [1993] QB 69 and took counsel's advice on the issue of the standard of proof. He

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Website www.judiciary.gov.uk

remains concerned however that the view expressed in both your letters as to the correct interpretation of that decision may well be flawed, not least in light of Lord Brown's

explanation of it in *Campbell v Hamlet* [2005] UKPC 19 at [20] – [22]. It appears, without the benefit of your Counsel's opinion or argument in court, that Lord Brown's explanation makes clear that in respect of all disciplinary matters the criminal standard applies. No doubt this is an issue to be decided in *Richards v The Law Society.*

While the Master of the Rolls notes the points made regarding the standard applied by The Law Society historically on internal disciplinary findings that have led to reprimands, he had understood that such matters were properly regulatory: true disciplinary matters being those referred to the Solicitors Disciplinary Tribunal (SDT). The new disciplinary powers given to the SRA being akin to those previously exercised solely by the SDT

He would furthermore point out that as far as he is aware during the passage of the Legal Services Act 2007 through Parliament it was made clear that the regulation of the legal profession could not properly be equated with the regulation of other professions e.g., the medical profession. This stems, to his mind, from the fact that our commitment to the rule of law is underpinned by a well-regulated legal profession and that this raises issues that do not necessarily arise in respect of the regulation of other professions. While regulatory matters can quite properly be dealt with on the civil standard, where the interests of the public and the reputation of the profession is concerned and serious allegations giving rise to disciplinary, not regulatory, issues it seems to him that the right approach is, as Peter Williamson noted rightly in his letter of 07 July 2009, that the SRA and SDT take a common approach, and that that approach, subject to *Richards,* should be the one as explained in *Campbell* and which appears to be supported by the judgments of both Lord Carswell and Lord Brown in *In re D (Secretary of State for Northern Ireland intervening)* [2008] 1 WLR 1499 at [23] and [48].

In light of the fact that *Richards v The Law Society* may well shed further light on these matters, the Master of the Rolls is glad to agree that this matter should be reviewed following its determination. At that time it appears to him that the sensible approach should be, as was taken already, to align the standards applied by the SRA and the SDT in these matters. It might well be helpful for the SRA and the SDT to enter into discussions before any revisions to the draft rules are made.

Yours sincerely

John Sorabji

cc The President of The Law Society

The President of the Solicitors Disciplinary Tribunal

Geraint Davies on behalf of the Lord Chancellor, The Ministry of Justice

Peter Williamson, The Solicitors Regulation Authority

From the Chief Executive

The Law Society

Antony Townsend
Chief Executive
Solicitors Regulation Authority
Ipsley Court
Berrington Close
Redditch
B98 OTD

10 July 2009

Dear Antony

Disciplinary Proceedings – Standard of Proof

We have seen a copy of the letter sent to you on behalf of the Master of Rolls about the SRA's Disciplinary Proceedings Rules, and as you know the Law Society was an interested party in the case of Richards which was decided by the Divisional Court yesterday.

It is clearly a matter of some importance for there to be clarity about the standard of proof required when various allegations against solicitors are under consideration. We recognise that, so far as investigations conducted by SRA are concerned, decisions about this are for SRA, subject to securing the necessary approvals to rules, and of course to the jurisdiction of the courts.

But we think it might nevertheless be helpful if relevant staff in the SRA and in the Law Society could discuss the issues prior to the matter being reconsidered by the SRA Board, to see whether or not we can reach an agreed way forward. It may be desirable to include the Solicitors Disciplinary Tribunal in any such discussions, although we have an open mind as to whether there should be tripartite discussions from the outset, or whether it would be worth seeing how far the Law Society and SRA can agree before involving the SDT.

I understand that the SRA attached some importance to securing approval to its rules quickly, so we would naturally be happy to have initial discussions with SRA in the very near future if that would be helpful.

Yours sincerely

Desmond Hudson
Chief Executive

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23 JUL 2009

CHIEF EXECUTIVE SRA
AJT/906

Antony Townsend
Chief Executive
Solicitors Regulation Authority
8 Dormer Place
Leamington Spa
Warwickshire
CV32 5AE

16 July 2009

Dear Antony

SRA (Disciplinary Procedure) Rules 2009

Thank you for your letter of 1st July 2009 seeking the Lord Chancellor's concurrence in the SRA (Disciplinary Procedure) Rules 2009 ('the 2009 Rules').

As you know, on 2nd July 2009, the Law Society wrote to the Master of the Rolls, copying in the Lord Chancellor and the Solicitors Disciplinary Tribunal, concerning the standard of proof to be applied under Rule 7 (8).

I am also aware of the Master of the Rolls' letter to you on this matter, informing you that he is unable to concur the 2009 Rules. I am persuaded by his argument that existing precedent provides that the standard of proof to be applied to disciplinary proceedings concerning the legal profession should be the criminal standard rather than the civil standard as specified in Rule 7 (8), but that it may be wise to review the standard to be applied once Richards v The Law Society is decided.

In light of the Master of the Rolls' decision and the reasons behind it, I also feel unable to concur the 2009 Rules until Richards v The Law Society is decided.

Kind regards
Bridget

BRIDGET PRENTICE

Public – Item 6
Annex 6

SRA BOARD

15 January 2010

Correspondence between David Middleton of the SRA and Russell Wallman of the Law Society

(a) Letter from David Middleton to Russell Wallman dated 7 August 2009 – pages 1-2;

(b) Discussion paper by David Middleton – pages 3-8;

(c) Letter from Russell Wallman to David Middleton dated 30 November 2009 – pages 9-10.

Our Ref: 090807/ Standard Proof/jp
Your Ref:

Mr Russell Wallman
Director of Government Relations
The Law Society
13 Chancery Lane
London
WC2A 1PL

7 August 2009

Dear Russell

STANDARD OF PROOF

Thank you for the constructive informal discussion on 24 July 2009 on the basis that neither of us have had the opportunity to discuss the current position with our respective boards.

That caveat is particularly important because the SRA Board at the meeting in June 2009 was strongly in favour of the civil standard but felt it appropriate to apply Lord Lane CJ's decision in *In re a Solicitor* to try to address the potential problem of the SDT applying a different standard of proof on appeal. However, as we discussed, it does strike me that a way forward in the interests of all stakeholders, notably the public, might be to try to reach a common SRA/Law Society view and then approach the SDT. If the SDT is persuaded to the same view it could perhaps be invited to consider altering its rules, particularly since the absence of express provision for the standard of proof is somewhat unsatisfactory.

I will not set out the detailed arguments which have been dealt with in skeleton arguments for the Richards case and in correspondence about the rules, but I think it is clear that the modern approach to regulation (and civil proceedings generally, including family law) is that often very serious allegations are dealt with on the civil standard. The position arising from *In re a Solicitor* could perhaps be addressed by provision for the standard of proof to be civil save for express allegations of dishonesty which must be proved beyond reasonable doubt. A number of points arise from this wording:

a) You will note my reference to "beyond reasonable doubt" – I think it is undesirable to use the word "criminal" for a number of reasons including that there is no risk to liberty in disciplinary proceedings and that equating such proceedings with the criminal process is inappropriate in principle;

b) The reference to an express allegation of dishonesty is intended to provide a brightline distinction – the intent being to avoid costly argument about whether particular allegations come within a less well defined category such as seriousness.

I would be very concerned to keep the provision as clear as possible.

1

The difference between the two possible standards of proof is perhaps not as significant as it might be in, say, civil disputes or magistrates' court cases where the decision turns on oral evidence. Most SDT cases are based on documentary evidence. I do not think that applying the civil standard would mean that many more solicitors would be found to have committed professional misconduct than before, particularly since internal findings have been based on the civil standard for many years without undue difficulty or, as far as I recall, being challenged by way of judicial review. The civil standard is also more appropriate as part of the overall move to a more firm-based and proportionate approach, including levying modest fines by an internal process that will be swifter and less costly than applying to the SDT.

Yours sincerely

David J Middleton
Legal Director

(2)

The Standard of Proof in SRA and SDT Proceedings

1. The SRA has a statutory power to make findings of misconduct and to impose fines up to £2000 and/or publish rebukes of regulated persons. The power requires the making of rules. The SRA Board made the rules in 2009 (the Draft Rules) and it appears that only rule 7(8) remains controversial:

> "The standard of proof shall be the civil standard except where the allegation is tantamount to a criminal offence when it shall be beyond reasonable doubt."

2. An impasse appears has been reached on this issue about which, on closer analysis, there may in fact be a reasonable amount of agreement. This paper is produced by the SRA after discussions between SRA and Law Society staff with a view to trying to resolve the impasse.

Areas of likely agreement

3. There may be[1] a reasonable consensus that:

   a. The SRA and its predecessor bodies have applied the civil standard of proof for many years;

   b. Whilst some may have views about the quality of internal decisions, overall the standard has been applied without significant difficulty or controversy;

   c. Resolving cases by SRA internal decision is more timely and cost-effective for all concerned when compared to prosecuting at the SDT;

   d. The SRA's increasing emphasis on regulation of firms and overall proportionality is likely to be facilitated by the new powers being exercisable;

   e. Requiring the SRA to move from a "balance of probabilities" test to "beyond reasonable doubt" is likely to:

      i. Reduce public protection and/or increase public frustration with the disciplinary system;

      ii. Result in many more referrals from the public and profession being rejected at an early stage because there is no prospect of proof to that standard or because it would be disproportionate to try to prove the allegation to that standard, which would impact on public perception of the ability of the SRA to regulate;

      iii. Alternatively, result in a need for much more detailed, lengthy and costly investigation to prove allegations for the purposes of an internal sanction.

[1] In anticipation of criticism, this is not an assertion that there *is* or definitely will be agreement.

f. Although the new powers enable the imposition of fines up to £2000 and the publication of findings of misconduct resulting in a "rebuke", there is no inherent objection in principle to findings which lead to the exercise of such powers being reached by application of the civil standard of proof because:

   i. There is a statutory appeal as of right to the SDT against such findings or sanction;

   ii. The powers are relatively modest in that:

      1. They do not directly endanger a person's right to practise;

      2. The power to fine is low in itself – in comparison to the SDT's former power to fine £5,000 per allegation and its new power to levy unlimited fines;

      3. The power to fine is currently interpreted as being potentially a cumulative maximum rather than being exercised for each proved allegation;

g. The SDT's ability on appeal to deploy its stronger powers, including higher fines, suspension and strike-off, may give rise to difficulties if SDT and SRA decisions are reached by the application of different standards of proof;

h. The statutory powers of the SDT and SRA to make rules are wide and capable of providing expressly for the standard of proof that they will apply;

i. In the interests of transparency and clarity, the rules of the SDT and SRA should state the standard of proof they will apply.

Positions

4. A detailed exposition of the arguments will not be attempted. Instead, positions will be robustly summarised.

5. The SRA is of the view that modern regulatory practice is that disciplinary tribunals are jurisdictionally civil in nature and that the civil standard of proof is appropriate.

6. The SDT is of the view that it is bound to apply the criminal standard of proof as a matter of law. The primary binding authority is *In re a Solicitor* [1993] QB 69. Strongly persuasive authority is provided by the Privy Council decision in *Campbell v Hamlet* [2005] UKPC. Although that case deals with the standard of proof in disciplinary proceedings against lawyers, the SRA/Law Society was not a party nor, it appears, was it invited to make submissions.

7. The SRA sought to accommodate the SDT's concerns by adopting the formulation from *In re a Solicitor* in the Draft Rules.

The civil standard and seriousness

8. Although the two House of Lords judgments handed down on the same day in June 2008 sought to resolve some very vexed issues around the standard of proof, they are not entirely clear or indeed wholly consistent although to be fair that may be partly a result of their differing factual and statutory bases.

9. In *In re B (Children) (FC)* [2008] UKHL 35, Baroness Hale concluded:

> "There are some proceedings, though civil in form, whose nature is such that it is appropriate to apply the criminal standard of proof. Divorce proceedings in the olden days of the matrimonial 'offence' may have been another example (see *Bater v Bater* [1951] P 35). But care proceedings are not of that nature. They are not there to punish or to deter anyone. The consequences of breaking a care order are not penal. Care proceedings are there to protect a child from harm. The consequences for the child of getting it wrong are equally serious either way.
>
> 70. My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.
>
> 71. As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future."

10. In *In re Doherty* [2008] UKHL 33, Lord Carswell said:

> "a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such **heightened examination** necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. **The seriousness of the allegation requires no elaboration: a tribunal of fact will look**

> **closely into the facts grounding an allegation of fraud before accepting that it has been established.** The seriousness of consequences is another facet of the same proposition: if it is alleged that a bank manager has committed a minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established."[2] [emphasis added]

11. It will be noted that there is a difference as to whether the seriousness of the consequences of a finding is relevant. It is perhaps significant that both cases relate to future risk (to a child in *Re B*, to the public in *Re Doherty*), which provides a parallel with disciplinary action and perhaps agreement with Baroness Hale's point by analogy – disciplining a professional may have serious consequences for the professional, but failing to discipline a professional when it is necessary to do so to protect the public is also a serious consequence.

12. It may be that the formulation of an allegation "tantamount to a criminal offence" is focused on a similar point, since if such an allegation is proved the professional is likely to be deprived of the ability to practise.

13. These points are made for two reasons. Firstly, to demonstrate that the civil standard can deal with serious allegations – by "heightened examination", "appropriately careful consideration" and that the "tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established". Secondly, because it may be that the Law Society and/or the SDT would be attracted to a position by which the standard of proof is proportionate to the seriousness of the allegation and perhaps the potential consequences. In the context of disciplinary action, it may be that there is rarely a genuine difference between the two – only proof of a serious allegation could lead directly to a serious consequence.

Possible ways forward

14. Working on the assumption that the standard of proof should be the same for both SRA internal decisions and SDT findings, the alternatives appear to include:

    a. Both adopt the criminal standard of proof – this is undesirable and will not be accepted by the current Board;

    b. Both adopt the current formulation, which appears to be the binding legal position for the SDT (subject to its rule-making powers) – "the

[2] This was quoted as authoritative in *SOCA v Pelekanos* [2009] EWHC 2307 (QB), handed down on 2 October 2009.

civil standard except where the allegation is tantamount to a criminal offence when it shall be beyond reasonable doubt";

c. Both adopt an alternative previously discussed by the SRA and Law Society – "civil save for express allegations of dishonesty which must be proved beyond reasonable doubt";

15. A further option would be to build on the exceptions, such as:

"The standard of proof shall be the civil standard save for the following which must be proved beyond reasonable doubt:

a. An express allegation of dishonesty;

b. An allegation which does not involve dishonesty but which is otherwise tantamount to a criminal offence and which if proved is likely[3] to result in the regulated person being struck off or suspended."

16. The reference to the possibility of strike-off or suspension is intended partly to accommodate concerns about the seriousness of consequences but also because of the proliferation of new criminal offences in recent years conviction for which in themselves might not give rise to serious consequences at the SDT. It is also intended to dissuade attempts by respondents to argue that the allegation against them is tantamount to a (minor) criminal offence and that it must therefore be proved to the criminal standard of proof.

17. The advantage of this formulation is that it should mean that allegations dealt with internally by the SRA will almost invariably be determined on the civil standard whilst the most serious allegations will be subject to the higher standard of proof at the SDT. It may also require the SDT to establish at the outset which standard of proof is to be applied. The possible processes are discussed in the next section.

Processes

18. The process can be similar for an SRA prosecution and a Respondent's appeal. For the purposes of the following the Applicant is either the SRA as prosecutor or the original Respondent as appellant against an SRA internal decision.

a. Applicant certifies in the rule 5 statement whether, taking account of the wording of the applicable rule, it considers that the civil or criminal standard applies, per allegation;

b. SDT reviews as part of "case to answer" review and if necessary seeks written representations from one or both parties;

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[3] To assist any discussion about this phrase, it should be noted that it is part of the statutory framework in child care cases – see *Re B* [2008] UKHL 35: "The effect of the decision of the House in *Re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563 is that section 31(2)(a) of the Children Act 1989 requires any facts used as the basis of a prediction that a child is '**likely to** suffer significant harm' to be proved to have happened." [emphasis added]

c. SDT directs which standard applies to each allegation;

d. Either party may apply at any time to vary the direction.

19. The need to certify the standard of proof for each allegation is probably less onerous in practice than it might appear at first sight. It might be suggested that this does not cater for a possible suspension or strike off resulting from a number of allegations being proved that in themselves do not require proof beyond reasonable doubt. That is correct but also seems appropriate since the intention is to address the standard of proof for serious allegations rather than to make provision for serious consequences as a stand-alone reason to apply a higher standard overall.

20. A simpler alternative would involve the SDT and SRA adopting the bare civil standard but elaborating its application, perhaps by practice direction or policy statement, by reference to the dicta in the *Re Doherty* about "heightened examination" etc when dealing with serious allegations.

21. If the SRA and TLS can reach a common position, it is suggested that the SDT's comments be invited with a view to reaching a tripartite position that can be put to the Master of the Rolls (with appropriate formalities by the SRA Board in making an amended rule for concurrence).

David J Middleton
Legal Director
November 2009

The Law Society

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30 November 2009

Dear David,

Standard of Proof

We said we would let you have a Law Society response to the paper the SRA Board considered about Standard of Proof once RAB had been able to consider the matter. RAB did indeed discuss it at their meeting last week.

Our first point is that we have not as yet understood what difficulties SRA envisage if the standard of proof for all decision making on conduct issues were to be "beyond reasonable doubt". SRA have accepted that that is the appropriate test where there is an allegation of dishonesty. Where dishonesty is not an issue, the justification for action often rests on matters of more or less incontrovertible fact (such as money having wrongly been moved from client account) on which we would not have thought it an obstacle to need to establish matters beyond reasonable doubt. So we would be grateful if you could let us know what practical problems you envisage arising from the adoption of that standard of proof across the board.

Turning to your paper. I should first say that it is disappointing that the paper apparently did not include the letters sent on behalf of the Master of the Rolls which set out more fully the reasoning behind his conclusion that it would be inappropriate to approve the SRA rules as drafted. The paper before the SRA Board thus in our view paints a picture of the current legal position which is potentially misleading.

So far as the substance of your proposal is concerned, the Law Society of course wishes the SRA to be as effective as possible in carrying out its regulatory role. The reputation of the profession is undermined by misconduct, and that reputational damage is exacerbated if the Law Society's regulatory arm is perceived to be ineffective. Accordingly, we have a strong interest ensuring that the SRA can be effective. However, there is also a strong public interest – and a strong representational interest – in ensuring that there are proper safeguards to ensure that solicitor's ability to practice is not removed without compelling evidence that it is necessary to do so.

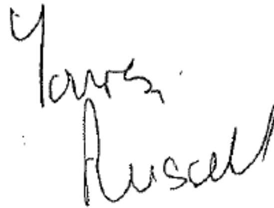
(9)

We think those considerations point to an adaptation of the approach suggested in paragraph 15 of your paper, spelling out the circumstances in which the standard of proof should be "beyond reasonable doubt". We believe those circumstances should be:-

- An express allegation of dishonesty.
- An allegation which does not involve dishonesty but which if proved is likely to result in the regulated person being struck off or suspended.
- An allegation which is likely to lead to a condition on a Practising Certificate which will substantially affect the solicitor's ability to practice.

For the avoidance of doubt, we recognise that if this approach were to be taken, we would need to discuss further the circumstances in which it was appropriate for SRA to take action to protect the public on an interim basis, prior to a full hearing on the underlying matters of concern.

In the meantime, we see every benefit in the SRA exercising the powers to fine which have been introduced by the Legal Services Act. We have no objection to the rules being made without explicit reference to the standard of proof at this stage. Although it is desirable to achieve a common understanding as to the standard of proof, given that both the SRA and the SDT have exercised powers up to now without any specific provision on this matter, we do not think it necessary to delay the new powers until this issue has been sorted out.



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