SRA BOARD
25 June 2009

CLASSIFICATION – PUBLIC

Extract from SRA Board Paper June 2009

Part 1 – Summary of responses

Introduction

4. Consultation paper 14 (CP14) was published on 1 December 2008 and closed on 23 February 2009. The paper invited comments on the draft SRA (Disciplinary Procedure) Rules [2009]. These draft rules deal with the SRA's new powers under section 44D of the Solicitors Act 1974 (the Act) which came into force on 31 March 2009. This new section, which was introduced by the Legal Services Act 2007, gives the SRA the statutory power to impose a written rebuke and/or a penalty of up to £2000 where it is satisfied that there has been a breach of regulatory obligations or professional misconduct. These could be ordered together and may be published in the public interest. CP14 is available on the website at http://www.sra.org.uk/sra/consultations/1578.article.

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

- "prescribing" the circumstances in which the SRA may decide to issue a written rebuke or order payment of a penalty;
- "about" the practice and procedure to be followed in relation to such action;
- "governing" the publication of decisions to impose a written rebuke or fine.

6. The draft rules, which were annexed to the consultation paper, focussed on what was required by section 44D but they were also intended to provide more transparency in relation to other SRA procedures, such as referrals to the SDT. Therefore, the approach that was adopted in the draft rules was to:

- make rules that comply with section 44D;
- provide transparency and clarity on other disciplinary action where that will help to resolve areas of uncertainty; and
- leave other matters to be dealt with by way of detailed guidance and published policy statements.

Respondents to the consultation

7. There were 23 responses to the CP14 which can be broken down as follows:

- solicitors in private practice - 7;
- local law societies - 4;

- solicitor groups - 3;
- legal regulators - 3;
- other regulatory bodies - 1;
- consumer bodies – none;
- Law Society - 1;
- Non lawyers - none;
- Solicitors Disciplinary Tribunal – 1;
- Public body - 1;
- Other - 2.

A list of the respondents is attached as **Annex 2** and a copy of the response from the Law Society is attached as **Annex 3**. Hard copies of the other responses are available on request, although confidential responses are not publicly available. The lack of response from consumer bodies is unfortunate since it means representations come almost exclusively from the profession and may therefore be somewhat one-sided.

8. Section 44D(8) of the Act provides that before making rules under subsection (7), the SRA must consult the Solicitors Disciplinary Tribunal (SDT). The SRA consulted the SDT before issuing CP14 and made a number of changes to the draft rules in the light of their comments. The SDT has responded to CP14 and a copy of the SDT's response together with the SRA's reply is attached as **Annex 4**. A number of their comments will be considered in detail in this paper.

9. A draft of this paper was considered by the Rules and Ethics Committee on 7 April 2009 and the Compliance Committee on 30 April 2009. The Rules and Ethics Committee were concerned about the lack of responses to CP14 particularly from BME practitioner groups. To try to address these concerns, a letter was sent by the Chief Executive to a number of BME and other practitioner groups to give them a further opportunity to respond to CP14 and a response was received from the Black Solicitors Network.

Summary of responses to the consultation and comments on the responses.

Question 1 – Are the rules clear and transparent?

10. Most of the respondents answered *"yes"* to this question although some respondents, including the SDT, gave their answer as being subject to certain comments or drafting points.

The Law Society (LSEW) said:

"*The rules are clear and transparent. In particular, we welcome the clarification of the existing procedures for investigation, seeking explanations, reporting and referrals to the Solicitors Disciplinary Tribunal.*

We look forward to receiving further guidance about the SRA's practice in cases that will clearly not result in a disciplinary decision."

City of Westminster and Holborn Law Society said:

"*For the most part the rules themselves are clear. We believe it is helpful to have all of the rules relating to the SRA's disciplinary powers in one document to assist in clarity*

and transparency. We are somewhat concerned to note that the rules, whilst containing detailed descriptions of the SRA's powers, make very little reference to the SRA's obligations in the exercise of those powers.

We believe that certain of the rules will lead to confusion and an unnecessarily complex approach. Other rules are somewhat vague or not in accordance with the prevailing legal position and may well give rise to satellite litigation which should be avoided where possible."

11. One respondent, the Association of Personal Injury Lawyers (APIL), answered *"no"* to this question.

APIL said:

"No. In answer to the consultation questions below, we have set out various examples of where the rules are unclear and not transparent.

It is our view that regulation must be crystal clear with a rigid framework. Clarity is paramount so that the regulated person and the public know exactly what is required to comply."

Comments on responses to question 1

12. A number of amendments have been made to the draft rules to take account of comments made in the responses to CP14. These changes are discussed in more detail in the following paragraphs and in part 4 of this paper.

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

13. Ten of the respondents agreed with the approach and seven, including the SDT, disagreed.

The LSEW said:

"*We agree with the approach of prescribing circumstances in which the SRA may make a disciplinary decision. The circumstances listed in draft rule 3(1)(a) are sufficiently broad to cover cases of misconduct where a published rebuke or fine might be appropriate, while at the same time provide useful guidance to regulated persons."*

The SDT said:

".....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 or 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."

City of Westminster and Holborn Law Society said:

"*Rule 3 contains a list of circumstances which permit the SRA to make a disciplinary decision. The list of circumstances is so wide (e.g. causing "inconvenience" to a third party) as to be worthless and leaves a great deal of discretion open to the SRA. Indeed, perfectly proper conduct could fall within the meaning of the listed circumstances. This type of approach is counter-productive as it creates imaginary obstacles, as the factors listed do not create real restrictions or pre-conditions which have to be met.*"

City of London Law Society said:

"The Committee agrees that it is sensible to ascribe circumstances. However, it seems that the powers might be more aligned if the first condition is satisfied where the SRA is satisfied that the act or omission by the regulated person is not trivial nor justifiably inadvertent and breaches one of the Solicitors Code of Conduct Rules 1.01 to 1.06 or falls within the proposed categories (i), (v) or (ix), i.e. the act or omission:

(i) was deliberate or reckless;
….(v) persisted after the regulated person realised or should have realised that it was improper;
….(ix) formed or forms part of a pattern of misconduct or other regulatory failure by the regulated person."

The Black Solicitors Network said:

"Rule 3(1): We note the list of circumstances that may lead to disciplinary decision and question the combination of (a) (ii) and (viii). An innocent action could lead to disciplinary action."

Comments on responses to question 2

14. It is questionable whether the simplified version of rule 3 put forward by the SDT would satisfy section 44D(7)(a) of the Act under which the SRA is required to make rules which *"prescribe the circumstances in which the SRA may decide to take action under subsection (2)(a) or (b)."* The difficulty lies in the fact that section 44D(1) of the Act already prescribes the circumstances in which these powers may be exercised as being *"where the Society is satisfied:*

    (a) that a solicitor or an employee of a solicitor has failed to comply with a requirement imposed by or by virtue of this Act or any rules made by the Society; or
    (b) that there has been professional misconduct by a solicitor."

15. In view of this, it is assumed that Parliament intended that the rules would provide more details of the circumstances. Consequently, the simplified approach may not satisfy the requirements of the Act and would leave the SRA open to a challenge that it had not properly prescribed the circumstances. We also believe that the more detailed approach in the draft rules is helpful and gives clarity but with flexibility.

16. It also appeared from some of the responses that respondents were looking at the first condition in draft rule 3(1)(a) in isolation and were not considering the fact that the second condition also had to be satisfied before the SRA would be able to make a

disciplinary decision. The second condition that must be satisfied 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.

17. Some amendments have been made to the draft rules to make these conditions clearer, in particular by the addition of a third condition that the act or omission which gives rise to the SRA finding was neither trivial nor justifiably inadvertent. This was previously part of the first condition but it has been separated out and now appears as the third condition that must be met. The word *"significant"* has been added to draft rule 3(1)(a)(ii) so that it is now *"significant inconvenience"* rather than just *"inconvenience"*.

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

18. Sixteen respondents agreed and the remaining respondents did not answer the question. The SDT said that it was a matter for the SRA to decide.

Comments on responses to question 3

19. The respondents have endorsed the approach in the draft rules.

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

20. Sixteen respondents agreed and the remaining respondents did not answer the question. The SDT agreed that it was helpful to provide for referral to the SDT in the rules but they had some comments about rule 8. The SDT considers that the SRA should have a duty to bring cases before the SDT if the conditions in rule 8(1) are met unless it would not be in the public interest to do so. They also questioned the desirability of a code contemplated in paragraph 8(2) which is not incorporated into the rules.

Comments on responses to question 4

21. The majority of the respondents have agreed that it is helpful to provide for referral to the SDT in the rules. The SDT's comments have been considered but we disagree with the imposition of the new duty on the SRA. The approach in the draft rules reflects the current position and since the CPS use a Code for Crown Prosecutors, it seems to us that a reference to a Code which is published and available on the SRA website is a sensible approach.

Question 5 - Do you think that there should be an internal appeal process for cases where there is a statutory right of appeal to the SDT and the High Court? (rule 9)

22. Fifteen respondents agreed, one respondent answered probably. The SDT said in their response that on balance 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. However, at the end of their response they said in response to this

question that they had mixed views and must leave the decision to the SRA. The remaining respondents did not answer the question.

23. A number of respondents, including the Law Society, 3 local law societies and 2 solicitor groups raised concerns about the time allowed for appeals and some believed that it should be increased to 21 days.

    City of London Law Society said:

    "*The requirement for an appeal "with reasoned arguments in support" to be lodged within 14 days is unreasonable. That period could include Bank or other holidays. When the SRA communicates any decision it should be required to notify the period for appeal being not less than 21 days.*"

    The Black Solicitors Network said:

    "Part 4 Rule 3: The time limit within which to appeal should not be varied downwards"

Comments on responses to question 5

24. The majority of respondents were clearly in favour of an internal appeal process but these responses were only from the profession and other regulators. The views of consumer bodies are not known as they did not respond to CP14.

25. We have considered the question of increasing the period in which an appeal may be made but 14 days is considered to be appropriate as this is the time allowed for an appeal against an SDT finding (which is a much more demanding process requiring formal grounds, bundles to be filed and so on). A longer period would have the detrimental effect of extending the length of the case generally. However, it should be noted that draft rule 9(3) provides that the appeal must be made within 14 calendar days or *"within a different time period specified by the SRA"* so there is a certain amount of flexibility which could accommodate matters such as holidays or where the case is particularly complex. This draft rule has been amended to make it clear that this *"different time period"* could not result in a reduction in the time allowed for an appeal by replacing *"different"* with *"longer"*.

26. Whether or not to have an internal appeal process is finely balanced. Factors include:

    (a) An internal process will mean that there are four possible decisions (the first, internal appeal, appeal to SDT, appeal to High Court) which could be a very lengthy process;
    (b) Internal appeals can correct error (but sometimes error is in the appeal decision);
    (c) Is it proportionate in cost terms for there to be an elaborate internal appeals process by which the cost of the overall case will probably be more than the maximum penalty?

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

27. Ten of the respondents answered *"no"*, the LSEW and the SDT made no comment but three of the respondents raised concerns about the position of employees.

ILEX and IPS said:

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

APIL said:

"The new provisions will therefore, for the first time, directly affect all employees (eg. Receptionists; secretaries; cleaners; etc) regarding them as 'regulated persons' and thus subject to disciplinary action. We do not believe that this is appropriate. We believe that rule 5 of the code already provides adequate protection for the public."

Comments on responses to question 6

28. Section 44D(1)(a) of the Act specifically applies the section to circumstances where a solicitor or an employee of a solicitor has failed to comply with a requirement imposed by or by virtue of this Act or any rules made by the Society. Therefore it is entirely appropriate to include employees within the definition of *"regulated person"* in the draft rules and is an important regulatory tool. This is also consistent with the changes that have already been made to the Solicitors Code of Conduct 2007 to extend the application of the Code to employees. It is clear that where such employees are members of other regulatory bodies there will need to be liaison with the other regulators.

Question 3 – Do you have any other comments on the draft rules?

29. A number of common themes emerged from the general comments and these themes are dealt with below.

Publication of written rebukes or fines in the public interest (rules 3(2) and 11)

30. The issue which has generated the most comments in the responses to CP14 concerns the publication of written rebukes or fines. Section 44D(3) of the Act gives the SRA the power to publish details of any action it has taken under subsection (2)(a) or (b), if it considers it to be in the public interest to do so. This is dealt with in draft rule 3(2) which provides that 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 a publication policy promulgated from time to time. Nine of the respondents raised concerns about the criteria for publishing such decisions.

The SDT said:

"...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. …. 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."

City of Westminster and Holborn Law Society said:

The SRA will be aware of the concerns repeatedly raised by practitioners in relation to its publication policy. The issue is of particular concern to sole practitioners and small local firms whose reputation is dependent on the good name of one or two individuals but it affects us all.

First, we must point out that Rule 3(2) appears inconsistent with Rule 11. We strongly believe that the wide ranging application of Rule 3(2) is inappropriate as it makes no allowances for circumstances in which it will clearly never be appropriate to publish a decision such as where the regulated person's safety, security or health may be put at risk by publication or where general principles of law would otherwise prevent publication. Furthermore, we object to the position that the SRA may publish when it considers a matter to be in the public interest where the SRA has not clarified the objective criteria which it will use to inform its opinion....

....We believe that it is important to consider the impact of the existing publicity regime before pressing ahead with the proposed expansion of that regime to matters which have previously been confidential. It is important to strike the right balance between the public interest and respect for the professional reputation of a solicitor. We do not believe that the SRA has struck the right balance with the current publication policy..."

The Sole practitioners group said:

"It is a matter of concern that results of its disciplinary processes (which are inherently at a much lower level than that of the SDT) should be susceptible of publication. Any 'regulated person' who has accrued a serious track record of justified complaints should surely be referred to the SDT. We are far from convinced that such publication is in the public interest in any event."

Hampshire Law Society said*:*

"*If fines are to be very rare then perhaps there should be publicity, but rebukes which must be more common should not be disclosed unless the same person received xx number in yy years."*

Comments on responses

31. The SRA's current policy statement on the publication of regulatory disciplinary decisions includes a list of factors which would support publication of regulatory disciplinary decisions and those which would support a decision to keep it private. A copy of the current policy statement is attached as **Annex 5**. The current policy is of course only of limited relevance because the section 44D powers require a decision on publication in the public interest to be made in each case.

32. The Compliance Committee considered the issues raised in these responses concerning the publication of disciplinary decisions. The Compliance Committee recommended some changes to the current publication policy which were set out in a separate paper to the Board in May 2009.

33. An important issue that the office itself identified but has also been raised in some of the responses is whether any publication criteria should be set out in a separate policy statement or should be included in the rules. The Board considered this issue in May 2009 and was inclined to suggest that the draft rules should be amended to incorporate publication criteria rather than such criteria appearing in a separate policy statement. Accordingly, the draft rules have been amended to include an appendix to the draft rules which sets out publication criteria. Some of the concerns raised in the responses have been addressed, for example, the appendix includes among the factors that would support a decision not to publish:

    "in all the circumstances the impact of publication on the individual or the firm would be disproportionate".

34. The Board also decided that it should be made explicit in the draft rules that a solicitor's comments on publication would be invited in each case. The draft rules now include the following provision to address this point:

    "Rule 6 – Report stage

    (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."

Standard of proof (rule 7(8))

35. The SDT, the City of Westminster and Holborn Law Society and the Sole Practitioners Group raised concerns about draft rule 7(8) which provides that the standard of proof shall be the civil standard.

    The SDT said:

    "...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 …. 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."

As will be discussed below, it is not in fact clear that the SDT does always operate in the way it describes or that it is "by law…obliged" to do so.

City of Westminster and Holborn Law Society said:

"Rule 7(8) is a contravention of settled case law as interpreted by the Privy Council and the House of Lords.

In Re Doherty [2008] UKHL 33 Lord Carswell stated at paragraph 23:

> *"Much judicial time has been spent in the last 50 or 60 years in attempts to explain what is required by way of proof of facts for a court or tribunal to reach the proper conclusion. It is indisputable that only two standards are recognised by the common law, proof on the balance of probabilities and proof beyond reasonable doubt. The latter standard is that required by the criminal law and in such areas of dispute as contempt of court or disciplinary proceedings brought against members of a profession."*

…*We believe that it would lead to an absurd dichotomy if the SRA imposed a civil standard of proof when, on appeal to the Tribunal or the High Court, these bodies would impose a criminal standard of proof. It is also possible that weaker cases which do not satisfy the evidential burden and standards imposed in the Tribunal and the High Court would result in the SRA imposing internal penalties on the basis of a lower burden and standard of proof leading to significant injustice and inequality, particularly for those regulated persons who cannot afford the benefit of professional advice and assistance."*

Comments on responses

36. The issue of the appropriate standard of proof under the draft rules is dealt with in detail in Part 2 of this paper.

Disclosure of Report (rules 6(5) and 6(6))

37. Six respondents including the SDT, two firms, APIL, ILEX and IPS and the City of London Law Society raised concerns about the provisions concerning restrictions on the disclosure of the report and the disclosure of information to persons other than the regulated person.

The SDT said:

"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?"

ILEX and IPS said

- *"Draft rule 6(6)(b) permits the SRA to restrict disclosure of confidential or privileged documents. It is not clear whether this refers to restricting disclosure to the regulated person; to an adjudicator; and or to third parties. The regulated person may be placed at an unfair disadvantage where the SRA is able to rely upon documents in reaching its decision which the regulated person cannot have sight of or respond to."*

APIL said

"We are also concerned that any comments received as a result of such disclosure are subject to the provisions of draft rule 6(6) which might limit the disclosure to the regulated person. This is inequitable – it must be mandatory for the full report and any comments to be available to the regulated person and it can be made abundantly clear to a commentator that it will be so disclosed. A regulated person must have the right to consider and address the full report and any comments."

Comments on responses

38. Draft rules 6(6) and 6(7) (previously 6(5) and 6(6)) have been revised to address these concerns. Rule 6(6) now provides that:

    "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."

    This makes it clear that the regulated person will be able to see any comments that the adjudicator may be relying upon when reaching a decision. However, the SRA would not be required to disclose comments which are not included in the documents referred for adjudication. For example, the SRA may decide not to include an informant's comments if they are not relevant or were sent confidentially.

39. Draft rule 6(7)(b) now provides that:

    "(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."

    This makes it clear that the restriction in draft rule 6(7)(b) only applies to disclosure to a person other than the regulated person.

Reconsideration (rule 10)

40. Two respondents sought clarification on whether it would be possible for a reconsideration to result in an adverse decision for the regulated person.

    The SDT said:

    "*In Rule 10 is it the case that reconsideration can lead to a decision which is adverse to the regulated person? If so, we think this may need to be made clear."*

The City of London Law Society said:

"It is unclear from the above draft subrules whether the SRA has the right to "reconsider" a decision with a view to imposing a harsher penalty. The rule should either explicitly exclude that possibility, or make it clear that it is included. If it is to be included, the subrule should make it clear that such reconsideration must be initiated within a specified time frame and can only be directed by an adjudicator or an adjudication panel (rather than any "duly authorised person")."

Comments on responses

41. Rule 10 would allow reconsideration to lead to a decision which is adverse to the regulated person. We have considered whether any amendment is necessary to make this clearer but we believe that the current draft rule is sufficiently clear as the rule does not impose any limitation on the decision that can be reached. This will also be made clear in any guidance that is issued in relation to this rule. The reference to *"any duly authorised person"* also remains as it is important for the draft rules to be flexible and to allow the SRA Board to decide the appropriate person to direct such reconsiderations.

Time limits

42. Seven respondents raised concerns about the time limits in the draft rules for providing information to the SRA.

Hampshire Law Society said:

"*The time limit of 14 calendar days set out in rule 6 is very short and in our view there should be a provision to allow a longer period in exceptional circumstances*. "

The Black Solicitors Network said:

"*Whilst we appreciate there are instances where speed may be of the essence in an investigation, 14 days for a response in many instances, is far too short, particularly if documents or other evidence has to be gathered. It can be an unnecessary burden on a busy practitioner where the alleged infringement is not serious. We emphasise the need for proportionality and in this instance, flexibility.*

Conversely, the SRA caseworker seems to be under no discipline with regard to reaching an expeditious conclusion. We wish to see fixed timescales established which can only be extended with good reason. Not only does the delay cause stress to the practitioner, it can cause difficulty for instance when renewing indemnity insurance, if an investigation is extant. Even if no disciplinary action is taken, the damage has already been done."

Comments on responses

43. We have considered the question of increasing the time periods in the draft rules but we are concerned that longer time periods would have the detrimental effect of extending the length of cases generally. However, the draft rules do provide flexibility as they refer to *"a time period specified by the SRA, which shall be no less than 14*

calendar days". This could accommodate matters such as holidays or where the case is particularly complex.

44. The draft rules do not impose specific time limits on the SRA but draft rule 6(9) provides that 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."* Further, the SRA intends to publish service standards wherever possible.