Solicitors Regulation Authority

Legal Services Act Consultation Paper 14

New disciplinary powers for the SRA – public rebukes and fines

A response by the Association of Personal Injury Lawyers

February 2009

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Membership comprises solicitors, barristers, legal executives and academics, who are all committed to serving the needs of people injured through the negligence of others.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Executive Summary

We believe that the draft SRA (Disciplinary Procedure) Rules 2009 are not clear and transparent enough to ensure the protection of the public and the 'regulated person'. Clarity in regulation is paramount so that the public and the 'regulated person' know what is needed to ensure compliance.

We are concerned that the 'strict rules of evidence' will not apply to decisions of the SRA with no indication of what rules will apply.

We believe that the internal appeals process should remain in place for cases where there is a statutory right of appeal to the Solicitors Disciplinary Tribunal (SDT) and the High Court. We submit, though, that the time limit for appeal should be increased to 21 calendar days.

We are concerned that the definition of 'regulated person' is too wide and includes employees of a firm or body. This would, for example, subject receptionists, secretaries and cleaners to regulatory action by the SRA.

We do not agree with the provisions of draft rules 6(5) and 6(6). We believe that the full SRA report and any comments from interested parties must be disclosed to the 'regulated person' with the time limit for a response in draft rule 6(4) being a minimum of 21 days.

Introduction

APIL welcomes the opportunity to respond to the Solicitors Regulation Authority (SRA) Consultation paper 14 about new disciplinary powers for the SRA.

In general terms we do not agree with the approach taken in the paper in making rules that comply with section 44D of the Solicitors Act 1974 because we believe the proposals are too vague and do not provide transparency and clarity in relation to SRA procedures. The new draft rules do not achieve their purpose because the intention seems to be to provide what we believe to be too much flexibility.

In our view, regulation cannot be as 'flexible' as is proposed – it is vital for the protection of the public, as well as the protection of the regulated person, that regulation is clear and transparent, with a detailed framework behind it.

Consultation Questions

Q.1: Are the rules clear and transparent?

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.

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

We believe that the approach taken in draft rule 3 is too vague and does not provide clarity and precision. We believe that regulation must have clarity so that the regulated person knows exactly what to do to ensure compliance.

We are concerned that draft rules 3(1) and 3(2) state '… the SRA may make a disciplinary decision…' as this in some way suggests that the decision is still discretionary even if the requisite conditions are fully met. Additionally, the second condition in draft rule 3(1) refers to a '… proportionate outcome in the public interest…' but this is nowhere defined. We believe there needs to be a clear framework and concrete criteria about when publication would be '… in the public interest…'. For example, we suggest that there should be a distinction between situations where there has been a 'technical' breach of some kind, with no actual harm to the public and those where some public harm has occurred

Q.3: Do you agree that disciplinary decisions should be made only by adjudicators? (rule 7).

Yes.

APIL has serious concerns about draft rule 7(7) which states that the strict rules of evidence shall not apply to decisions of the SRA. There is no indication of what rules of evidence (if any) will apply. We believe the rules need to be clear and transparent on this issue.

Q.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).

Yes.

Q.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).

Yes. We believe that the internal appeals process should remain in place.

We believe that the time limit for appeal in draft rule 9(3), namely 14 calendar days from the date of the decision letter, is too short. It may be many months since the initial referral of the matter to the SRA for investigation and for the regulated person to only have 14 calendar days to appeal is inequitable. This would be particularly harsh, for example, where the regulated person leaves for a two week holiday on the same day as the date of the letter. This means he will return to the office and find that the time limit for appeal has already expired.

In the introduction to the consultation paper it is said that the new powers '… provide an effective alternative … where a formal prosecution to the SDT may not be a proportionate response but where a private reprimand may be insufficient.'[1] In such circumstances it is highly unlikely that the matter is one of extreme urgency for the protection of the consumer and thus a longer time limit for appeal is of no detriment. We would suggest a 21 day time limit for appeal is more appropriate.

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

Yes. We are concerned about the definition of "regulated person" within the draft rules.[2] Draft rule 1(9)(f) includes as a regulated person '… an employee of a recognised body, a solicitor or a registered European lawyer…'.

The Solicitors' Code of Conduct 2007 ('the code') does not refer to a 'regulated person' although rule 23.01 does identify to whom the code applies - this does not include employees unless they are qualified in some way (for example, as a solicitor). Rule 5 of the code ensures that principals are responsible for the actions and omissions of all staff.

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.

Q.7: Do you have any other comments on the draft rules?

Yes. We have serious concerns about the impact of draft rule 6 (the report stage).

[1] Consultation paper 14, page2
[2] Draft SRA (Disciplinary Procedure) Rules 2009, Rule 1(9) [Consultation paper 14, page 13]

For similar reasons to those set out in answer to question 5, above, we believe the time limit set out in draft rule 6(4) is too short. We submit that this should be changed to 21 calendar days.

We are concerned that there is no definition of '… any other person with a legitimate interest…' in draft rule 6(5) and the circumstances that '…may…' allow the SRA to disclose the report. 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.

- Ends -

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