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Response to SRA Consultation on rule changes for health and well-being at work

May 2022

Response of the Consultation Committee of the Birmingham Law Society to the SRA Consultation on rule changes for health & well-being at work

This response has been prepared by the Consultation Committee of the Birmingham Law Society. The Society is the largest local law society with some 5,000 members. The response represents the collective view of the Consultation Committee whose members are specialist lawyers practising in all aspects of professional regulation and discipline.

SRA questions in full

We welcome your views on the questions raised in this consultation, and on all aspects of our proposals. A full list of the consultation questions is below.

Q1 – do you agree with our proposal to add to the Codes of Conduct an explicit requirement for regulated individuals and firms to treat people fairly at work? Please explain the reasons for your answer.

We agree that regulated individuals and firms should be required to treat people fairly at work but the difficult question is how that requirement should be imposed and more importantly enforced? Fairness within the workplace is not an objective professional conduct standard. It varies from firm to firm from individual to individual and does not lend itself to consistent enforcement. Any rule would also duplicate firms' obligations under existing employment law. Is this another example of the SRA extending its regulatory reach into matters that would be better left alone? These type of investigations where subjective standards are in play and witnesses are reluctant to give evidence are fraught with difficulty. The SRA is already aware of these problems with its sexual misconduct investigations post MeToo. Does the SRA want to be concerned with even more complaints which it is required to investigate and which go nowhere? Where is the data or evidence to justify a new rule?

We would refer the SRA to the Legal Services Act 2007 under the heading "General duties of approved regulators" and in particular to Section 28(3) which provides that

"The approved regulator must have regard to—

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

The SRA should question whether these rule changes are necessary. Is there sufficient data to support action in this area? Does the existing employment law provide adequate remedies for complainants? These are the sort of considerations that the Legal Services Board would expect a regulator to be asking itself.

Rather than introducing a rule immediately, the SRA should consider introducing more detailed Guidance covering this area with examples both drawn from SDT judgments and human resources expert input so that it is clear what the SRA requires of the profession – that would demonstrate effective professional regulation. In extreme cases, the SRA could investigate and enforce under the existing Principles and Rules – for example . Rule 1.2 Code for Firms You do not abuse your position by taking unfair advantage of clients **or others (emphasis added).** Principles 2 & 6 could also be relevant. We acknowledge that some guidance has already been published but this needs to be monitored and updated regularly and only the most extreme cases investigated and prosecuted.

If a rule were introduced, we consider that the rule should be enforced proportionately, without excessive prosecutions and the associated costs and that the enforcement approach should be specifically set out in the SRA's Enforcement Strategy, in order to achieve consistency of approach. Proportionate enforcement is essential as adding to professional rules may increase the costs of regulation, which can act to the detriment not only of regulated professional, but to clients and their ability to access justice.

The suggestion to treat people fairly, is however, not a new duty. Guidance in force previously in former Codes of Conduct, in particular the "The Guide to the Professional Conduct of Solicitors" (1999-8th Edition) ("the Guide") states:

"A solicitor must maintain his or her personal integrity and observe the requirements of good manners and courtesy towards other members of the profession ***or their staff,*** *no matter how bitter the feelings between clients."* (emphasis added).

This was part of the duty of good faith required of solicitors in Principle 19.01 of the Guide. Such a duty could be relevant for future Guidance or rules.

Although a rule is not a completely new suggestion in the regulation of solicitors, there is a lack of enforcement decisions. It is suspected that any such reported cases would have not reached the required threshold for formal investigation, except where they also involved a breach of the Equality Act 2010.

Q2 – do you agree with our proposal to include an explicit requirement for regulated individuals and firms to challenge behaviour which does not meet the new standard? Please explain your reasons.

Should the SRA decide to introduce rule changes in this area which we disagree with for the reasons stated above under question 1, we consider that any requirement to challenge behaviour, should primarily rest on the firms' managers (partners in a partnership, members of an LLP and directors of a company), and any specially designated persons on behalf of the firm. The focus of the SRA should always be on firms not individuals in order to ensure firms have good working environments for their staff and to avoid extreme examples such as the *Sovani James c*ase. In this way, the SRA has a better chance of succeeding with its investigations and enforcement as opposed to dealing with petty disputes or challenges by one employee against another. There is scope here for a myriad of unjustified or even tactical complaints to the SRA.

A challenge to perceived inappropriate behaviour should be done in a professional way, by trained employees and senior staff, otherwise, the challenge itself may be the subject of a complaint. Introducing such a requirement on all employees would also involve significant training costs.

What would a challenge in practical terms look like? A face-to-face conversation? Would that need to take place immediately, or should the person challenging the behaviour seek to conduct the challenge in a private office at a later time? Should an individual have the opportunity to take advice from a Human Resources professional before initiating the challenge? These are the practical issues that would be faced by solicitors subject to the duty. For these reasons, we feel that it would be more effective if only those in senior positions had a duty to challenge individuals, to avoid confrontations and complaints. If the rule were imposed on all employees, then potentially junior employees would have the duty to step in and challenge more senior employees or partners. This would be an unfair duty to impose on those under the authority of senior staff.

The SRA may find that the rule to treat employees fairly, is a difficult and costly one to enforce. In addition, to open up a new angle on prosecutions for those who had not made a sufficient challenge (would it be acceptable that a witness did not immediately challenge the behaviour, but had reported it, knowing that the designated HR professional would then investigate and would then challenge the behaviour?) would make enforcing the rule even more difficult and costly. The requirement to treat others fairly and with respect is primarily an employment law issue and therefore, the SRA should limit its involvement in this area only to very serious cases.

Many modern firms, such as alternative business structures that are licensed bodies and unregulated firms employing solicitors carrying out unreserved work will have a mixture of regulated and non-regulated staff. It would be very difficult to draw the distinction between solicitor employees and non-solicitor employees if this rule were introduced.

Q3 – do you agree that this requirement should cover colleagues such as contractors, consultants and experts, as well as staff in a formal employment relationship? Please explain your reasons.

We agree that solicitors should treat all non-employee colleagues such as contractors, consultants and experts fairly and with respect. We do not consider that the SRA should extend its regulatory reach in this area for the reasons already expounded above. However, should there be a rule, there should not be a duty to challenge, in non-employee situations except, perhaps by senior managers, who would be guided by advice and Human Resource professionals.

Q4 – do you agree that these new obligations should apply to behaviour outside of the workplace or the direct delivery of legal services? This is where behaviour is in a relationship between colleagues rather than a purely personal relationship. If so, should this be made explicit in the new wording?

Extending the SRA's regulation into the personal lives of solicitors, even if that personal relationship is between solicitors is a step too far. The decision to introduce such a rule could expose the SRA or even the Legal Services Board to a judicial review of its decision based on The European Convention of Human Rights, article 8, the right to respect for private life. The SRA must treat a solicitor's right to a private life with respect. The SRA was subject to an adverse decision in the case of Beckwith v SRA [2020] EWHC 3231 (Admin) where it was argued that Mr Beckwith's right to respect for a private life had been infringed, *". . .in any event, such rules represent an intrusion into private life that cannot at the level of principle, be justified by the public interest in the regulation of a profession."* (para 49).

In the transition from the 2011 to the 2019 Codes of Conduct, the SRA lost the Application chapter which made it clear which parts of the code applied outside of practice. Now it is stated in the Code in the introduction that the Code applies to a solicitors practice, " *They apply to conduct and behaviour relating to your practice,. . .".* If requirements were introduced that applied outside of practice, the SRA would need to reintroduce an Application rule and amend the Code to make it clear that it applied outside of practice, because as it currently stands, the Code does not apply outside of practice.

Paragraph 39 of the Beckwith Judgment states:

"Yet the approach we have taken in this case is not any form of permission to expand the scope of the obligation to act with integrity simply by making rules that extend ever further into personal life. Rules made in exercise of the power at section 31 of the 1974 Act (in the language of the Handbook, the "outcomes" and the "indicative behaviours") cannot extend beyond what is necessary to regulate professional conduct and fitness to practise and maintain discipline within the profession."

It would appear that a rule that required investigation into the private relationship of two solicitors would *"extend beyond what is necessary to regulate professional conduct".*

That is not to say there is no issue with how solicitors conduct themselves in their private lives as solicitors have been properly prosecuted before the Solicitors Disciplinary Tribunal for convictions of domestic abuse.

The SRA should also be wary of using the phrase *"outside of the workplace"* which is unhelpful and suggests that professional conduct is linked to an office location. In these days of flexible working and working from home, this is no longer the case. The SRA should confine its attention (as has always been the case) to *"conduct and behaviour relating to your practice".*

Q5 – do you have any other changes to suggest to our proposed wording for the new requirements? If so, please give details.

Should a rule be introduced, we agree with the wording for the Code of Conduct for Firms, with two suggested amendments

First, the insertion of the word *"managers"* for reasons explained above.

Secondly, the SRA needs to reconsider the draft wording *"or discriminate unfairly".* It is our understanding that *"fairness"* is not a concept in discrimination law. For example, positive action under section 159 of the Equality Act is lawful. A preferred

approach may be to make it clear that any discrimination should be unlawful. Also the existing wording to *"discriminate unfairly"* suggests that it is permissible to *"discriminate fairly"* which of course cannot be the case.

Please see suggested amends below:-

'*You treat those who work for and with you fairly and with respect, and do not bully or harass them or unlawfully discriminate against them. You require your managers and employees to meet this standard, and your managers challenge behaviour that does not meet this standard.'*

We agree with the wording for the Code of Conduct for Solicitors, with deleting the requirement to challenge behaviour.

'*You treat colleagues fairly and with respect. You do not bully or harass them or unlawfully discriminate against them. ~~You challenge behaviour that does not meet this standard.'~~*

Q6 – do you have any comments on our proposed approach to enforcing the new requirements on unfair treatment at work?

We agree that SRA investigations should only be initiated where it is proportionate to the breach. However, what is missing from the consultation is an explanation as to how the use of regulatory sanctions will be used proportionately. For example, letters of advice and Regulatory Settlement Agreements could be used whereby the solicitor will agree to attend training courses. The SRA needs to consider what enforcement measures are proportionate, but also which ones will have the effect of changing behaviour, rather than removing the individual from the profession altogether, which in practical terms is what might happen with a formal prosecution, as an appearance at the Solicitors Disciplinary Tribunal which would limit a solicitor's ability to find employment. The SRA needs to use the carrot and not the stick in this area. Encouragement and the sharing of best practice is the way forward not heavy-handed investigation and prosecution.

Q7 – do you have any comments on the regulatory or equality impact of our proposed changes on wellbeing and unfair treatment at work?

It should be noted from the anecdotal evidence of junior lawyers prosecuted by the SRA (e.g., the toxic working arrangements case), that both age and (mental health) disability are relevant and these are protected characteristics under the Equality Act 2010. It would not be for a junior solicitor to have a duty to challenge their firm's compliance with the duty to treat others with respect. It would appear that the changes, if properly and proportionately enforced, would have a positive impact on solicitors with a mental health disability and would have a positive impact on solicitors who are likely to be younger in age.

Q8 - do you agree with our proposal to amend our Rules and Regulations to make it clear that fitness to practise covers all aspects of practising as a solicitor, including the ability to meet regulatory obligations and be subject to regulatory proceedings? Please explain the reasons for your answer.

In broad terms, we agree that the rules should make reference to being able to take into account a solicitor's health. However, a regulator must discern what information is relevant and that which is not relevant or comes from an unreliable source. The rules should not assume that all information will be considered, indeed, it may be improper to accept some information, for example medical records that have not been disclosed with the consent of the solicitor.

We do not agree that fitness to practice should be taken to include the ability to be subject to prosecutions in the Solicitors Disciplinary Tribunal. Effectively, that would mean a solicitor who was subject to a severe mental health condition, possibly made worse by the threat of disciplinary action, would be prohibited from practising as a solicitor because they were suffering, possibly from a temporary, but severe, mental health condition. Even if the solicitor was not guilty of the offence, the rule change effectively says that the solicitor will be unable to practise and earn a living because the SRA will say they are not fit to practise.

Q9 – do you have any changes to suggest to our proposed wording for the amendments? If so, please give details.

We suggest the following amendment to the proposed addition to Rule 2 Assessment of Character & Suitability Rules:

'Solicitors have a statutory duty to comply with our regulatory arrangements and such compliance is part of what it means to practise as a solicitor. Therefore, in assessing your suitability the SRA will take into account ~~anything~~ all relevant factors, including your health, which indicates you are unfit to meet your regulatory obligations ~~or to be subject to regulatory investigations or proceedings.~~'

We disagree with the proposed changes to Regulation 7.2, Authorisation of Individuals Regulations. The new wording in bold goes much too far and is too wide. It places too much power in the hands of the SRA to curtail a solicitor's practice. It goes far beyond the imposition of conditions when a solicitor is unwell and unable to practise. For example, it would enable the SRA to impose a condition preventing a solicitor from practising in a situation where a solicitor has been unable to comply with an investigation for a genuine reason wholly unconnected to ill health.

Another reason for caution is that the SRA deals with the imposition of conditions as a paper exercise. It rarely permits an oral hearing. An unrepresented solicitor could find himself at a considerable disadvantage in such a situation.

Q10 – do you have any comments on our approach to managing health concerns in the context of the proposed changes to our rules?

The SRA could give further information about what they have done in the past to help inform the consultation process. This consultation paper is light on data. How many solicitors are subject to practising certificate conditions due to their health? The emphasis on enforcement should be to support those solicitors with health concerns

and disabilities. The SRA needs to innovate more positive enforcement approaches. For example, private (not public due to the sensitive nature of health information) Regulatory Settlement Agreements where an individual will agree to remain in certain employment, or work with the supervision of another solicitor, or undergo training. Managing the process through private agreements, rather than public agreements or information may be a better way of dealing with sensitive issues, even if the agreement includes a provision to inform an employer. Conditions on a practising certificate appear to have negative connotations as they are also imposed when there have been disciplinary investigations, or breaches. Reaching private agreements, would encourage constructive engagement with the SRA.

Q11 – do you have any comments on the regulatory or equality impact of our proposals on solicitors' health and fitness to practise?

A rule which effectively prevents solicitors with mental health conditions from practising, particularly when the disciplinary process is so brutal, appears to raise the question of compliance with the Equality Act 2010.

Birmingham Law Society Consultation Committee
6 May 2022