

Meeting: Legal Services Board

Date: 8 June 2021

Item: Paper (21) 27

Title: Solicitors Disciplinary Tribunal Performance

Author: Steve Brooker, Head, Policy Development and Research

Status: Official

Purpose of the paper

1. The paper facilitates a wide-ranging discussion with the Solicitors Disciplinary Tribunal (SDT) about its operations. Suggested discussion topics include:
 - Equality, diversity and inclusion
 - Learning from recent cases
 - Impact of changing to the civil standard of proof
 - Relations with the Solicitors Regulation Authority (SRA)
 - Remote and hybrid hearings
2. Ed Nally, President of the SDT, and Geraldine Newbold, Chief Executive Officer and Clerk of the SDT, will be in attendance.

Recommendation

3. The Board is invited to **discuss** the issues in the paper with the SDT.

Background

4. At the April 2021 meeting, as part of the CEO update item, the Board considered annual performance statistics provided by the SDT. This is established custom and practice, but the creation of a challenge panel to consider the annual budget application means that the Board no longer routinely has a periodic opportunity to discuss the overall functioning of the SDT with its key officers. In this context, the Board invited the SDT to attend a forthcoming meeting for such a discussion.
5. The SDT is constituted as a Statutory Tribunal under Section 46 of The Solicitors' Act 1974. It may be helpful to remind the Board of its statutory

functions in relation to the SDT as contained in the Legal Services Act 2007. These are as follows:

- **Approval of the SDT's annual budget (Schedule 16)** – Section 46A of the Solicitors Act 1974 (which was inserted by paragraph 48 of Schedule 16 to the Legal Services Act 2007) requires that the SDT submits to the Law Society an annual budget that has been approved by the LSB. This process operates in accordance with a memorandum of understanding revised in 2019 signed by the LSB, SDT and the Law Society.
 - **Approval of alteration to the tribunal rules (s178)** – this mirrors provisions on approving proposed alterations to regulatory arrangements by approved regulators. The Board last exercised this function in 2019, notably when the SDT moved to using the civil standard of proof.
 - **Give directions to the SDT (s179)** – this mirrors powers to give directions to the approved regulators under the LSB's enforcement policy. The statutory test is that the SDT has failed to perform any of its functions to an adequate standard or at all. This power has never been exercised.
 - **Modify the SDT's functions (s180)** – the Board may make a recommendation to the Lord Chancellor with a view to an order being made which enables the Tribunal to carry out its role more effectively or efficiently. This mirrors powers to make similar recommendations in relation to approved regulators. This power has never been exercised.
6. Therefore, the Board has significant powers in relation to the SDT, although some are subject to certain tests being met. Even so, its statutory oversight functions are more limited than is the case for the approved regulators and the Office for Legal Complaints. For example, the Board has no role in relation to appointments or performance oversight more generally. In practice, the Board's principal interface with the SDT is through the annual budget process.
7. The Board's discussion will provide valuable insights on related areas of work in the current business plan. These linkages include discussions on fitness to practise regimes (being considered as part of the ongoing competence project) and the review of the regulatory performance framework (this includes standards on enforcement and will consider future approaches to enforcement oversight).

Discussion topics

8. Below we set out potential discussion topics.

Equality, diversity and inclusion (EDI)

9. The SDT has historically found it difficult to persuade respondents to provide EDI data. In 2020, the SRA published an analysis of its EDI data on disciplinary outcomes. The key findings in relation to prosecutions before the SDT are reproduced in the SDT's annual performance statistics document. This includes a statement that the SDT followed up by reviewing data in relation to the same 144 individuals in the SRA's report, and in particular the sanctions imposed, and considers that respondents were treated fairly and consistently. The Board

raised this point at its April meeting so may wish to pursue this with the SDT, including the potential for the SDT and SRA to work more closely together to share data that could reveal any disproportionality of outcomes.

10. Following feedback from the Board in the last budget round, the SDT developed a new key performance metric on EDI. This a step forward, but we encouraged the SDT to see this as a starting point rather than an end destination and to continue to explore ways of improving measurement in this area. We have also encouraged the SDT to take a holistic and strategic approach to EDI issues. The Board may wish to explore the progress the SDT is making on this front.
11. There is a shared wish to make the pool of SDT Panel Members more diverse. Although the Board has no role on appointment of SDT Panel Members, we note that the Master of the Rolls recently strengthened their appointments protocol in relation to EDI. This includes a focus on advertisement of vacancies to encourage diverse applications and permission to use positive action initiatives, including 'equal merit provisions' at all stages of the appointments process. From now on, appointment panels must also be ethnically and gender diverse.

Learning from recent cases

12. The SDT has been involved in some high-profile cases, including a small number where its decisions were successfully appealed. These include:
 - Beckwith – the High Court overturned the SDT's decision that Mr Beckwith, a former Freshfields partner, breached the SRA code of conduct in relation to sexual activity with a junior lawyer at the firm.
 - Claire Matthews – the junior solicitor struck off after she left confidential documents in a locked case on a train. After expert medical evidence obtained by her legal team acting pro bono the SRA agreed for the Divisional Court to quash the SDT ruling and order a fresh hearing before a new panel to reconsider the impact of her mental health on her action.
 - David Greene – the former president of the Law Society who stepped down following a High Court ruling that the SDT was wrong to dismiss a prosecution brought against him by a former client. The High Court ruled that the SDT's decision was flawed both in its analysis of abuse of process and by not properly examining the merits of the case.
13. The SDT may be unable to discuss the specifics of individual cases, especially those subject to ongoing proceedings. However, the Board may wish to discuss points of general learning from these and other cases. The Beckwith case has implications for the handling of allegations involving sexual misconduct, and, more widely, where the role of regulators in matters of personal conduct should begin and end. The Matthews case has implications for consideration of mental health and has informed debate around the need for a fitness to practise regime.
14. Note that LSB's work on fitness to practise as part of the ongoing competence project has focused on remedial support when there has been incompetence (but not misconduct). The fitness to practise element is about having the

processes in place to deal with someone who needs further training, supervision or other conditions on their licence to be fit to provide good services.

Impact of changing to the civil standard of proof

15. The switch to the civil standard of proof came into effect in November 2019, coinciding with the introduction of the SRA's Standards and Regulations. Given the lag between when potential misconduct is first identified and an SDT hearing takes place, it is too soon to understand the full impact of this change. However, given the controversial nature of the proposal (at least at the time) the Board might wish to explore what, if any, differences have resulted to date.

Relations with the SRA

16. A feature of some recent SDT rulings is criticism of legal costs claimed by the SRA; this criticism has been echoed in the High Court. Further, the SDT has ruled against the SRA in some high-profile cases, mostly notably the Leigh Day case¹. We note that the SRA would not expect to win all the cases it prosecutes. Indeed, if it did, this might indicate risk aversion in its enforcement strategy.
17. While operating independently, the quality of relationships between the two bodies is critical to effective operation of disciplinary arrangements for solicitors.

Remote and hybrid hearings

18. The Board has commended the SDT on adapting to the challenges posed by Covid-19 by quickly moving to remote and later hybrid hearings. As with other parts of the justice system, this raises questions about what should constitute the 'new normal' once lockdown restrictions are fully lifted.

Next steps

19. We will follow up on points discussed with the SDT at this meeting.
20. The Board is due to consider the SDT's 2022 budget application at its October meeting. Michael Smyth and Catherine Brown have kindly agreed to form a challenge panel to review the application ahead of the Board's discussion.

Annexes

Annex A – LSB summary of SDT annual performance statistics – reproduced from the April meeting. The full SDT document is available in VBR.

¹ This case concerned allegations of misconduct arising from the Al-Sweady inquiry into claims about the actions of British soldiers in Iraq. The SRA unsuccessfully appealed the SDT's decision at the High Court.

Risks and mitigations	
Financial:	N/A
Legal:	N/A
Comms and engagement:	The SDT has faced greater scrutiny due to high-profile cases including successful appeals against some of its decisions. There is some stakeholder misunderstanding about the extent of the LSB's oversight role in relation to the SDT. This paper clarifies the statutory position, while we have also revised our web pages.
Equality and diversity:	See paragraphs 9 to 11 of the paper.
Resource:	N/A.

Freedom of Information Act 2000 (Fol)		
Para ref	Fol exemption and summary	Expires
None		