

## **Solicitors Disciplinary Tribunal’s response to Legal Services Board re: Rule change application Solicitors (Disciplinary Proceedings) Rules 2019 and correspondence from the Legal Services Consumer Panel**

1. On 5 June 2019 the Tribunal received a request for further information from the Legal Services Board (“LSB”) and a copy of a letter sent by the Legal Services Consumer Panel (“LSCP”) to the LSB dated 3 June 2019.
2. In this response the Tribunal addresses the questions raised by both the LSB and the LSCP.

### **Request for Further Information from the LSB**

3. The LSB has requested further information on substantive issues in order for it to assess the application against the refusal criteria under Schedule 4 of the Legal Services Act 2007.
4. Equality Impact Assessment
  - a) The Equality Impact Assessment sets out that the SRA will soon be publishing a report on its disciplinary track record. What action will the SDT take if the report flags issues that are relevant to the changes being proposed at this time?
  - b) What relevant evidence did the SDT find within the sources of information identified at Paragraph 4.2?
  - c) How did the evidence found in the sources of information help inform the equality impact assessment?
- 4.1 The Tribunal does not consider that the SRA’s report on its disciplinary track record will flag any issues that are relevant to the changes being proposed at this time. The Tribunal anticipates that the proposed rules will affect all groups of people in the same way as the Solicitors (Disciplinary Proceedings) Rules 2007 (“2007 Rules”) currently affect all groups of people.

4.2 If say for example, the report flagged that there was a disparity in the sanction being imposed in respect of different groups of people this would not impact on the changes proposed but would mean that the Tribunal needed to consider how to address this disparity. In the unlikely event that the SRA identified a specific issue which in the view of the Tribunal must be addressed by a change to the draft rules, then it would consider doing so as part of the current process.

4.3 The relevant evidence that the Tribunal identified from the sources set out at paragraph 4.2 is set out at Paragraph 17 of the “Response to the Consultation on the making of procedural rules in relation to applications to the Tribunal” and at Paragraph F of Annex 1 to that document at pages 10 and 11. As previously mentioned, the Tribunal holds very limited equality and diversity information as respondents have chosen not to provide such information.

4.4 All of the available information was considered in full when preparing the equality impact assessment and seeking to identify whether or not there was any evidence that the proposed changes would affect any one group of respondents disproportionately compared with any other group of respondents, regardless of whether or not the respondent has a protected characteristic. The available evidence enabled the Tribunal to conclude that there was no evidence that the proposed changes would affect any one group of respondents disproportionately compared with any other group of respondents regardless of whether or not the respondent has a protected characteristic.

## 5. Drafting Points

a) Has the Ministry of Justice been engaged in drafting the proposed statutory instrument?

b) The “in the alternative drafting” of rule 3(4) of the proposed rules means the LSB would be left approving uncertain rules. Perhaps the SDT could consider amending its drafting so that both versions appear in the final rules. We would suggest considering

drafting that sets out that in the event of exit day 3(4) be replaced by the alternative wording you have included.

5.1 The Ministry of Justice was sent the Tribunal's Consultation but did not submit a response. With the exception of the definition of registered European lawyer, the Ministry of Justice has not been engaged in detailed discussions in respect of the drafting of the proposed statutory instrument but has been kept fully informed of the process.

5.2 In responding to the question about the definition of registered European lawyer, it is important to note that the current intention is that the rules will be made so as to come into effect in November, which as things stand will be after exit day. It cannot be said with certainty that exit day will be 31 October. This goes to explaining why the rules were drafted in the way they were, allowing for some flexibility as to the final content.

5.3 Following discussion with the Ministry of Justice on 17 June 2019 the Tribunal will review the wording of rule 3 to address the LSB's concern as to uncertainty. Revised wording will be submitted to the LSB as soon as practicable and will be shown tracked in an updated version of the rules.

5.4 In reviewing the draft rules the need for four minor amendments to the draft rules has been identified. These will also be shown tracked in the updated version of the rules referred to above. The proposed amendments are as follows:

- The deletion of the words "Laid before Parliament" as the rules do not need to be laid before Parliament.
- The insertion of a short preamble in the following terms:

"The Solicitors Disciplinary Tribunal, in exercise of the powers conferred upon it by section 46 of the Solicitors Act 1974(a), makes the following Rules.

The Legal Services Board has approved the Rules in accordance with section 178 of the Legal Services Act 2007**(b)**.

Footnotes:

- (a) 1974 c. 47.
- (b) 2007 c. 29.”

- The amendment of the numbering from rule 58(1) to rule 51.
- Minor amendments to the Explanatory Note namely amending the word “order” to “rules”, removing the numbering and inserting a postal address at which the forms referred to are available.

6. Targeted – Paragraph 6.5.2

a) Paragraph 6.5.2 states that the new rules will have no impact on anyone whose behaviour accords with their professional obligations. What consideration has the SDT given to any other impact on its regulated community beyond those solicitors who find themselves before the tribunal? For example, has the SDT considered any unintended consequences of the change to the civil standard such as whether or not solicitors will be more reluctant to take on certain cases and whether such reluctance may negatively impact the regulatory objectives?

6.1 The Tribunal adjudicates on allegations of professional misconduct. The Tribunal considers that the proposed changes to the Tribunal’s rules will not impact on those who are potentially within the Tribunal’s jurisdiction but who do not find themselves before it.

6.2 The Tribunal considers that the risk of professional misconduct proceedings arising is highly unlikely to form part of the assessment a solicitor or other legal professional makes as to the merits of a case and the factors that they will consider when deciding whether or not to take on certain cases.

6.3 The Tribunal cannot identify any unintended consequences of the proposed change to the civil standard and does not consider that the change, if approved, will make solicitors more reluctant to take on certain cases. The Tribunal considers that in deciding whether or not to take on certain cases, solicitors are far more likely to take into consideration the prospects of success and the potential for complaints if the client does not achieve their desired outcome.

6.4 The Tribunal has considered each regulatory objective in turn:

- Protecting and Promoting the public interest
- Supporting the constitutional principle of the rule of law
- Improving access to justice
- Protecting and promoting the interest of consumers
- Promoting competition in the provision of legal services
- Encouraging an independent, strong, diverse and effective legal profession
- Increasing public understanding of the citizen's legal rights and duties
- Promoting and maintain adherence to the professional principles.

6.5 The Tribunal has not identified any further potential impact (either positive or negative) other than those already set out in the application.

## 7. Post-Implementation

a) At Paragraph 9.6 of the application the potential for impact on the SDT budget and hearing days is mentioned. How will the SDT monitor any impact once it becomes quantifiable?

7.1 The Tribunal monitors the number of cases it receives each month and the number of hearing days per month. The Tribunal also monitors the number of future hearing days that are listed. This information is compared to the historical information in relation to hearing days and new cases received. In comparing the data any impact will become apparent.

7.2 In terms of the impact it may not be possible to distinguish between the impact of the Tribunal's proposed new rules and the introduction of the SRA's new regulatory model which is likely to be introduced at the same time.

7.3 What will be key is ensuring that there are sufficient hearing days available to ensure that matters are dealt with in a timely manner. If more hearing days are required then in the short term the Tribunal would be able to fund these from its reserves whilst making an application for Additional Funding in accordance with the Memorandum of Understanding, should there be sustained and significant increase in the number of hearing days that are required.

## 8. Overriding Objective

a) How has the SDT considered the impact of its overriding objective on the regulatory objectives?

b) What was the rationale for amending the overriding objective that appeared in practice direction 6 to set out the requirement of "proportionate cost"?

c) How has the SDT considered the requirement of proportionate cost will apply to its function as a specialist tribunal as compared to how it applies more generally in the civil courts?

d) Can the SDT provide an example of how such a requirement would be applied in a specific case?

e) Can the SDT provide examples of other professional disciplinary jurisdictions that have overriding objective rules?

### 8.1 The Proposed overriding objective in proposed rule 4 is:

"(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases justly and at proportionate cost.

(1) The Tribunal will seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable—

- (a) ensuring that the parties are on an equal footing;
  - (b) ensuring that the case is dealt with efficiently and expeditiously;
  - (c) saving expense;
  - (d) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues.
- (3) The parties are required to help the Tribunal to further the overriding objective set out above.”

8.2 The Tribunal considers that the overriding objective protects and promotes the public interest. It is in the public interest that allegations of professional misconduct are dealt with efficiently and expeditiously. The overriding objective also supports the constitutional principle of the rule of law. The Tribunal will deal with cases justly and in a way that is proportionate to the nature, importance and complexity of the issues before the Tribunal. In ensuring that as far as is practicable the parties are on an equal footing this improves access to justice for individuals who find themselves before the Tribunal. A Tribunal that has clear expectations of the parties and which deals with matters justly promotes and maintains adherence to the professional principles. The Tribunal does not consider the overriding impact has any specific impact on the remaining regulatory objectives.

8.3 The overriding objective as set out in Practice Direction 6 states:

“The Overriding Objective when managing all cases brought before the Tribunal is to ensure that they are dealt with justly:

- To determine allegations brought against Respondents;
- To deal fairly with Applicants and Respondents, their representatives and others appearing before the Tribunal;
- To deal with cases efficiently and expeditiously;
- To ensure that all relevant evidential material is available to the Tribunal in a timely fashion and accessible format throughout the proceedings and at the final hearing;
- To deal with matters proportionally;
- To deal with matters in accordance with the Tribunal's duty to be independent, impartial and transparent.”

8.4 Practice Direction also states that “It is the duty of every party actively to assist the Tribunal and its administrative staff in fulfilling the Overriding Objective.”

8.5 The Overriding Objective in the Civil Procedure Rules 1998 states:

“1.1

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable

–

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.”

8.6 The LSB will be aware from the responses to the Consultation itself and from comments in the legal press that the costs of proceedings before the Tribunal are of considerable interest and concern to the profession. The Tribunal made specific reference to a requirement of “proportionate cost” to highlight to all parties the need to ensure that the costs incurred are reasonable and properly incurred.

8.7 The Tribunal has not made any reference in the Overriding Objective to the amount of money involved or the financial position of the parties not to allocation of an appropriate share of the Tribunal’s resources. These are not matters that the Tribunal considered should be included in its Overriding Objective.

8.8 The Tribunal considered that the requirement of proportionate cost will apply to all parties in a case and will be a relevant factor when the Tribunal is considering what if any costs it should order. This is perhaps best illustrated by a hypothetical example. Take for example a set of proceedings based on a conviction for stealing client money where the respondent accepts the conviction and the fact they will be struck-off. If the applicant instructed leading counsel to attend the Tribunal to present the case and sought costs of £100,000 the Tribunal would not consider this proportionate.



However, if the applicant's own representative presented the case and sought costs of £3,000 the Tribunal is likely to consider this proportionate.

8.9 What is and is not proportionate will, of course, depend entirely on the facts of any given case. It is important to note that the Overriding Objective refers to "Dealing with a case justly and at proportionate cost includes, so far as is practicable..." The Tribunal is not fettering its discretion and the requirement to deal with matters at proportionate cost is subject to the important caveat "as far as is practicable". What is crucial is that justice is done and seen to be done in all proceedings before the Tribunal.

8.10 In considering whether or not to include an overriding objective in the proposed rules the Tribunal considered other precedents. Those found were not in the professional regulatory rules, but in court and other tribunal rules: the Civil Procedure Rules (r 1.1), Court of Protection Rules (r 1.1) and the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (r 2). Neither the General Medical Council or General Optical Council fitness to practice rules has an overriding objective rule. As the Tribunal is a statutory Tribunal and has had an Overriding Objective for some years it was considered appropriate for this to be specified in the proposed rules.

## 9. Practice Directions

a) The SDT intends to retain its power to issue practice directions in new rule 6(3). How does the SDT envisage using this power given that it has determined existing practice directions require the status of rules and appear to have been used as though they were rules?

9.1 A practice direction is a supplemental protocol to rules of procedure in the courts and tribunals. A practice direction is in effect a device to regulate procedural matters. As the LSB will be aware the Civil Procedure Rules 1998 contain a large number of

practice directions which give practical advice on how to interpret the rules themselves.

9.2 The Tribunal recognised in undertaking a review of the 2007 Rules and bringing forward the proposed rules that there were a number of matters currently set out in practice directions that should be incorporated into the rules themselves.

9.3 When the proposed rules come into force the Tribunal's current practice directions will cease to have affect as they will be superseded by the rules. Currently the Tribunal only envisages one new practice direction setting out the practical steps in relation to applications for Agreed Outcomes. The Tribunal considers this is more appropriately dealt with by way of a practice direction given the level of detail required and the need to be able to update the procedure from time to time which would not be possible if the requirements were specified in the rules. The Tribunal will keep under review the question of whether further practice directions are required, as it currently does.

## 10. Consistency with other Disciplinary Tribunals

a) What assessment has the SDT made of the consistency of its new rules with practice across other professional disciplinary tribunals?

b) In any instances where the rules proposed are not consistent with other tribunals, what is the rationale for the SDT proposing them?

10.1 The Tribunal's starting point in bringing forward its new rules was to review the 2007 Rules and The Solicitors Disciplinary Tribunal (Appeals and Amendment) Rules 2011 ("2011 Rules") and to identify what changes were required to the 2007 Rules and to try and achieve as much consistency as appropriate with the 2011 Rules.

10.2 The Tribunal is a statutory Tribunal under the Solicitors Act 1974. In bringing forward the proposed rules the Tribunal has ensured that they are consistent with the statutory framework as set out in the Solicitors Act 1974.

- 10.3 Other tribunals operate according to the specific legislation that is relevant to that tribunal. The Tribunal has not reviewed practice across other disciplinary tribunals for consistency with the proposed new rules. The Tribunal did consider the provision of the Civil Procedure Rules 1998 in formulating certain proposed rules particularly in relation to the Overriding Objective, Service and Disclosure.
- 10.4 Although parts of the 2007 Rules are dated, on the whole the 2007 Rules are clear and effective and understood by the parties to proceedings before the Tribunal. In proposing the new rules necessary updates have been made to the 2007 Rules and additional matters have been included. The new provisions have been identified as necessary due to issues arising prior to and during substantive hearings at the Tribunal.
- 10.5 The rationale for proposing the new rules is to ensure that the requirements and procedures are clear to all parties in proceedings before the Tribunal. This will enable the Tribunal to ensure that cases are heard in a timely, efficient and effective manner.

## **Response to the points made by the LSCP**

### 11. Composition of Panels

- 11.1 The Tribunal did not consult on the possibility of a lay majority. This was something that was raised in the responses to the consultation and therefore was considered by the Tribunal. The Tribunal's position is set out a paragraph 13 of its Response to the Consultation.

### 12. Disclosure of Publication

- 12.1 The Tribunal would reiterate that in respect of draft rule 35 (9) (prohibition of publication leading to identification of persons) the aim of this rule is not to address third party disclosure, which is covered in a separate policy, but to cover the situation

where a name or material which should not be referred to in a public hearing is referred to in a public hearing.

12.2 The Tribunal is committed to the principle of transparency. In addition to its rules the Tribunal has a Judgment Publication Policy and a Disclosure Policy which specifically sets out the Tribunal's approach to applications for disclosure made by those who are not party to the proceedings.

13. Agreed Outcomes

13.1 The 28 day period referred to in respect of Agreed Outcomes is 28 calendar days which is the timeframe currently applied in relation to Agreed Outcome applications. There is no need to provide a definition of "day".

14. Protecting Vulnerable Witnesses

14.1 As set out in paragraph 16 of the Response to the Consultation the Tribunal has decided not to make an amendment to the proposed rules. The Tribunal decided that any additional guidance required can be better addressed by way of Practice Direction rather than by way of provision in the rules. The Tribunal will continue to keep the need for additional guidance under review and notes the views of the LSCP.

**Further Information**

15. Should the LSB require any further information or clarification please do not hesitate to contact the Tribunal.

Response on behalf of the Solicitors Disciplinary Tribunal

Dated 17 June 2019