

SRA BOARD
1 February 2022

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This paper will be published

Proposed rule changes on health and wellbeing in the profession

Reason for paper	This paper sets out proposals for consultation on changes to our Standards and Regulations regarding (i) appropriate treatment of colleagues in the workplace, and (ii) our ability to address circumstances where a solicitor's health may affect their fitness to practise, including their ability to take part in disciplinary proceedings, in a fair and proportionate way. The paper outlines how we will test the proposals with stakeholders during consultation.
Decisions(s)	The Board is asked to: <ul style="list-style-type: none"> a) agree to a consultation on the rule changes as proposed. b) agree to the proposed approach to consultation.
Previous Board and committee consideration	The Board discussed the issues in this paper at a workshop on 20 July 2021.
Next steps	Following the Board's decision we propose that sign-off of the consultation document is delegated to the Chair. We propose to consult for twelve weeks and return to the Board after the consultation for a decision on the final rule changes before submitting them to the Legal Services Board for approval.

If you have any questions about this paper please contact: **Juliet Oliver**, General Counsel, at juliet.oliver@sra.org.uk

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Proposed rule changes on health and wellbeing in the profession

Purpose

- 1 This paper sets out proposals for consultation on changes to our Standards and Regulations regarding (i) appropriate treatment of colleagues in the workplace, and (ii) our ability to address circumstances where a solicitor's health may affect their fitness to practise, including their ability to take part in disciplinary proceedings, in a fair and proportionate way. This follows on from the discussion at the Board workshop on 20 July 2021, in which members considered themes arising from our disciplinary work, and agreed in principle to take forward work to develop consultation proposals on these issues.
- 2 For each of the proposals, this paper summarises the key case for change, the proposed changes, and their expected regulatory and equality impact. The paper also outlines how we will test the proposals with stakeholders during consultation.

Recommendations

- 3 The Board is asked to:
 - a) agree to a consultation on the proposed changes set out in this paper
 - b) agree to the proposed approach to consultation.

Discussion

Wellbeing and treatment in the workplace

- 4 The health and wellbeing of legal professionals is an important issue for us as a regulator. In our casework we have seen instances of people who work in legal firms being treated unfairly and inappropriately in the workplace environment. There is also wider evidence of such problems; in the LawCare survey 'Life in the law 2020/21' over 20% of respondents said they had been subjected to bullying, harassment or discrimination in their workplace, and 69% reported experiencing mental ill-health in the last 12 months.
- 5 As well as affecting the wellbeing of those involved, such behaviour can lead to poor outcomes for clients, for instance where staff are pressured to take on matters outside of their competence. In severe cases, poor working practices in legal firms may increase the likelihood of staff behaving dishonestly and thus affect wider public confidence in the profession and in legal services. Publicity around cases involving discrimination, sexual harassment and toxic working environments can also damage confidence in the profession as a safe and inclusive environment, amongst clients and prospective solicitors/employees.

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- 6 We will shortly be publishing a report of our thematic review of workplace culture, in which we engaged with firms through a series of questionnaires and interviews which took place from June last year, and with external stakeholders such as LawCare and the Junior Lawyers Division of the Law Society. This will include practical resources and examples of good practice demonstrating how firms can support and invest in their people. This will be accompanied by new guidance, intended to make our regulatory expectations clearer for firms, and to highlight the importance of systems and culture that ensure the safety of staff and the delivery of competent and ethical legal services.

Proposed amendments to our Codes of Conduct

- 7 The proposed rule changes will underpin these initiatives and reinforce our ability to take action in appropriate cases.
- 8 Our current Codes of Conduct do not include an explicit requirement to treat people fairly in the workplace, requiring us to rely on general Principles relating to acting with integrity and maintaining public confidence where we see cases of seriously unfair or abusive treatment.
- 9 We plan therefore to consult on a new obligation within both the Firm and Individual Codes of Conduct. This would place a requirement on both regulated individuals and firms to treat colleagues fairly and with respect, creating an environment that is inclusive and free from discrimination, bullying and harassment. The proposal, which we would test through consultation, is for this to cover all those with whom solicitors and firms work closely, such as contractors, consultants and experts, as well as staff in a formal employment relationship.
- 10 We will also consult on a requirement for firms and individuals to challenge behaviour which does not meet this standard, with the aim of fostering a collegiate approach and a culture in which poor behaviours are not tolerated.
- 11 The proposed rule changes would make clear to the regulated community that unfair treatment is not acceptable. There has been publicity about tribunal proceedings which have highlighted toxic working environments, and the proposed changes, together with the regulatory guidance referred to above, will help to clarify our position and show that we are prepared to act on failings by firms as well as individuals where appropriate.
- 12 The proposed changes would bring our regulatory framework into line with the approach taken by healthcare profession regulators, whose requirements include explicit standards or overriding duties covering unfair treatment in the workplace. The current rules of the other legal regulators in England and Wales focus on illegal harassment and discrimination, rather than the broader range of unfair treatment, such as bullying or the tolerance by management of toxic workplace cultures, that our proposed changes would cover.

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- 13 We will make it clear in the consultation how we intend to enforce against the new rules. In line with our enforcement strategy, we would investigate allegations about workplace behaviours where these present a serious risk to clients/colleagues or to the wider public interest. This might include cases of bullying, harassment or discrimination by an individual, or situations where such cases are sustained or tolerated within a firm, or where an individual's ability to practise in a safe and ethical manner is put at risk by the practices in place. In terms of the obligation to challenge poor conduct, we would recognise the difficulties that junior staff may face in challenging their seniors and would not penalise them in these circumstances.

Summary of anticipated impacts

- 14 We will consult on a provisional assessment of the regulatory and equality impacts of our proposals. In terms of the former, we think the proposed changes:
- will benefit consumers of legal services by reducing the risk that unfair treatment of staff leads to behaviour which is against clients' interests
 - will promote the wellbeing of people working in legal firms, and so encourage a strong, independent, diverse and effective profession
 - will have no negative cost or other impact on firms, save to the extent that this encourages some firms to take stronger measures to ensure fair treatment of staff.
- 15 In terms of equality, diversity and inclusion, we expect the changes to have a positive impact for women, people with an ethnic minority background and people with a disability who work in legal firms, since surveys have shown that people with these characteristics are more likely than others to experience bullying, harassment or discrimination at work. The changes may prompt firms to do more to reduce the risk of serious unfair treatment in workplaces, and may also encourage more reporting to us of serious unfair treatment, by making it clear that such behaviour breaches our standards and may lead to regulatory action.

Solicitors' health and fitness to practise

- 16 Over the past few years we have seen an increase in cases in which the respondent solicitor has health issues that affect their ability to practise safely, or to participate in disciplinary proceedings to address concerns about their practice. This creates risk to their clients and to the public interest. In some circumstances, this can result in the Solicitors Disciplinary Tribunal (SDT) concluding that proceedings cannot fairly continue. This can mean that a solicitor continues to practise while not being accountable through our disciplinary processes.
- 17 In our disciplinary work we aim to handle concerns over solicitors' health in a way that is sensitive and appropriate – taking all the circumstances into account including medical evidence, making reasonable adjustments where

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appropriate, and fairly balancing the interests of the parties and the public interest. We have recently reviewed and updated our disciplinary processes to ensure that health issues are explored as early as possible and that these are handled by staff with appropriate training and experience and resolved in a proportionate way through the use of conditions and agreed resolutions (Regulatory Settlement Agreements) wherever possible.

Proposed amendments to our Suitability Rules and Authorisation Rules

- 18 In addition, we are proposing to make explicit reference in our rules, for the avoidance of doubt, that suitability or fitness to practise as a solicitor covers all aspects of practising as a solicitor, including the ability to meet regulatory obligations and be subject to regulatory investigations or procedures. The changes would allow us to take action, as a result, to address health issues that raise a regulatory risk at any point that these arise.
- 19 The proposed changes would include an amendment to our Suitability Rules which would allow us to take into account health issues that would raise a regulatory risk at the point of admission as a solicitor. We would also propose to amend our Authorisation of Individuals Regulations to make it clearer that where appropriate, we may refuse to issue a practising certificate or to grant registration as a foreign lawyer – or that we may impose conditions on a practising certificate or registration - to address concerns about a solicitor's fitness to practise on health grounds. Conditions might include, for example, the requirement for the individual to follow the treatment recommendations of an appropriate healthcare practitioner, or to work under the supervision of a senior solicitor.
- 20 Our current rules are unusual amongst professional regulators in England and Wales in making no explicit provision for limiting the practice of people whose fitness to practise is affected by health issues. The Bar Standards Board and CILEx Regulation have processes to deal with concerns about the impact of health issues on professional practice, as does the Institute of Chartered Accountants in England and Wales. The healthcare professional regulators can deal with health as a separate ground for action in the fitness to practise process.
- 21 Some stakeholders within the profession have noted this and called for us to introduce processes to deal with health concerns. The SDT encouraged us to consider making procedures in respect of fitness to practise on health grounds following a 2019 consultation on its procedural rules. We think the proposed rule changes together with the changes to our existing processes, will deal effectively and proportionately with the issues identified through our casework.

Summary of anticipated impacts

- 22 We expect these changes to promote public confidence in the profession and benefit consumers of legal services generally, by reducing the risk that health problems may cause a solicitor to fail to act in a client's best interests or to

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meet the ethical standards that clients and the public are entitled to expect. The changes should also reduce the delay, uncertainty and stress that can be generated for everyone involved where a health concern affects the progress of a case.

- 23 In terms of equality impacts, we are mindful that many solicitors experience ill health and or disability during their working lives and will manage their health conditions themselves; where necessary, seeking assistance or reasonable adjustments, or limiting or restricting their practice as appropriate. We will only become involved where there is evidence of a potential risk to the public, and any action we take will be aimed at protecting clients and the public and will go no further than is required to do so. We will make this clear in the consultation and in our communications work.
- 24 The changes will make it clear to solicitors on admission, and in practice, that ability to take part in our regulatory and disciplinary processes is an inherent element of fitness to practise. This should encourage solicitors whose health issues may affect their fitness to practise, including those with a disability, to be proactive in managing any issues, and should also encourage the firms within which they work to be responsible for supporting them in doing so. This should in turn foster frank discussions between individuals, firms and us as the regulator about supportive measures and reasonable adjustments.
- 25 Additionally, there may be intersectionality with age; past surveys have indicated a high incidence of mental ill health in young lawyers compared with the general population, while age-related health conditions may affect the practice of older solicitors. Further, our data on representation in enforcement work shows that compared with the overall solicitor population, Black, Asian and other minority ethnic solicitors are over-represented in concerns raised with us and in cases that we decide to investigate. This suggests that solicitors from these backgrounds may be more likely to be affected by our proposals than other solicitors with health issues.

Recommendation: the Board is asked to agree to a consultation on the proposed changes set out in this paper.

Next steps

- 26 Following the Board's decision we propose that sign-off of the consultation document is delegated to the Chair. We propose to consult for twelve weeks and return to the Board after the consultation to confirm the final rule changes before submitting them to the Legal Services Board for approval.

Recommendation: the Board is asked to agree to the proposed approach to consultation.

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Supporting information

Links to the Corporate Strategy and/or Business Plan and impact on strategic and mid-tier risks

- 27 This paper relates to objective 1 in the corporate strategy, to set and maintain high professional standards for solicitors and law firms. The proposed changes to our rules will support this objective by clarifying and confirming our regulatory approach to the issues discussed in the paper. As such, it relates to mid-tier risk 8 (operational failure) as it aims to support consistent and robust decision-making, taking into account appropriate EDI considerations.

How the issues support the regulatory objectives and best regulatory practice

- 28 Both sets of proposed rule changes support the regulatory objectives of protecting and promoting the public interest and the interests of consumers, and encouraging an independent, strong, diverse and effective legal profession. We believe these will provide a targeted and proportionate way of addressing risks to those objectives that have been identified in our casework, and to help ensure consistent casework outcomes. In developing the proposals we have considered the approach of other professional regulators.

Public/Consumer impact

- 29 Our initial assessment of the regulatory impact of the proposed changes on consumers and the public is set out at paragraphs 13 and 21 of the paper. We will test our assessment through consultation.

What engagement approach has been used to inform the work and what further communication and engagement is needed?

- 30 Our proposals take into account past discussion and correspondence with stakeholders in the legal sector. In consultation we will engage with sector bodies including the Junior Lawyers Division (JLD) of the Law Society, and members of the SDT user group, as well as the SDT itself. We will also engage with LawCare, the Legal Services Consumer Panel and other regulators, and a range of legal firms and in-house solicitors. We will invite views on all aspects of the proposed changes, including the proposed wording of the changes, their regulatory and equality impact, and our approach to using the new rules.

What equality and diversity considerations relate to this issue?

- 31 Our initial assessment of the equality and diversity impact of the proposed changes is set out at paragraphs 14 and 23 to 25 of the paper. We will test our assessment through consultation.

How the work will be evaluated

- 32 The impact of the proposed changes will initially be evaluated through consultation. If the proposed changes are put into effect we will evaluate their

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impact by monitoring our casework relating to the issues that the changes address.

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