

## Annex 3

### Investigation and enforcement rules and material

Our proposed approach is set out in the 'Investigation and enforcement' section of the consultation paper. This annex provides further technical information about our proposed approach, and should be read in the context of the consultation paper.

Included in this annex are:

- amendments to our Regulatory and Disciplinary Procedure Rules (RDPRs) (Annex 3.1)
- a new draft Appendix B to our Enforcement Strategy setting out the sanctions and
- controls that will apply to authorised CILEX lawyers (Annex 3.2)

Draft amendments to our Application, Notice, Review and Appeal Rules (ANRARs) are at Annex 4.1.

### Our proposed approach to investigation and enforcement

Upon CILEX delegating regulatory powers to us we will be able to investigate and adjudicate on any report relating to an alleged breach of SRA rules and regulations that will apply directly to an authorised CILEX lawyer or authorised CILEX body. We will also be able to make decisions to impose a sanction or control and seek costs following our investigation into a report.

As set out in the consultation paper, we will handle any reports about authorised CILEX lawyers, using broadly the same processes as for concerns about solicitors, and other individuals and firms we regulate (triage, assessment, investigation, notice and decision).

#### Investigations

We will receive reports about potential breaches by an authorised CILEX lawyer of our Standards and Regulations, including the new SRA Principles and Code of Conduct for Authorised CILEX Lawyers (see Annex One). We will use our existing assessment and investigation procedures, amended as needed, to reflect our regulation of authorised CILEX lawyers. The changes we propose to make to those procedures are set out in the amended RDPRs (see Annex 3.1).

We will:

- assess whether a reported concern meets our threshold test for investigation as an allegation (Rule 1 of the RDPRs)
- carry out an investigation and request information in accordance with our investigative powers (Rule 2.1 and 2.3 of the RDPRs)
- consider whether we should suspend or place interim conditions or other controls upon practising rights certificates, registration or any other form of authorisation (for example, designation as a role holder in a firm) to manage regulatory risks while we investigate the allegation (Rule 3.2(a) of the RDPRs)
- make a decision about whether there has been a breach of our Standards and Regulations or other relevant statutory requirements and, if so, decide what

regulatory response is appropriate (Rules 3-5 of the RDPRs) (see the 'decisions on enforcement' section of the consultation paper).

### Enforcement action

We are committed to taking a risk-based approach to regulation and this includes what enforcement action we take.

Our [Enforcement Strategy](#) explains what factors we take into account before using the powers available to us so that we can meet our regulatory objectives. Our authorised decision makers are required to exercise their judgement on the facts of each case, taking into account our guidance and Enforcement Strategy.

We will publish an updated Enforcement Strategy which will include reference to authorised CILEX lawyers as SRA-regulated individuals and to authorised CILEX bodies. It will also set out the powers and sanctions available to us in respect of authorised CILEX lawyers. We will publish a new Annex B to the strategy setting out the sanctions and controls that will apply to authorised CILEX lawyers. A draft of this is attached at Annex 3.2.

The Enforcement Strategy will be kept under review to ensure that we appropriately take into account the types of issues that are presented to us about authorised CILEX lawyers and the entities that they work in.

### Use of our disciplinary powers

The consultation paper summarises how we will use the additional disciplinary powers delegated to us by CILEX alongside our existing powers over CILEX members who work in firms that we already regulate. We provide more detail on our proposed approach below.

Where a CILEX lawyer is involved in misconduct and works in or is involved in a solicitor's practice we can make, or seek from the Solicitors Disciplinary Tribunal (SDT), a section 43 order against that individual to restrict their involvement in a solicitors practice:

- (i) in circumstances where the act or default is related to a legal practice, or
- (ii) in the event of a criminal conviction,

where we consider that it would be undesirable for the person to continue to be involved in a solicitor's practice.

Where the CILEX lawyer is an employee, we can also discipline them with fines or rebukes. The SDT can also impose unlimited fines on employees of a solicitor.

If the person is working in or as part of an SRA licensed body, we could also use powers under section 99 of the Legal Services Act 2007 to disqualify the person from being an employee or from taking up certain activities, such as acting as a manager, the head of legal practice (HOLP) or the head of finance and administration (HOFA).

As the regulator of individual authorised CILEX lawyers, and of entities owned and managed by them, we will have direct powers to impose sanctions and controls by virtue of their authorisation status. We will consider and adopt the use of different outcomes as appropriate to respond to any regulatory risk that we need to address. This might include a combination of sanctions or controls, where appropriate.

For example, using internal fining powers as well as directing the exclusion of the individual from CILEX membership. Or, if the authorised CILEX lawyer works in, or is involved in, a solicitors practice we could make or seek a section 43 order in addition to using our direct powers in order to control how that individual works with solicitors' practices in the future.

## Disciplinary decisions and who will make them

### *First-instance decisions*

As set out in the consultation paper, we will use our current decision-making framework for disciplinary decisions involving authorised CILEX lawyers. Decisions on whether an allegation is proved, and whether any sanction or other enforcement action is appropriate, will be taken by an SRA authorised decision maker in accordance with our published [schedule of delegations](#). This provides for decisions to be taken by appropriate SRA staff members such as a case officer or manager in a relevant operational team, or by an adjudicator or panel of adjudicators, depending on the nature of the matter. We will update our schedule of delegations to reflect our oversight of authorised CILEX lawyers and authorised CILEX bodies.

Individual adjudicators or a panel of adjudicators can make decisions at first instance or on review or appeal. This is likely to be the case where the evidence needs to be examined and the misconduct has not been admitted.

### *Hearings*

A solicitor's conduct is usually referred to the SDT for a hearing in the most serious of cases, such as where dishonesty is alleged or the likely result, if allegations are proven, would be a sanction such as a suspension or strike off. Our approach to making decisions to refer individuals or firms to the SDT is set out in a separate code, modelled on the Code for Crown Prosecutors. These decisions must pass both an evidential and a public-interest test.

The consultation paper sets out our proposed approach to hearings for authorised CILEX lawyers and authorised CILEX bodies. Rules 8.6 and 8.6A of the RDPRs will apply to such hearings. These rules set out the reasons and process for deciding whether a matter should be considered at a hearing. Our published guidance on our [approach to hearings](#) will also apply. This, for example, highlights that a hearing might be appropriate in a case of significant importance to the profession and/or to the public. Where an adjudication panel is being asked to make a decision, we will seek to include adjudicators with CILEX experience on the panel.

The approach we are taking broadly reflects CRL's current approach to matters that are dealt with by its Disciplinary Tribunal<sup>1</sup>.

### *Reviews and appeals*

The consultation paper sets out our proposed approach to reviews and appeals of our disciplinary decisions, including our proposal to provide authorised CILEX lawyers and

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<sup>1</sup> All CRL hearings, except for appeals by applicants for membership or authorisation, are held in public, unless the decision-making forum is satisfied that, in the interests of justice or for the protection of private lives, a hearing should not be public.

authorised CILEX bodies with rights to an internal appeal where they disagree with the outcome of a case. This is an interim measure pending a statutory instrument which could give CILEX members the same external rights of appeal as solicitors. The changes we propose to make to our existing appeals procedures are set out in the amended ANRARS (see Annex 4.1).

### **Other issues**

Other material differences between our proposed approach and CRL's current arrangements are discussed below.

#### Limitation periods

Rule 1.1 of our RDPRs confirm that we shall assess any allegation which comes to, or is brought to, our attention. Our assessment process takes into account appropriate factors to establish whether an investigation is required based on the risks and issues that have been identified.

CRL Enforcement Rules 16.1 and 16.2 set out that a report of misconduct may be rejected by an investigator where the time which has elapsed since the events (or knowledge of those events, if later) giving rise to the allegation exceeds 12 months. We do not apply a time bar, as we consider this presents a barrier to taking action which might be needed in the interests of the public.

#### Management of health issues during an investigation

If we receive information about the health of an authorised CILEX lawyer which raises concerns regarding their fitness to practise, or if health issues are identified during the course of an investigation, these will be dealt with under our existing processes for handling health concerns in our regulatory work (see our [guidance on our approach to health issues](#)). This approach enables us to take appropriate steps to ensure that the person affected is treated fairly and that risks, including health risks, are managed appropriately as an integral part of our investigation process.

If we feel that the individual, their practice or the public are at risk, we may need to use conditions to restrict how those individual practises while, for example, a health assessment is being obtained. The conditions we use and the length of time for which we impose them will depend on the particular circumstances of the case.

We understand that where CRL (or CILEX) receives information about a member of CILEX or an applicant that raises questions concerning their fitness to practise on the grounds of health, this is considered by CRL's Health Committee. We will not maintain a separate Health Committee for such issues.

### **Sanctions and controls**

The sanctions and controls available to us in respect of authorised CILEX lawyers are summarised in the consultation paper and set out in the draft new Appendix B to our Enforcement Strategy (see Annex 3.2 to this consultation).

Some of these powers are not available to CRL so will not be familiar to CILEX members or firms. We provide further detail below on some of these powers and the circumstances in which we expect to use them.

### ***Interim orders***

We will use our established system of using interim conditions or controls to manage risks to the public posed by authorised CILEX lawyers who are the subject of an investigation. We will also have a power to suspend practice pending the outcome of an investigation or proceedings. This is similar to the current measures used by CRL that have the effect of an interim suspension. The power to order a suspension is set out in the CILEX bye-laws confirming that rules may be made ordering the authorisation or other approval of an authorised CILEX lawyer to be suspended.

Our powers to impose interim orders and the underlying power to place conditions on practising rights certificates are set out in our draft SRA Authorisation of CILEX Lawyer Regulations and the RDPRs (Rule 3.2a).

Applications for interim conditions in a matter under investigation would be made by the investigation officer who has conduct of the investigation, and who will propose targeted conditions aimed at addressing the risk posed by the alleged misconduct. These conditions can be continued/reapplied at the point the authorised CILEX lawyer renews their practising rights certificate.

### ***Undertakings and controls***

CRL use undertakings or conditions to address risks arising from an individual's practice, depending on the circumstances. We intend to adopt the use of undertakings.

An undertaking is a signed agreement by an individual to refrain from taking certain action or to take a particular course of action. The agreement will set out a timescale within which action is to be taken, and must be capable of being monitored. This is usually an act that must be completed within a certain timeframe, or an agreement not to act in a particular way for a defined length of time. For instance, supervising tasks to ensure efficient and appropriate record-keeping takes place, or that certain reports are delivered to the SRA.

The draft amended RDPRs and Authorisation of CILEX Lawyers Regulations allow us to impose conditions on an individual's practising rights certificate or firm authorisation. Conditions can be imposed without the agreement of the parties involved, unlike undertakings. Conditions on practice may be applied for instance where we consider it undesirable for an individual to be involved in certain activities, or where we are concerned that the individual will not comply, or is unable to comply, with our regulatory arrangements. In practical terms our decision whether to use undertakings or practising conditions will depend on the nature and seriousness of the misconduct, and how best we consider public protection can be achieved.

### ***Fixed Financial Penalties***

We have recently introduced fixed penalties for specified breaches of our rules, for example non-compliance with our more administrative requirements or failure to respond to our requests. The following are examples of breaches where a fixed penalty will be issued:

- failure to publish the required costs or complaints information, or display a clickable logo, in accordance with the SRA Transparency Rules
- failure to provide information or documentation to us in response to any requests or requirements, for example failure to provide us with firm diversity data or to comply with requests for declarations of compliance with AML requirements
- failure to ensure approval of role holders, for example managers, compliance officer for legal practice (COLP) and compliance officer for finance and administration (COFA)
- failure to notify us of role holders, for example managers and owners who need to be approved by us for these positions.

Additional information about financial penalties can be found [here](#).