1 August 2022

LawCare response to the Solicitors Regulation Authority (SRA) consultation on publication of decisions about disciplinary and regulatory action

Introduction

We welcome the SRA reviewing its approach to publication of decisions about disciplinary and regulatory action and are glad of the opportunity to respond to the questions raised in this consultation.

LawCare has been supporting and promoting mental health in the UK's legal community for 25 years and in that time, we have listened to over 10,000 legal professionals talk about the pressures of legal practice. Last year we published the largest study to date on lawyer mental health in the UK, with over 1,700 professionals responding. Full findings of the research can be found here https://www.lawcare.org.uk/life-in-the-law/

Stress is the most common reason for people contacting us for support; it accounted for 33% of all contacts during 2021.

Solicitors with poor mental wellbeing are more likely to make mistakes or poor ethical decisions. Consequently, addressing the factors that can lead to poor mental wellbeing in legal workplaces protects the public and maintains confidence in the legal profession.

We need to get to a position where all regulated professionals are sufficiently confident of being treated fairly and compassionately and of being supported so that they feel able to raise health issues that may be affecting their ability to meet their regulatory obligations at the earliest opportunity. Further work needs to be undertaken to build trust between the regulator and the profession and managers and their teams in the sector.

Total transparency of criteria applicable to all stages and aspects of the process, especially relating to the SRA's exercise of its discretion to publish, is necessary along with a commitment to a proportionate, sensitive approach with each case being treated on its own merits. The SRA should clearly explain the process from start to finish, perhaps with the aid of a flow chart, and should have a clear published structure setting out the categories of information it will publish in respect of each decision.

We appreciate the obligations of the regulator to uphold the integrity of the profession and to protect the public. However, disproportionate publication runs the risk of the reputation of the profession being unduly tarnished and concerns of the public may in fact be unnecessarily amplified.

We know from our direct support channels and additional engagement with the profession that legal practitioners in the formal disciplinary process are particularly vulnerable and often lack support and representation. In addition, the extent to which regulatory investigations can impact on the mental health of those undergoing the process is not always fully recognised. The publicity and the threat of disciplinary sanction is a huge source of concern amongst legal professionals and training investigators in sensitive handling throughout the often lengthy process is vital.

As distressing as the proceedings themselves are, we know from our service users that the publication aspect causes significant additional anguish and genuine fear among the profession with some raising serious safeguarding concerns. If publication is deemed appropriate, we feel there is no justification for the timing of it being any earlier than when the process is complete. To do otherwise would be inconsistent with the principles of justice and at odds with the current approach of bodies such as the police and Crown Prosecution Service where very limited pre-charge publicity is made available.

General comments

Purpose – In our view it is questionable whether publication acts to raise awareness among the profession of appropriate conduct and the consequences of failure to comply; if this is the intention then it is far more likely to be achieved through education, by the issue of clear guidance and promotion of good practice. The SRA could take a more proactive approach to educating the profession about its decisions by including anonymised case studies in its update emails to practitioners for example.

In our experience the profession regards publication almost exclusively as a punitive deterrent.

In terms of the public interest argument, it seems unlikely that the majority of consumers will be cognisant of the roles of the SRA and the Legal Services Board (LSB); it would be useful to learn if there is data on frequency of access and attitudes to publication. If a main purpose is protection of the public, then greater emphasis on educating the profession about psychologically safe working environments is much more likely to achieve this.

Discretion - The SRA has a discretion on whether to publish any disciplinary decision it makes. One argument is that rather than a starting point favouring publication, there should be a need to demonstrate reasons to justify publication. Is there merit instead in a system whereby potential consumers and those with a genuine interest could request information rather than a system of unfettered publication?

Our view is that far greater regard needs to be had for the wellbeing of the practitioners involved when deciding whether to publish and in how much detail and for what period of time. Publishing a decision in relation to someone who has serious mental health issues may well compound their problems and exacerbate their condition. We know from our support contacts that it is often the case that those with mental health problems who are caught up in the disciplinary process are unrepresented and disadvantaged throughout the whole disciplinary process. They may well not voluntarily disclose any mental health issues they have. They are also unlikely to be able to resist any proposal by the SRA to publish its decision about them. Being unrepresented and unwell, they are also unlikely to challenge the SRA publication decision through its Application, Notice, Review and Appeal Rules. With the SRA set to significantly increase its own fining powers, it is going to be publishing many more decisions and dealing with cases which would otherwise have gone to the SDT, which increases the risk of harm to those with mental health problems.

The real issue from the perspective of those with mental health issues is (a) when would it be appropriate not to publish a decision (could the SRA issue some clear guidance on this in relation to mental health problems?) and (b) if a decision is published, is there any way of handling the information in a sensitive way? Greater consideration should be given to time limitation and redaction. This all comes back to the wider question of whether the SRA does enough to identify those in the disciplinary system with mental health problems. If individuals are not identified at the investigation stage as having a problem, this will not feed through into the publication stage.

Education and training – we would advocate for more good practice guidance, training and education to enable employers to create psychologically safe workplaces with a healthy speak up culture, so that regulated professionals feel able to seek help when they are struggling or unwell, sooner rather than later which we believe will reduce the risk of regulatory breaches. The internal culture of an organisation has the potential to significantly impact the performance and conduct of its workers; we would like to see more training, education and guidance on best practice in people management and supervision. Our Life in the Law research showed that less than half the people who responded to our survey who had management responsibilities had had any training in managing people; yet 90% of those who had it, reported the training as being helpful or very helpful.

Legal Education – there needs to be a greater emphasis in legal education and training on the human skills that go alongside the technical legal skills in the delivery of legal services and the importance of understanding competence and ethical decision-making and how this can be undermined by poor mental wellbeing. This should include how to manage situations where things have gone wrong, or a mistake made.

Legal representation – it is a concern to us that not all regulated professionals have access to legal representation when being investigated for disciplinary matters and/or referred to the tribunal; we frequently hear via our support channels of those who do not have the financial means to fund this, and it can result in widely differing outcomes. If we compare the case of Claire Matthews, who was unrepresented, raised her mental health condition during proceedings, but was struck off for dishonesty; with pro bono legal representation where medical evidence was obtained, on appeal was then reinstated (with conditions), with that of Susan Orton who had legal representation, was also found to be dishonest, but was able to provide evidence of her mental health condition and was not struck off (she did have conditions imposed on her practicing certificate). How does this align with Article 6 of the Human Rights Act 1998, that everyone has the right to a fair and public hearing? LawCare would like to know if any records are kept by the SRA of the number of regulated professionals who are unrepresented during disciplinary investigations and proceedings and also the number of those who mention mental health issues.

Support for those undergoing investigation

LawCare would like a formal referral system to be put in place for any regulated professional to be referred to us for emotional support when facing a disciplinary investigation or proceedings. Individuals who contact us for support when in the disciplinary process are vulnerable and often raise safeguarding concerns. We believe that if individuals were better supported both with professional legal advice and emotional support during an investigation, the process would be more efficient.

We would also like to see formal training and education for SRA staff who are working with regulated professionals in the disciplinary process on how to understand and respond appropriately to vulnerable people.

The SRA frequently only becomes aware of health issues when there is a concern about conduct or behaviour. There needs to be a fair, transparent and independent process that operates outside of the formal disciplinary process for dealing with health (or other) issues that have impaired a solicitor's competence to practise.

Any solicitor in these circumstances should be actively referred for support and legal representation, not just signposted.

If that health condition led to or contributed to the misconduct, is it appropriate to conduct disciplinary investigations in the first place? What discretion will there be to discontinue any investigation in these circumstances?

Any process needs to be expedited and followed efficiently, a common complaint from people we support through the disciplinary process is how long it can take to resolve matters, leading to greater stress, anxiety and impact on existing health conditions.

Summary

The current approach is outdated and fuels the unhealthy approach to error culture that prevails in law. The profession appears to regard it as a naming and shaming exercise and there is an argument that once someone is unable to practise, publication of full details is an unnecessary humiliation. Perhaps with the exception of those convicted of serious criminal charges which has resulted in disciplinary action, public declarations often appear both unfair and disproportionate.

We know from our experience that it is difficult for legal professionals to challenge poor workplace culture, all of which has the potential to impact their compliance record, for fear of negative repercussions. Some do not report this to their employers and most of this conduct goes unreported to regulatory bodies.

The SRA should look to gather and publish more data about regulatory outcomes such as area and size of practice, age of practitioner, gender, ethnicity, disability and whether any mental or other health issues were raised, to provide far greater context and improve knowledge around risk and to establish which parts of the profession may need greater support and/or education.

By understanding more about the circumstances that led to any breach, the profession can possibly provide space for people to learn from mistakes and identify additional training and supervision requirements to improve the experience of legal practice of those within the sector and the quality of legal services for the consumer. Greater emphasis could be placed on the role support and supervision has to offer for those sanctioned, rather than public denouncements.

More needs to be done to promote good practice and the understanding of the link between psychologically unsafe working environments and compliance issues.

Publication criteria should be transparent, and a proportionate balanced approach should be adopted with appropriate sensitivity throughout.

Questionnaire

1 Do you agree that publication of regulatory decisions helps to raise awareness in the profession of appropriate conduct and the consequences for failure to comply?

(Strongly Agree, Agree, Don't Know, Disagree, Strongly Disagree)

Agree: In theory, we recognise how publication of regulatory decisions ought to raise awareness in the profession of appropriate conduct and the consequences of failure to comply. However, there is

insufficient data suggesting this is actually the case. A pertinent question might be: how many solicitors ever look at the published information – or even know it exists?

The SRA could instead take a more proactive approach to educating the profession about its decisions. It could do this by providing case studies in its update emails and these could be done without referring to an individual by name.

For each decision where the SRA sanctions an individual, the decision needs to summarise the facts; identify the rules breached; explain whether the individual took independent legal advice; relate the facts to the rules including any relevant case law; and explain the sanction with reference to the factors listed in the enforcement strategy.

Additionally, it is not easy to search the Solicitors Register by outcome or types of misconduct/breach, making it difficult to learn lessons. This view of the register does enable you to search by outcome: https://www.sra.org.uk/consumers/solicitor-check/, but this view does not: https://www.sra.org.uk/consumers/register/.

2 Do you agree that the publication of regulatory decisions is important to help raise awareness among consumers of what they should be entitled to expect?

(Strongly Agree, Agree, Don't Know, Disagree, Strongly Disagree)

Disagree: In principle, possibly, but we are not aware of data indicating the current position. Has any research been done on the extent to which the public access published decisions and the extent to which it is found helpful? In addition, it is arguable that there are more basic points of principle the public should be made aware of, including which legal services are reserved and which are unreserved, differences between conveyancers and conveyancing solicitors, and the significance of terms used by different legal professionals all of which could potentially be the cause of confusion for the public.

Given the number of solicitors who are unfamiliar with the Solicitors Register, we suspect that relatively few members of the public are routinely using the Register to check the regulatory record of those regulated by the SRA before they instruct a specific solicitor or firm.

3 Do you think that principles outlined provide a good framework for our approach to publication of regulatory decisions?

(YES/NO)

• Please explain your answer (Free text)

Yes, but:

- it would assist to explain what is meant by "open justice" and why this is important;
- the principles of publication should be included in the SRA's guidance on its approach;
- the SRA needs to explain who makes decisions at different stages of its enforcement process – it could use a flowchart to explain the process from start to finish, describing the different teams/decision-makers that make decisions;

- the SRA needs to have a clear (published) structure/template setting out the categories of information it is going to publish in respect of each decision. As described in response to question 1, the published decision needs to summarise the facts; identify the rules breached; explain whether the individual took independent legal advice; relate the facts to the rules including any relevant case law; and explain the sanction with reference to the factors listed in the enforcement strategy.

4 Are there any other principles and considerations on publication of our regulatory decisions that we should consider?

(YES/NO)

• If YES, please explain (Free text)

Yes, to provide a better balance, the SRA should reiterate in the "Principles to publication" that each decision to publish will be fact-specific and taken on its own merits. This is something the guidance on publication already refers to and warrants repeating.

5 What types of regulatory information do you currently access and for what purpose? (FREE TEXT)

As an organisation we may look at the record of those applying to work or volunteer with us depending on particular circumstances.

6 Do you think we should publish more or less detail on the regulatory decisions we make?

(Multiple Choice – More Information, The Same, Less Information)

• Please explain your answer including whether you have different views in relation to different types of decision? (Free Text)

Different formats are taken for different decisions, so it is impossible to give a generic answer to this question. As explained above, the SRA needs to have a clear (published) structure/template setting out the categories of information it is going to publish in respect of each decision. As described in response to question 1, the published decision needs to summarise the facts; identify the rules breached; explain whether the individual took independent legal advice; relate the facts to the rules including any relevant case law; and explain the sanction with reference to the factors listed in the enforcement strategy.

Where the SDT makes a decision, such as approving an Agreed Outcome, the SRA should explain this rather than saying, for example, "we have prohibited this person from practising as a solicitor" – this is inaccurate, because the sanction is an SDT sanction. In addition, where an individual has been suspended, the regulatory record should specify that rather than refer to the individual as "prohibited", which infers the individual has been permanently banned rather than temporarily suspended from practice.

7 How else could we better improve the regulatory information we publish to support the profession?

(Free text)

We strongly feel that the SRA ought to take a more proactive approach to educating the profession about its decisions. It could do this by providing case studies in its update emails and these could be done without referring to an individual by name.

8 How else could we better improve the regulatory information we publish to support the public? (Free text)

Both in the notes on the "Check a solicitor's record page" (https://www.sra.org.uk/consumers/solicitor-check/) and on each record where there is a published outcome, the SRA should link to a diagram/scale of outcomes and "Glossary of terms". The SRA has already produced these elsewhere in its literature and these should be referred to (and the same language used across the SRA's publications), to promote clarity and aid understanding of the outcomes and where they fall on the scale of seriousness. The scale and glossary appear at pages 38 to 40 inclusive of the SRA's report "Upholding Professional Standards 2018/2019" (https://www.sra.org.uk/globalassets/documents/sra/research/upholding-professional-standards-2018-19.pdf?version=4af086) and would need to be updated to reflect the SRA's new fining powers.

9 Is our current approach to balancing the public interest and principles of open justice with protecting the respondent's well-being, fair and proportionate?

(Strongly agree, agree, unsure, disagree, strongly disagree)

Unsure: Without having a clear picture of the detail of the approach and how this works in practice, due to a lack of available data, it's impossible to answer this question in a meaningful way. To be able to answer the question, the responder would need to know:

- how many instances the SRA decides on;
- how many times the SRA decides in favour of the public interest and open justice;
- how many times the SRA protects the respondent's wellbeing; and,
- a summary of the reasons for the SRA's decisions in each case.

This data would enable an informed response. SRA should collate this data centrally, to enable someone other than those making decisions about publication to periodically assess whether publication decisions are being made in a fair, proportionate and consistent manner. This analysis would enable the SRA to reflect on the consistency and appropriateness of its decision-making and enable it to share lessons across decision-makers.

10 Are there any circumstances where you think the principles of open justice outweigh the rights of the respondent

(YES/NO)

• If YES, please explain: (Free Text)

Yes: In principle, the presumption must lean in favour of open justice. Without this, confidence in the profession and the SRA would be eroded over time. There must be an open, transparent and progressive profession and regulator, capable of learning from mistakes.

11 Are there any circumstances where you think the right of the respondent outweighs the principles of open justice?

(YES/NO)

• If, YES, please explain: (Free text)

Yes: If there is a serious safeguarding concern such as risk to the life of the respondent as a result of information about them being published, that must have an impact on the information that is published about them. It may still be possible to publish some information relating to an outcome and/or the safeguarding concern may alter over time, also impacting the information published about the individual. This analysis will need to be made on a case-by-case basis, but decision-makers should have a template to follow to guide their decisions, which incorporates lessons learnt from earlier decisions.

12 Do you have any other views on this topic that you would like to share

(Free Text)

Where an individual is referred to the SDT, their record must state that any allegations have not been proved and an independent tribunal will decide. If an individual is then exonerated by the SDT, their record must be updated to remove the SRA's decision to refer. This means the decision to refer is not subject to the usual approach of publishing for three years. It is unfair that the individual has a regulatory record on the SRA website, if the outcome is that there is no sanction for that individual.

13 Do you think that our current approach to timing of publication of our decisions requires change?

(YES/NO)

• If YES, please explain why?

Yes: "Promptly" is not sufficiently specific and it would be better for the SRA to stipulate timescales stating when it will publish different types of decisions. Where the SRA publishes a decision in respect of an individual and that individual has not had an opportunity to make submissions in respect of publication, the record on the SRA website needs to specify this and explain whether the individual will be given an opportunity to make representations and, if so, by when.

14 In what circumstances do you think details of regulatory action and/or decisions should be published earlier?

(Free Text)

The SRA would need to publish a schedule listing when it publishes in respect of each decision type it publishes, in order to be able to answer this question.

15 What are your views about at what point we should publish referrals to the SDT?

(Free Text)

Only once the SDT has certified there is a case to answer.

16 Do you have any further views on the timing of publication of our regulatory decisions?

(Free Text)

A decision can only be published once it has been made. If the individual is not afforded an opportunity to make representations about publication, the record needs to specify this and explain whether the individual will be given an opportunity to make representations and, if so, by when.

Each publication decision should say, on its facts, when the SRA will review that decision, e.g. where there are conditions on a practising certificate and these are published, the record needs to stipulate the date when the conditions were last and will next be reviewed.

17 Do you think there are benefits to extending or shortening the length of publication of regulatory decisions?

(YES/NO)

• Please explain your answer and provide details (Free text)

Yes: In principle, the duration of publication should be linked to risk which is likely to reflect the severity of the breach and the usefulness of the information to the public. However, this would require assessment on a case-by-case basis and we question whether the SRA has the resources available to make such assessments. The SRA could develop a checklist of what an individual would need to show to demonstrate risk had been appropriately managed, in order to reduce the amount of a time a decision is published. However, the time it would likely take the SRA to assess the evidence provided by the individual would mean any reduction in publication would likely be negligible. Additionally, such an approach would increase the chances of inconsistent decisions by the SRA, unless the SRA published a schedule of publication durations as they apply to each type of decision/outcome.

18. Do you think it might be beneficial to link the length of publication to the level of severity of the regulatory decision?

(YES/NO)

• Please explain your answer (Free text)

Yes: In principle, the duration of publication should be linked to risk. See response to the previous question.

19. Do you have any further views which we should take into account in relation to the length of publication for our decisions?

(Free text)

The guidance ought to say why decisions are generally published for three years, or any other duration, where the publication length differs from three years.