

SRA BOARD
18 October 2022

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This paper will be published

Rule changes on health and wellbeing in the profession

Reason for paper	This paper reports on the outcome of our consultation on changes to the Standards and Regulations regarding (i) appropriate treatment of colleagues in the workplace, and (ii) circumstances where a solicitor's health may affect their fitness to practise, including their ability to take part in disciplinary proceedings.
Decisions(s)	The Board is asked to: <ul style="list-style-type: none"> a) make the new rules relating to unfair treatment of colleagues set out in section 1 of annex 1 b) make the rule changes relating to solicitors' health and fitness to practise set out in section 2 of annex 1.
Previous Board and committee consideration	The Board held an initial workshop discussion on the issues addressed by the rules in July 2021, and agreed to a consultation on the proposed rule changes in February 2022.
Next steps	Subject to the Board's agreement we will: <ul style="list-style-type: none"> • publish a report setting out the key points made in consultation and our response • submit an application to approve the rule changes to the Legal Services Board • develop and publish guidance for solicitors and firms to support the rule changes • continue to engage with stakeholders to manage any ongoing concerns about the rules.

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Summary

- 1 This paper summarises the key points made in response to our consultation on proposed rule changes, and reports on subsequent engagement with key stakeholders. The paper discusses the arguments, and recommends that the Board makes rules broadly in line with the consultation proposals.

Background

- 2 Following the Board's discussion in February 2022 we [held a public consultation](#) between March and May 2022 on proposed rule changes to:
 - make it clear that those we regulate must treat colleagues with respect and dignity, and that if they fail to do so we will act where necessary to protect the interests of clients and the public
 - support our ability to take appropriate and proportionate action where necessary to deal with concerns over solicitors' health affecting their fitness to practise.
- 3 The consultation received 59 responses. 41 of the responses were from individuals (largely solicitors) and were generally supportive of the proposed changes. The other 18 responses were from organisations including representative bodies, local law societies and law firms, many of which opposed or questioned aspects of the proposals.
- 4 Since the consultation closed we have met organisations that expressed concerns about the proposals, including the Law Society (TLS), the Lawyers with Disabilities Division (LDD), the Junior Lawyers Division (JLD), the Sole Practitioners Group (SPG) and LawCare. This engagement seems to have lessened some of the concerns raised during the consultation, particularly about the impact of the rules relating to solicitors' health and fitness to practise.
- 5 This paper discusses the key issues raised by stakeholders in respect of the proposed rules, and recommends that the Board makes the rule changes set out in sections 1 and 2 of annex 1. There is a breakdown of the responses to each consultation question and a summary discussion of other issues raised during the consultation at annex 2.

Wellbeing and unfair treatment at work - discussion

The case for new rules

- 6 Respondents generally accepted that there are issues with unfair treatment in the legal profession, and most individual respondents welcomed the proposed new rules. However, many organisations and some individuals queried how widespread the problems are, and whether new rules are needed to address

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them. Some including TLS argued that the regulatory risks could be managed using our existing rules and additional guidance. Others including the Employment Lawyers Association (ELA) argued that rules about 'fairness' would be vague and difficult to enforce. The charity LawCare stressed the need for more training of managers and supervisors, and was not sure that a rule change in itself would reduce the risk of unfair treatment.

- 7 There is clear evidence of problems with unfair treatment in the profession. Our consultation paper cited recent surveys by LawCare and the JLD which show high levels of reported bullying, harassment and stress in the profession. Our casework records show that each year between 2015 and 2021 we received on average 462 reports about bullying or harassment, of which on average 144 met our assessment threshold test and were investigated.
- 8 We think this evidence indicates that rules are required in addition to guidance to make clear our regulatory standards in respect of behaviours in the workplace. We issued new guidance on the workplace environment in early 2022 to explain our regulatory approach and give examples of good practice. The proposed rule changes would complement that guidance and underpin our existing principle to encourage equality, diversity and inclusion (Principle 6) by introducing an explicit obligation on individuals and firms to treat people fairly and with respect, and not to bully, harass or unfairly discriminate against them.
- 9 The case for new rules is reinforced by the consultation responses which argue that the proposed rules represent an expansion of our remit (see 'behaviour away from the workplace' below). This suggests it would be difficult to achieve the aims of our proposals simply through guidance on our existing rules.
- 10 Spelling out in our rules that treating colleagues fairly is a regulatory requirement will help to promote the importance of a healthy workplace culture in the profession. It will also reinforce our ability to take action against any case of unfair treatment that poses material regulatory risks. Given stakeholders' concerns about the enforceability of rules on 'fairness', we have conferred with other regulators whose rules require fair treatment of colleagues. Having done so, we are confident that we can enforce the rules in a consistent and predictable way, using guidance to set out a clear threshold for taking action.
- 11 The consultation invited views on the regulatory and equality impact of our proposals. Respondents generally agreed that they would be positive, particularly for certain groups. We have updated our impact assessments and will publish them in our report on the consultation (see annex 2, question 7).

Requirement to challenge unfair behaviour

- 12 The draft rules on which we consulted required firms and individuals to challenge unfair treatment, and we invited views on that. Most respondents supported it in principle, but many were concerned that in practice a 'challenge' requirement on all individuals would put an unreasonable burden on some people, particularly junior staff and people who are victims of unfair treatment. Some also argued that a requirement for firms to challenge unfair treatment

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was not needed, since firms must already have effective systems in place to comply with our regulatory arrangements as well as with employment law.

- 13 We have considered these arguments and discussed them with stakeholders. It is an important element of a safe and ethical workplace that a firm's managers are ready to challenge unfair treatment, and it is not sufficiently clear that this is required by our existing rules. We therefore think it is reasonable to require managers in a firm to challenge unfair treatment.
- 14 However, we accept that in the current environment, requiring all individuals to challenge unfair treatment could cause undue anxiety for junior staff and those who are themselves being treated unfairly. Rather than requiring this in our rules at this time, we can instead use guidance to encourage individuals at all levels to challenge unfair treatment where they are able to do so. We will keep this under review as we monitor the impact of the new rules.
- 15 We expect firms not only to put in place effective systems and controls, but to provide a safe environment for staff to raise concerns, to treat staff with dignity and respect and to create an ethical workplace. We have concluded that if we introduce a 'challenge' requirement for managers, we would not need a parallel requirement in the Code of Conduct for Firms, since paragraph 2.1(b) of the Code already requires firms to ensure their managers and employees comply with our regulatory arrangements.

Behaviour away from the workplace / direct delivery of legal services

- 16 Our consultation paper said that although the proposed rules are principally intended to cover behaviour at work (whether in an office or remotely), our view is that they also cover behaviour away from the direct delivery of legal services, where that behaviour is in the context of a relationship between colleagues rather than a purely personal relationship. We invited views on this.
- 17 This was the one consultation question that attracted more opposition than support. Several respondents, including TLS, the ELA and the SPG, argued that there is no evidence to support regulatory intrusion into personal relationships. Some cited the *Beckwith* judgment to support this argument. Others acknowledged that such behaviour could raise regulatory concerns, but suggested that our existing rules including Principle 2 (upholding public trust and confidence) were sufficient to deal with this. Some respondents also noted that the boundary between a relationship between colleagues and a purely personal relationship would be hard to define.
- 18 There is a clear tension between the view that the existing safeguards on behaviour outside the workplace are adequate, and the belief that regulatory oversight of such behaviour is inherently disproportionate. In practice, we do see cases where serious unfair behaviour occurs away from the delivery of legal services, but clearly in the context of a work rather than purely personal relationship – for instance at work social events and conferences. And in our view *Beckwith* confirms that our regulatory remit can extend into private life.

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However, it also requires us to provide identifiable standards for solicitors – and this is consistent with the introduction of rules on unfair treatment.

Wellbeing and unfair treatment at work - recommendation

- 19 In view of the analysis set out above including our updated impact assessments (at annex 2 question 7), we propose to introduce rules in our Codes of Conduct for Solicitors and for Firms, to require individuals and firms to treat colleagues fairly and with respect.
- 20 Given consultation feedback on the requirement for individuals to challenge unfair treatment, we propose that the new rule in the Code of Conduct for Solicitors should require managers in firms to challenge unfair treatment. However, this 'challenge' requirement would not extend to other individuals. As discussed above, if we introduce this requirement for managers we do not think a parallel 'challenge' requirement for firms is needed.
- 21 We propose to make clear, in our report on the consultation and in guidance on the new rules, that we may take action under the new rules in cases where unfair treatment occurs in settings other than the delivery of legal services. However, we will only do so where that behaviour touches on the practice or standing of the profession in a way that is demonstrably relevant. We also intend to make this clear in the introductions to both our Codes of Conduct (which do not form part of the Codes themselves but provide context for their interpretation). The wording we intend to add to the introductions to both Codes is in section 3 of annex 1.
- 22 Section 1 of annex 1 sets out revised draft rules on unfair treatment. These are based on the draft rules on which we consulted, with changes to remove the requirement for individuals (other than managers) and firms to challenge unfair behaviour.

Recommendation: the Board is asked to make the new rules relating to unfair treatment of colleagues set out in section 1 of annex 1.

Solicitors' health and fitness to practise - discussion

- 23 Most individual respondents supported the proposed rule changes relating to solicitors' health and fitness to practise. But many organisations – including TLS, the JLD, the LDD, the SPG and LawCare – and some individuals had questions and concerns about aspects of the proposals. These included:
 - our intention to make it explicit that fitness to practise as a solicitor includes the ability to meet the obligations of a regulated professional, as well as to perform the work of a solicitor. Some respondents disagreed with this as a matter of principle, while others accepted it but queried the need to spell it out in our rules
 - whether our proposals might impose significant new burdens on solicitors. For instance, some respondents asked if the rule changes would require

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solicitors to submit medical evidence of fitness to practise whenever seeking authorisation or renewing a practising certificate

- the risk of unintended outcomes – in particular, several organisations said the changes could deter people with a health condition or disability from declaring it to their employer, or even put them off joining the profession.
- 24 After reviewing these concerns we met with TLS, the JLD, the LDD, the SPG and LawCare to discuss the issues they had raised. As mentioned above, this engagement seems to have lessened many of the concerns. We explained that in practice the changes will only bite in the very small number of cases where:
- a solicitor has a health condition
 - that condition means they cannot safely practice or engage with our regulatory processes
 - the solicitor has not taken their own steps to manage the impact of their condition, for instance by restricting their practice or obtaining the necessary support from their firm.
- 25 It follows that we will not take action under the proposed rules simply because someone has a health condition. We will only act in those cases where this combination of circumstances comes to our attention and we are concerned that the solicitor poses significant risks to clients or the public. We typically manage those risks by using proportionate conditions to limit the scope of the solicitor’s practice. For instance, where a solicitor has a health issue which affects their ability to perform certain tasks, they are not managing the issue and that is adversely affecting clients, we can use conditions to ensure the individual is supported in handling those tasks.
- 26 While such situations are unusual they do occur, almost always via a concern or allegation about misconduct. A snapshot of our caseload in 2021 showed that in around 5% of open cases, concerns had been raised about a health condition affecting participation in an investigation or disciplinary process. We have seen two recent cases where a Solicitors Disciplinary Tribunal hearing has been stayed indefinitely for health reasons but the solicitor remains able to work. In such cases the solicitor is effectively practising without meaningful regulatory oversight, and that poses an unacceptable regulatory risk.
- 27 If we make the proposed rules we will update our guidance and processes to make it absolutely clear that we regard fitness to practise as covering the ability to meet regulatory obligations. This will include asking people whether there are reasons why they would be unable to meet our regulatory standards when renewing a practising certificate, as well as on admission.
- 28 That may sometimes lead an individual or firm to advise us of a health condition. We do not intend to introduce a general requirement for solicitors to provide medical evidence of their fitness to practise when seeking authorisation or renewal. We will only ask for medical evidence where required in order to establish the nature or impact of a health issue.

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- 29 We recognise from our discussions with stakeholders that it will be important to explain clearly to the profession how we deal with health concerns, both in investigations and disciplinary processes and in our wider regulatory work such as authorisation. We have confirmed that we will produce guidance and resources on these topics, and that we want to work with stakeholders to ensure that solicitors with health conditions are appropriately supported when they engage with us. We will also use this guidance to manage the risk of unintended outcomes, such as the rule changes leading people to decide against disclosing a disability.
- 30 Some respondents suggested we should introduce a separate formal process for fitness to practise concerns relating to health, in a similar way to some other regulators. We do not think this would add any benefit, and could add to delays and stress for the solicitor involved (see annex 2, question 8).
- 31 The consultation invited views on the regulatory and equality impact of the proposals. Several organisations expressed concern about equality impacts, particularly for disabled solicitors. As discussed above, we expect the rule changes to have a direct impact only in a small number of cases, and we consider that in those cases they are needed to manage significant regulatory risks, and are a proportionate response. We have updated our impact assessments to reflect this (see annex 2, question 11).

Solicitors' health and fitness to practise - recommendation

- 32 In view of the analysis and engagement set out above including our updated impact assessments, we recommend that we proceed to make the rule changes on solicitors' health and fitness to practise on which we consulted. The rule changes are set out in section 2 of annex 1.

Recommendation: the Board is asked to make the rule changes relating to solicitors' health and fitness to practise set out in section 2 of annex 1.

Next steps

- 33 If the Board agrees to make the new rules, the next steps will be to:
- a) Prepare and publish a report on the outcome of the consultation, setting out the key points made by stakeholders and our response as discussed above. This will include final regulatory and equality impact assessments.
 - b) Submit an application to the Legal Services Board (LSB) for approval of the rule changes. This will include an explanation of the changes we plan to make to our guidance to reflect the rules (see section 4 of annex 1).
 - c) Draft the required changes to guidance.
 - d) Continue to engage with stakeholders to gauge any ongoing concerns about the rule changes and explore how we can manage these.

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- 34 The rule changes will come into force when they are approved by the LSB. We intend to submit our application for LSB approval in November 2022. The LSB normally issues its decision within 28 days of receiving an application, or within 90 days if it chooses to issue an extension notice.

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Supporting information

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

35 This paper relates to objective 1 in the corporate strategy, to set and maintain high professional standards for solicitors and law firms. The rule changes will support this objective by clarifying and confirming our regulatory approach. As such, the paper 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

36 The 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. They are a targeted and proportionate way of addressing risks to those objectives identified in our casework, and will help ensure consistent case outcomes. In developing the proposals we have considered the approach of other professional regulators.

Public/Consumer impact

37 Our assessment of the impact of the proposals was set out in our consultation paper and tested through consultation. We will publish revised regulatory impact assessments as part of our report on the consultation.

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

38 We consulted on the proposals and engaged with key stakeholders during and after the consultation, including via meetings and a webinar. We will continue to engage with stakeholders in the run-up to the rule changes coming into effect.

What equality and diversity considerations relate to this issue?

39 Our consultation invited views on the equality impact of the proposals, and responses provided feedback on this as set out in the paper. We will publish revised equality impact assessments as part of our report on the consultation.

How the work will be evaluated

40 We will monitor our casework relating to the issues that the changes address.

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Annexes

Annex 1 **Rule changes and associated guidance**

Annex 2 **Headline responses and other issues raised in consultation**

NB: annex 2 of this paper will not be published because it relates to emerging strategy or policy