

# Use of enhanced investigatory powers

## Consultation

20 March 2009

1. The Legal Services Act 2007 has granted the SRA additional powers to require solicitors and others to explain their conduct and to produce documents. These are set out below.

We are now consulting on how we propose to use the new powers, and we invite views on the draft policy statement attached to this paper.

Please note that this consultation is about the SRA's approach to the use of the powers and not the powers themselves, which have been provided by statute.

This consultation closes on 15 May 2009.

2. The SRA has long-standing powers to require solicitors to explain their conduct and to produce documents. Recent experience has shown that serious misconduct, sometimes involving very large sums of money and or a risk to clients or to the administration of justice, can only be properly investigated by strong statutory powers. The Legal Services Act 2007 has now extended and modernised the existing powers so as to give additional rights to the SRA to pursue their investigations and also to extend these powers to third parties and to regulated persons.
3. Three powers are covered by the attached policy statement. The powers are as follows:
  - The power to require a regulated person to provide information – section 44B
  - The power to require a regulated person to attend to provide an explanation – section 44BA
  - The power to require any person to provide information – this can only be done if the SRA obtains a court order – section 44BB

The following section provides more detail about the proposed enhancements to the powers.

4. **To require a regulated person to provide information – section 44B**

This extends and clarifies an existing power. The extension is necessary to enable the SRA to require information or documents from people it will regulate in the new regime but who are not solicitors. It also makes clear that the SRA can seek not only documents but *information* generally. The current power has been exercised by technical advisory staff for many years, and it is not proposed to change that.

5. **To require a regulated person to attend to provide an explanation – section 44BA**

- i) If the SRA has required someone to provide information by using section 44B, it can also require that person (or his or her representative) to attend at a specified time and place to provide an explanation of the information provided or document produced. The policy refers to this as an “investigation meeting”.
- ii) Although the SRA and the independent Solicitors Disciplinary Tribunal already expect solicitors to cooperate with SRA investigations and to answer questions,<sup>1</sup> this specific requirement is new. In addition, it will apply to persons regulated by the SRA in the future but who are not solicitors.
- iii) Since requiring a person to attend at a particular time and place is a serious matter, it is proposed that this power should be exercised by a defined group of SRA staff as set out in the draft policy statement.
- iv) Although the investigation meeting will be informal, the draft policy statement sets out some guidelines including
  - o the person required to attend may be accompanied,
  - o appropriate breaks will be provided, particularly if the meeting is extended, and
  - o questions will not be provided in advance.

Comments are invited about whether these principles are appropriate.

6. **To require any person to provide information – section 44BB**

- i) This power enables the SRA to collect evidence to be used in serious misconduct cases. It will also help in resolving the problem that, while some organisations are willing to provide evidence, they feel unable to do so because they are worried about breaching a legal duty of confidentiality or data protection. This power, which can only be exercised through the court, enables the court to consider the right balance between those duties and the need to investigate misconduct.

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<sup>1</sup> *Baxendale-Walker*, SDT findings 9124/2004, paragraph 12.9

- ii) This is, strictly, a new power. However, in practice under the existing legislation, the court can order any person to produce a document if a solicitor has been required to do so under section 44B. This could arise where the solicitor has released a document to someone else, such as the client or another solicitor.
- iii) Disputed applications for substantial information are likely to be unusual. However, although the SRA must always be proportionate in deciding whether to pursue such applications, it is also important that the SRA is not dissuaded from doing so by obstructive behaviour or threats regarding costs.

## 7. **How to respond**

To find out how to respond to this consultation, please visit our website.

- Go to [www.consultations.sra.org.uk](http://www.consultations.sra.org.uk).
- Select **Use of advanced investigatory powers**.
- Click **How to respond**.
- Alternatively, enter the following URL in the address bar of your browser: [www.sra.org.uk/sra/consultations/2406.article#respond](http://www.sra.org.uk/sra/consultations/2406.article#respond)

# Annex – Draft policy statement

## Use of enhanced investigatory powers

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### Introduction

1. The SRA has strong powers to investigate misconduct including the power to require solicitors to explain their conduct and to produce documents. The SRA can also apply to the High Court for an order to require anyone else to provide information. If a regulated or other person fails to comply with these requirements, this may constitute misconduct or result in penalties imposed by the court.

### About the policy statement

2. This policy statement sets out the practice and processes which govern the SRA's use of the investigatory powers set out in sections 44B, 44BA and 44BB of the Solicitors Act 1974 as amended ("the powers").
3. The statement refers to the exercise of delegated powers. It should be read in conjunction with the scheme of delegation and authorisations, which is published by the SRA from time to time.<sup>2</sup> If there appears to be inconsistency between the statement and the scheme, then the scheme prevails.

### The powers

4. The criteria for the exercise of the powers are set out in the relevant sections below. The SRA's risk-based approach to regulation<sup>3</sup> is published and informs and underpins each decision to start an investigation.
5. The SRA operates in accordance with the better regulation principles,<sup>4</sup> one of which is to be proportionate. Therefore, the powers will be exercised proportionately. For example, section 44B is likely to be used frequently, since it enables evidence to be obtained without major cost or inconvenience (such as in having to attend to provide an explanation). Section 44BA is likely to be used less often and primarily for allegations of serious misconduct. A failure to deal openly with the SRA is likely to result in the need to use section 44BA. The power to require other people to provide information is only

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<sup>2</sup> See Solicitors Regulation Authority schedule of delegations (February 2009). To download the schedule, go to [www.sra.org.uk/documents/SRA/decision-making/schedule-of-delegations.pdf](http://www.sra.org.uk/documents/SRA/decision-making/schedule-of-delegations.pdf).

<sup>3</sup> See [www.sra.org.uk/risk](http://www.sra.org.uk/risk).

<sup>4</sup> See [www.sra.org.uk/sra/strategy.page#appendix](http://www.sra.org.uk/sra/strategy.page#appendix).

available by court order, and its use will be proportionate to the seriousness of the suspected misconduct under investigation and the potential usefulness of the information sought.

## **Section 44B – “Provision of information and documents by solicitors etc”**

6. The power in section 44B to require the production of documents for investigatory purposes is long-standing. It has operated without significant difficulty for many years. Protection against unfair use of the power is provided by the fact that there is the right of appeal to the courts.
7. A notice under section 44B may be authorised by the senior technical and legal SRA staff.

## **Section 44BA – “Power to require explanation of document or information”**

8. It is a serious matter to require a regulated person to attend at a specified time and place to provide an explanation. This is referred to as an “investigation meeting”.
9. The SRA Chief Executive, Legal Director or Head of Legal may authorise a notice under section 44BA.
10. The regulated person will be given reasonable notice of the investigation meeting, usually not less than seven days, unless it is the public interest for the meeting to take place urgently. This would be in the case where there is a serious risk of
  - a. immediate harm to the interests of clients or others,
  - b. financial default,
  - c. frustration or prejudice to the SRA investigation or any other investigation.
11. This process does not affect routine interviews and discussions between SRA staff and regulated persons in the course of investigations as they have been conducted for many years. The Solicitors Disciplinary Tribunal has confirmed that solicitors have a duty to cooperate with the SRA and to answer questions.<sup>5</sup>

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<sup>5</sup> *Baxendale-Walker*, SDT findings 9124/2004, paragraph 12.9: “As a matter of professional conduct, it is the Tribunal’s view, that every solicitor has a duty to give an explanation of actions which in the Law Society’s reasonable opinion give rise to any question related to the proper performance of professional duties.”

12. Investigation meetings will usually be conducted as follows:
- a. The regulated person will be informed in general terms of the suspected professional misconduct, failure to comply, or grounds for a section 43 order which the SRA is investigating. However, if this may prejudice the SRA investigation or any other investigation, they will not be informed.
  - b. The investigation meeting may be conducted in any reasonable location, including SRA premises and the regulated person's address.
  - c. Questions will not be provided in advance of the meeting.
  - d. A representative of the SRA's Legal Directorate (the "SRA lawyer") will attend to observe the meeting. If necessary, and within reason, they may state the SRA's position on any properly raised legal issue.
  - e. The regulated person may be accompanied by another person. However, only the regulated person may provide explanations, unless the SRA agrees otherwise.
  - f. One or more members of the SRA's staff, or its agent, will ask questions in order to obtain explanations from the regulated person.
  - g. If, in the opinion of the SRA lawyer, the person accompanying the regulated person obstructs the process, the regulated person will be warned that continuation of the obstruction may be considered to constitute failure to cooperate with the investigation. If the obstruction continues, the accompanying person may be excluded from the investigation meeting and/or the meeting may be terminated.
  - h. The investigation meeting will be digitally recorded and a CD copy of the recording provided to the regulated person.
  - i. Appropriate breaks will be provided, particularly if the meeting is extended.
  - j. Costs will not be paid other than in exceptional circumstances. For example, if the requirement for the regulated person to attend was subsequently determined by an adjudicator as unreasonable, costs might then be paid. However, a final decision that no regulatory action is necessary would not mean that requiring attendance at an investigation meeting was unreasonable. In any event, any costs payable will usually be limited to travelling and will not include legal costs incurred by the regulated person or consequential losses.
13. The SRA and the regulated person may agree to vary or dispense with any of the above requirements.

## **Section 44BB – “Provision of information and documents by other persons”**

14. Since this power is exercisable only by the court, applications will be authorised in the same way as any other litigation (primarily by the Legal Director).
15. It is important that this power is exercised proportionately. However the SRA will not be dissuaded from seeking a court order by obstruction or threats as to costs. Subject, of course, to any order of the court, the SRA will look favourably upon the possibility of paying the reasonable costs of third parties who assist in the provision of information, perhaps by an agreed court order.

## **Duty to cooperate**

16. The SRA’s powers to investigate are for the protection of the public, and the regulated persons have a duty to cooperate. A regulated person who without reasonable excuse fails to comply with a requirement under sections 44B or 44BA is liable to be found to be in breach of rule 20.03 of the Solicitors’ Code of Conduct 2007.<sup>6</sup>

## **Equality considerations**

17. The SRA is committed to promoting equality and diversity for all. Therefore, the SRA will ask the regulated person if any reasonable adjustment can be made for them.

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<sup>6</sup> See [www.sra.org.uk/rule20](http://www.sra.org.uk/rule20).