

Legal Services Act: New forms of practice and regulation

Feedback on responses to consultation paper 16

Better regulation: A new approach to regulating legal services firms and solicitors

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Introduction

1. The SRA would like to thank everyone who took the time to respond to this consultation. Your feedback has been extremely helpful and has provided some very useful comments on the proposed policy and its implementation.
2. The SRA is developing its vision for the ongoing regulation of firms, focusing on the proactive quality assurance of organisations delivering legal services, rather than on the reactive regulation of individuals. The recently published discussion paper on Alternative Business Structures demonstrates why this will be necessary in future, but it is also a better way of regulating traditional law firms.
3. In the light of this development it is all the more important for us to move to consider complaints and other information which gives rise to concern as being the responsibility of the firm, in the first place. In some cases it may also be necessary to investigate and take action against individuals. We will be looking to make these changes during 2009, at the same time as we are also able to use new statutory disciplinary powers avoiding the need to refer some cases to the Solicitors Disciplinary Tribunal.
4. We believe that in many cases a firm's response to our initial enquiries may well determine whether or not further investigation or regulatory action is required. We would like to focus more in future on helping firms to manage their own compliance.

Responses

5. This is a brief analysis of the responses received. The consultation received 25 replies. In addition 45 solicitors attended 3 focus groups in Leeds, Llandudno & Manchester and gave feedback in the context of a discussion.
6. The Compliance Committee considered the responses on 29th April 2009 and generally approved the policy to move to firm based regulation subject to some changes to the criteria suggested by respondents.
7. With regard to the general question of the change from regulating the individual to regulating the firm, the responses highlighted two main issues:
 - (a) the SRA needed to ensure that, in regulating the firm, the responsibility of the individual was not lost.
 - (b) the SRA must ensure not to "over regulate" and to end up regulating both the firm and the individual except where this was required by the facts of the case.
8. However subject to individual accountability where appropriate, there was general support for the move towards regulating the firm. Several respondees suggested that individual misconduct often arose from failings in a firm's administrative and management structures and as such it was appropriate to direct the investigation to the firm first. *"Individual conduct and competence is a product of organisational culture and standards alongside the individual's behaviour and ability"*

Question 1 What are your views on the suggested criteria and decision tree?

9. 86% of those who expressed a view approved of the decision tree and the criteria shown. The criteria set in the decision tree was felt to sufficiently cover the circumstances that would warrant an investigation into an individual either in conjunction with or as an alternative to the firm. However it was felt that the criteria “carelessness” was not serious enough to warrant an individual investigation.
10. Some concern was expressed as to how in practice these criteria would be applied and what was the threshold applicable to some of the criteria shown. The feedback from the focus groups was that they would welcome more guidance and examples so as to ensure compliance but also to ensure consistency. In addition they asked for the written criteria to be aligned with the decision tree.

SRA Response

11. (a) We have removed “carelessness” as a criteria and amended the decision tree accordingly (attached)

(b) We plan to provide further guidance and examples regarding the criteria on its website

Question 2 What are your views on the adoption of a new core duty defining a firm’s relationship with the regulator?

12. 50% of those who expressed a view agreed with this proposal. They considered that it was important that firms should have an open relationship with their regulator and that this would in turn foster confidence in general. However a number of respondents felt that that the existing rules were sufficient if applied thoroughly and that if firms did not report now, they were unlikely to do so under a new rule.
13. Further some felt that a new core duty would increase the regulatory burden on firms and thereby increase costs. It was felt that there was a risk of “over reporting” which might adversely affect the SRA and also that, in reporting such issues, the firm might find itself the subject of a regulatory investigation and this needed to be clarified.

SRA Response

14. It is proposed that the SRA’s Rules & Ethics Committee should give this matter further consideration, in the light of the responses. However, the Compliance Committee remains of the view that there is a strong case for a new rule dealing with the relationship between the regulator and the regulated, in the interests of clarity.

Question 3 Where a disciplinary penalty has been applied to a firm, do you agree that it is important for the record to show those who were the managers in a firm that has been disciplined?

15. 45% of those who expressed a view endorsed this proposal and said that all managers should be held responsible. It was felt that this would encourage firms to improve their management systems which are often the root cause of many problems.

16. There were however a number of respondees who were concerned that a manager who had not been responsible for a breach should nevertheless find themselves being defined as responsible. It was felt that this could be dealt with by the SRA recording this information internally but not making it public . Concerns were raised about the relationship that may exist between equity partners and salaried partners and the amount of control, and therefore culpability, one partner might have over the others in a firm.

SRA Response

17. (a) We recognise that it is important to identify those persons in a firm who have either a particular responsibility for the breach or misconduct so that the public can be protected.
- (b) In identifying those individuals who are “person under investigation” the SRA will be able to monitor an individual if they change firms and to identify any trends regarding that individual. Although not a definite indicator of personal misconduct it will be one of the factors taken into consideration when undertaking a regulatory risk analysis in future of an individual or firm.

Criteria to determine the focus of an investigation:

The primary responsibility for ensuring compliance with a firm's regulatory obligations rests with the firm itself. However, there will be instances in which there is evidence of personal culpability and where, in consequence, the SRA will investigate the individual as well as, or instead of, the firm. It is also important in public protection terms to provide a credible personal deterrent against misconduct.

Whilst all relevant circumstances will be taken into account, the presence of any the following factors suggest that the SRA should investigate the individual:

- perpetration, facilitation or failure to guard against fraud - including mortgage and property fraud, money laundering and high yield investment fraud
- dishonesty or deception
- reckless or intentional misconduct
- misleading - the courts, third parties or clients
- discrimination
- abuse of a position of authority or trust, such as when acting as trustee, receiver or attorney
- when there has been a report about an individual under Rule 20.04 of the Code
- otherwise serious misconduct – particularly that which is systematic, deliberate or pre-meditated and/or with potential for significant adverse impact or involving a vulnerable person
- serial - repeated misconduct in the context of the regulated person's history
- criminal convictions
- failure to comply with personal regulatory requirements – such as practising uncertificated, breach of practising certificate conditions, breach of section 43 order
- failure to ensure that client money is properly accounted for at all times
- breach of the Solicitors Act - such as holding out, reserved work or offences under sections 41 and 44
- conduct outside practice which reflects on the regulated person's integrity
- the public interest is directly engaged - the allegations raise issues about the conduct of an individual which it is in the public interest to investigate or which are of particular sensitivity or importance

When deciding whether to investigate the individual, the SRA will need to consider not only the type of matter but also the personal behaviour of any individual involved and in particular whether there is evidence of any of the following with regard to the individual which may indicate some direct personal responsibility:

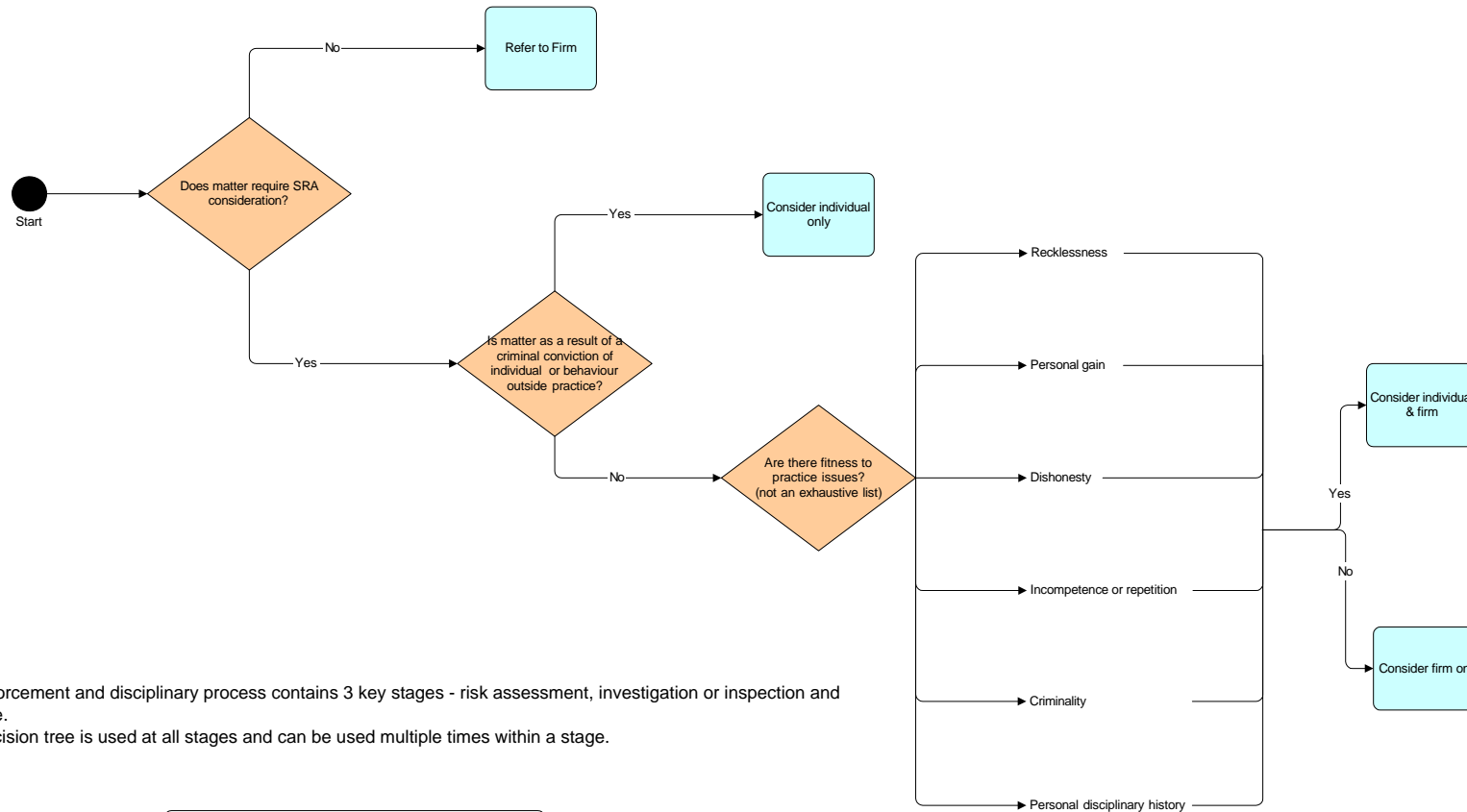
- recklessness
- personal motive such as gain for self or associates
- persistent non-compliant behaviour
- failure to co-operate with the SRA
- an adverse personal regulatory history.

Although in almost all matters the individual investigation will be in conjunction with an investigation of the firm, there will be some instances where only the individual will be investigated. An example of this is personal criminal behaviour outside of practice, such as drink driving.

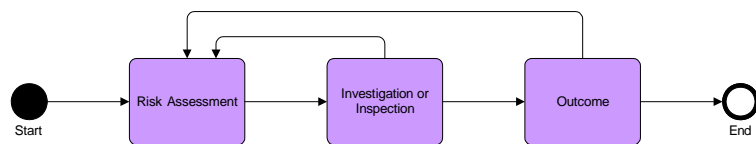
The decision tree attached sets out the factors to be considered when considering the most appropriate focus for any investigation and when, although the decision as to who to investigate can be reconsidered at any time during an investigation.

The position with regard to “recognised sole practitioners” is that the SRA will use these criteria to determine whether there are any relevant individuals within the practice, who should be subject to an individual investigation. However where the SRA determines that a regulatory sanction is required in relation to the firm, this can only be made and recorded against the recognised sole practitioner, in addition to any other action that may be taken in respect of an individual.

Firm / individual focus of enforcement disciplinary action decision tree v0.3



The enforcement and disciplinary process contains 3 key stages - risk assessment, investigation or inspection and outcome.
 This decision tree is used at all stages and can be used multiple times within a stage.



Firm / individual focus of enforcement disciplinary action decision tree v0.3 – text version

1. Does matter require SRA consideration?

No - go to 2
Yes - go to 3
2. Refer to form
3. Is matter as a result of a criminal conviction of individual or behaviour outside practice?

Yes - go to 4.
No - go to 5.
4. Consider individual only.
5. Are there fitness to practice issues? (e.g. recklessness, personal gain, dishonesty, incompetence or repetition, criminality, personal disciplinary history - not an exhaustive list)

Yes - go to 6.
No - go to 7.
6. Consider individual and firm.
7. Consider firm only.

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