Solicitors Regulation Authority

SRA response

Solicitors Disciplinary Tribunal consultation on the making of procedural rules in relation to applications to the tribunal

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Introduction

1. The Solicitors Regulation Authority (SRA) is the regulator of solicitors and law firms in England and Wales, protecting consumers and supporting the rule of law and the administration of justice. We do this by overseeing all education and training requirements necessary to practise as a solicitor, licensing individuals and firms to practise, setting the standards of the profession and regulating and enforcing compliance against these standards. We regulate in the public interest, as do all regulators, so our priority is public protection.
2. We welcome the opportunity to respond to this consultation on the proposed update of the Solicitors (Disciplinary Proceedings) Rules 2007.

Summary

3. We believe that the Tribunal should adopt the civil, rather than criminal, standard of proof, as a matter of public confidence. We call on the Solicitors Disciplinary Tribunal to make this change at the earliest possible opportunity, bringing it into line with the overwhelming majority of tribunals and regulators of the professions.
4. We support the proposal to include a rule dealing with Agreed Outcomes, as there is a strong public interest in disputes being resolved by agreement. We have made some detailed comments on draft rule 25, including reducing the time limits for filing Agreed Outcome Proposals to ensure a better balance between convenience for the Tribunal and the public interest.
5. In relation to whether the other provisions are fit for purpose, we have commented on several of the draft rules. In particular, we believe that draft rule 9 should be amended to require a lay majority, supporting public confidence by removing the perception of a structural bias in favour of solicitors. The Legal Services Act 2007 removed the requirement for a solicitor majority on any Tribunal panel hearing a case, but the Tribunal reinstated this in the rules in 2007. More than ten years later these redrafted rules retain that provision.
6. In our view, draft rule 24 should be removed, as there is no current justification for requiring the Tribunal's permission to withdraw an allegation. The pursuit of allegations is a matter for the SRA, not the Tribunal.
7. While we understand the apparent intent of the proposed rule 35(9), by which the Tribunal would be able to prohibit publication of a wide range of information, we are however concerned that this has significant implications. This proposal should be the subject of a separate and fully argued consultation not least because of its potential impact on open justice and freedom of the press. Such a rule must also not undermine such legal principles.
8. On costs, draft rule 43 offers welcome clarity on costs, provided it is not interpreted in time as watering down the legal principles established in the courts which enable regulators to bring difficult cases without significant risk of an adverse costs order.
9. We also propose that draft rule 41 should be amended to allow the SRA to make submissions on sanctions. This will help to avoid panels imposing inappropriate sanctions which provide insufficient public protection, followed by SRA appeal with the associated time and cost burden on the Court and all parties.
10. We welcome draft rule 27 on evidence and submissions and consider that the Tribunal should also expressly provide that evidence of propensity is admissible. This may be of particular benefit in for example, cases where there are allegations of harassment. We also suggest the Tribunal makes rules or a practice direction on protecting vulnerable witnesses.
11. We also welcome the clarity in the draft rule 48 about the need for the Tribunal to ensure that representatives are either properly qualified or can assist only with the Tribunal's permission.
12. We suggest minor changes to rule 19.
13. We believe that proposed rule 35(7) to exclude factual witnesses from hearings goes against the practice in the civil courts. In our view, the position should be that the Tribunal can exclude factual witnesses in its discretion, upon application and where there is a genuine justification for doing so.
14. Overall, we are concerned that a number of the proposed rules are not discussed in any detail, or at all, in the consultation paper itself, bringing with it the serious risk of the Tribunal being accused of insufficient consultation by not highlighting potentially significant changes. The Tribunal may wish to consider separate consultation in several areas.
15. We have also commented on the potential equalities impacts. We note that all consumers, including vulnerable consumers, will be better protected by use of the civil standard of proof and by allowing the SRA to make submissions on sanctions. As set out in paragraph 10 and 52, we believe that admitting evidence of propensity would be beneficial in difficult areas such as, but not only, harassment.

Consultation response

(a) Do you consider, in principle, that the Tribunal should change its rules to allow for the civil standard to be applied to cases which it hears (see draft rule 5)?

16. We fully support the application of the civil standard of proof by the Tribunal.

17. We have consistently called for the standard of proof in disciplinary proceedings to be the civil standard.[1] [#n1] This is to:
    - ensure a proper balance between protecting the public and the rights of a solicitor accused of breach of our rules
    - ensure that action can be taken when, on the balance of probabilities, an individual or firm presents a risk to the public
    - give the public confidence in the regulatory system and the profession
    - deliver a consistent, fair and efficient disciplinary process.
18. The use of the criminal standard of proof is costly, burdensome, unfair to the users of legal services and undermines confidence that regulation of the profession is in the public interest.
19. The criminal standard is disproportionate, putting the interests of individual members of the profession ahead of the interests of the public, with the risk of associated poor outcomes for the users of legal services and a loss of confidence in the profession.
20. The higher burden of proof also creates an incentive for defendants to fight cases, rather than to make early admissions. The higher burden of proof aligns with the criminal process rather than with a public interest risk-based regulatory system. It is important where a defendant faces conviction and imprisonment but has no place in modern regulation.
21. Using a civil standard of proof is usual regulatory practice in the professions, both in the UK and internationally. The use of the civil standard by the SDT would therefore make sure that the users of legal services are offered the same degree of protection as is the case for the consumers of other professional services.
22. Support for the change to the civil standard has also been echoed by others. The consultation paper highlights some examples of judicial comments supporting a move to the civil standard of proof which we will not repeat. We endorse the comments of the courts.
23. Other examples of support for the change include:
    - a consultation paper from the Law Commission in 2012[2] [#n2], which made "strong public protection arguments" for adoption of the civil standard of proof in medical regulation: It seems to us that professional regulation is quite different from the criminal context, where the state is required to make sure that someone has committed a crime before taking the extreme and punitive step of imprisoning him or her.
    - the Legal Services Board, which has repeatedly made it clear that using the civil standard of proof for legal regulation is in the public interest. In a paper in 2013[3] [#n3] it said "a consistent approach to the civil standard of proof for all enforcement decisions would reduce cost, improve consistency, better protect the public and reduce the risks of regulatory arbitrage"
    - the Insurance Fraud Taskforce report of January 2016 which recommended that there be a review of the standard of proof used in cases put before the Solicitors Disciplinary Tribunal, highlighting what they saw as an "inconsistent approach" and that the criminal burden of proof is "disproportionate… and may limit the deterrent message that such powers send out." They noted that the SDT applying a standard of proof which is more generous to solicitors this "means [the SRA's] enforcement actions may not act as a credible deterrent."
24. A change to the civil standard would also bring the SDT in line with most other tribunals across the professions. The civil standard is used widely by other regulators including all the health professions regulators, Accountancy and Actuarial Discipline Board, General Institute of Public Finance and Accountancy, General Teaching Council for Scotland and the Royal Institution of Chartered Surveyors. Disciplinary matters around the conduct of judges are also dealt with using the civil standard of proof. Internationally, most states in America have adopted the Model Rules for Lawyer Disciplinary Enforcement, which use a civil standard of proof. Disciplinary cases by the Upper Canada Law Society and the Australian Health Practitioner Regulation Agency are determined to the civil standard.
25. We regulate in the public interest and, like the overwhelming majority of modern regulators, make our own regulatory decisions on the civil standard of proof. That means that if it is clear on the balance of probabilities that there has been a breach, we may impose an appropriate sanction up to a maximum fine for "traditional" law firms and solicitors of £2,000. We have argued that the fining level for traditional law firms should be increased to save all parties the costs of prosecution at the Tribunal and because swift resolution is in the public interest. We also apply the civil standard of proof to cases involving licensed bodies and can disqualify individuals from involvement in such bodies and fine them up to £50m. We can fine the body up to £250m.
26. The lack of alignment between the use of the civil standard in these components of the regulatory process and the Tribunal adherence to the criminal standard is confusing for everyone and not in the public interest. It is also noteworthy that the SDT is required to apply the civil standard of proof in applications for orders under section 43 of the Solicitors Act 1974.
27. In 2017 we welcomed a proposal[4] [#n4] from the Bar Standards Board (BSB)[5] [#n5] to move to the civil standard. After wide consultation, the BSB has decided that it will be making this change, subject to the approval of the Legal Services Board (LSB), from March 2019.
28. Change at the SDT would therefore mean consistency across legal regulators in the public interest, removing any potential for regulatory arbitrage (whereby an individual could select a regulator with a disciplinary system that is perceived to be more lenient) and increasing consistency.
29. In continuing to apply the criminal standard of proof, the Tribunal would be out of step with most professional regulators, including all the legal services regulators in England and Wales.
30. In conclusion, we strongly support the use by the Tribunal of the of the civil, rather than criminal, standard of proof. We call on the SDT to make this change at the earliest possible opportunity.

(b) Do you consider in principle that the Tribunal should change its rules to make provision about agreed outcome proposals (see draft rule 25)?

31. We support the proposal to include a rule dealing with Agreed Outcomes.
32. It is well recognised that there is a strong public interest in disputes being resolved by agreement. Agreed Outcomes benefit the public by supporting quick and certain action to ensure public protection. They also significantly reduce costs for all concerned and for those who fund regulation.
33. We understand that the Tribunal would find it administratively useful for Agreed Outcome Proposals to be filed 28 days before a hearing (and note that the requirement to serve the Proposal on others beforehand increases the 28 days by a further seven in terms of an agreement being reached). However, in our view, respondents in the SDT are like many other litigants and increase their focus on the case at the last minute. The overriding objective and the public interest in an agreed outcome may ttherefore be impeded by too long a time period for filing. A period of 14 days would be more appropriate and shows balance between the Tribunal's convenience and the public interest.
34. We do not believe that proposed rule 25(3) should be included. The principle is presumably the avoidance of criticism in regulatory decisions or judgments of people who are not parties either substantively or, here, are not parties to the Agreed Outcome. The analogous case law on this includes In re Pergamon Press[6 [#n6]], FCA v Macris[7 [#n7]] and Taveta Investments Limited v Financial Reporting Council.[8 [#n8]]
35. The principle is well understood although there may well be a difference between regulatory notices and the judgments of a statutory tribunal such as the SDT (even where the judgment arises from an agreed outcome). There are inevitably cases on the borderline such as where a solicitor is facilitating dubious transactions for others and it is unrealistic to try to avoid at least some implied criticism of those responsible for what is, in many examples, very likely to be a fraud. The Tribunal and the SRA are experienced in dealing with this issue.
36. There is also a public interest in regulatory decisions being transparent about such concerns so that members of the public understand both why a solicitor has been disciplined and the wider risks. Any such issues should be dealt with in each case and not by an exclusionary rule which may lead to difficulties in cases with a strong public interest element.
37. We support the proposed rule 25(4). However we think that "does not relate to" may be too vague and it should be made clear that it means respondents who are not parties to the Agreed Outcome Proposal. We do not think it necessary for the Applicant to provide proof of service. Similarly, it seems unduly restrictive and potentially unfair to other respondents for the Applicant only to provide to the Tribunal responses "received by the end of the period mentioned in paragraph (4)(b)" particularly in view of the short time scale of seven days.
38. The requirement for "written reasons" in proposed rule 25(7) is unduly prescriptive and should simply state "reasons".
39. There is some concern about the Tribunal's understanding of its role in what is a process equivalent to the Carecraft procedure (Re Carecraft Construction Co Ltd[9 [#n9]], as clarified by the decision of the Court of Appeal in Secretary of State for Trade and Industry v Rogers[10 [#n10]]) in directors' disqualification proceedings and that it is developing a potentially clumsy and expensive process. The equivalent provision in the High Court is in the Practice Direction: Directors' Disqualification Proceedings[11 [#n11]] and is simpler. The risk is the process in the proposed rule becomes the norm. It may be that some or all paragraphs (6) to (9) would be better placed in a practice direction particularly since the use of mandatory wording in rules can be unnecessarily inflexible.

(c) Do you consider that the other provisions in the draft rules are fit for purpose?

(d) If the answer to question (c) is no, please explain why

(e) Do you have any detailed comments on the drafting of the proposed rules?

40. In relation to the other provisions in the draft rules as outlined, we make a number of specific points, as follows. We have also noted several key areas which we think should be included in this review of the Rules.

A lay panel majority – draft rule 9

41. We remind the Tribunal of the removal by the Legal Services Act 2007 of section 46(6) of the Solicitors Act (1974) which required a solicitor majority on any Tribunal panel hearing a case. SDT rules[12 [#n12]] reinstated this requirement, and over ten years later this remains in the proposed new rules as draft rule 9.
42. We believe that this rule should be amended to require a lay majority, supporting public confidence by removing the perception of a structural bias in favour of solicitors.
43. This would bring the Tribunal in line with many other regulators which use a lay majority – for example, CiLEx Regulation, the General Optical Council and the General Social Care Council - as well as others that vary the panel composition depending on member availability.

Reviewing orders relating to solicitors' employees and consultants – draft rule 19

44. The time limit of 14 days in the proposed rule is too short, bearing in mind that the Tribunal is dealing with public interest matters and not civil litigation between private parties. We suggest that the time limit for our response should be 28 days.

Withdrawal of allegations – draft rule 24

45. The proposed rule 24 should be removed. There is no justification for requiring the Tribunal's permission to withdraw an allegation. In practical terms, we make public interest decisions on whether to pursue or withdraw allegations as cases progress. Seeking permission leads to additional costs for both parties, and so is both inefficient and costly. In the absence of permission to withdraw we may consider that it is our duty to offer no evidence against an allegation.
46. This provision is understood to go back at least until the late 1800s and was to prevent lay applications being settled and issues being hidden. It is overly bureaucratic and has no relevance in circumstances where the vast majority of cases are now brought by us as a statutory regulator and where we are bound by the regulatory objectives in the Legal Services Act 2007 and are publicly accountable. If there is any residual concern about lay applications that should be addressed by rules applicable to them.
47. The provision also gives the impression that the Tribunal in some way supervises the work of the SRA. That is not part of its judicial function. The pursuit of allegations is a matter for the SRA, not the Tribunal.

Service and sending of Evidence and bundles – draft rule 27

48. We welcome the detailed provision in this proposed rule. Again, in a public interest environment, exclusionary rules of evidence need to be tempered in balance with the importance of fairness to respondents.
49. We consider that the Tribunal should expressly provide that evidence of propensity is admissible. We discuss that below although we note that the broad wording in the proposed rule may have that effect: "The Tribunal may... admit any evidence whether or not it would be admissible in a civil trial in England and Wales". It is important however to raise the issue transparently and to consider whether an express rule is necessary.

Evidence of propensity

50. The SRA Disciplinary Procedure Rules 2011 include that a report for adjudication:

    "may also include evidence of the person's propensity to particular behaviour..."

51. Propensity may be relevant both in the sense of a tendency towards particular behaviour (such as to assault clients) or by way of patterns of behaviour. Many serious cases become evident when a pattern or sequence is noticed such as overcharging in estates or apparent incompetence in transactions which in fact discloses the facilitation of alleged fraud by others.
52. The clearest current example where propensity evidence may be important in ensuring public protection is in the difficult arena of harassment (sexual or otherwise) cases where people are particularly vulnerable and perhaps only one of several alleged victims is available to support a specific allegation, but the evidence of other similar incidents may be probative. To some extent, the evidence may be admissible as "similar fact evidence" but it would be more transparent to state clearly that evidence of propensity is admissible.
53. There is a parallel with such evidence in criminal cases. The Criminal Justice Act 2003 (CJA 2003) allows bad character evidence to be admitted where it is relevant to an important matter in issue between the defendant and the prosecution.[13 [#n13]] Whether the defendant has a propensity (namely, evidence of a character trait making it more likely that the defendant had behaved as charged[14 [#n14]]) to commit offences of the kind with which he or she is charged is a "matter in issue" between the defendant and prosecution.
54. Evidence of propensity includes previous convictions that are not of the same description or category as well as other evidence of misconduct or disposition towards misconduct.
55. Misconduct is defined in the CJA 2003[15 [#n15]] as "the commission of an offence or other reprehensible behaviour". Reference to reprehensible behaviour can include non-conviction related behaviour and reprehensible conduct. The CPS guidance on reprehensible behaviour states that reprehensible conduct should be:

    "looked at objectively taking account of whether the public would regard such conduct as reprehensible such as racism, bullying, a bad disciplinary record at work for misconduct; a parent who has had a child taken into care and of course minor pilfering from employers. Conduct that should not be regarded as reprehensible could include consensual sexual activity between adults of the same sex. The term 'reprehensible conduct' will avoid arguments about whether or not conduct alleged against a person amounted to an offence where this has not resulted in a charge or conviction."

56. In R v Mitchell[16 [#n16]] the Supreme Court considered the following question:

    > "Whether it was necessary for the prosecution, relying on non-conviction bad character evidence on the issue of propensity, to prove the allegations beyond a reasonable doubt before the jury could take them into account in determining whether the defendant was guilty or not."

57. Lord Kerr held that it was not necessary (in a case where there are several incidents which are relied on by the prosecution to show a propensity on the part of the defendant) to prove beyond reasonable doubt that each incident happened in precisely the way that is alleged to have occurred and the facts of each individual incidents do not need to be considered in isolation from each other:

    > "The jury is entitled to – and should – consider the evidence of propensity in the round. There are two interrelated reasons for this. First the improbability of a number of similar incidents alleged against a defendant being false is a consideration which should naturally inform a jury's

deliberations on whether propensity has been proved. Secondly, obvious similarities in various incidents may constitute mutual corroboration of those incidents. Each incident may thus inform another. The question impelled by the Order is whether, propensity has been proved."

58. We do not suggest that the criminal law be imported into the Tribunal but it is telling that in that very serious arena evidence of propensity is admissible.
59. The rules should include express provision for the admission of evidence of propensity. Such evidence from the respondent is already admissible in the Tribunal in certain circumstances (namely, from referees on the question of dishonesty).
60. In a public protection environment, evidence of propensity should be admissible and of course the Tribunal can give it such weight as it thinks fit.

Protecting vulnerable witnesses

61. We welcome the Tribunal's current guidance on special measures and note that this is not being included in the rules. That may be appropriate to provide some flexibility in terms of updating and amendment. On the other hand, there is clarity by including such provisions in rules.
62. Although there is a current high level of concern about harassment cases, the Tribunal will be aware that such cases have been brought before it in the past and the issues are not new. We note however that the law has been developing in this situation for some time and that the Tribunal may need to adopt further rules.
63. Essentially, the key protections seem to be:
    - "Special measures" at a hearing – evidence by video link, behind screens or in private – the Tribunal and the General Medical Council (GMC) have provided for such measures.
    - Prevention of cross-examination of an alleged victim by the alleged perpetrator personally – the GMC has provided for this but the SDT has not. There are of course implications such as the need to appoint a representative to conduct the cross-examination.
    - Advance authorisation of cross-examination of the alleged victim – in criminal cases, in very brief terms, the judge authorises the questions that are going to be asked. This is in the Criminal Procedure Rules but neither the GMC nor the SDT make provision for it.
64. If the Tribunal does not consider it can or should make rules on these issues at this stage it may wish to consider making a practice direction.

Factual witnesses; restrictions on publication - draft rule 35

Factual witnesses

65. We do not consider the proposed rule 35(7) to exclude factual witnesses from the hearing to be appropriate in a civil jurisdiction.
66. The approach should be as discussed in Luckwell –v- Limata[17] namely that witnesses should be allowed to be present at a public hearing unless there is good reason to exclude them.
67. An approach has developed by default in the Tribunal of excluding SRA staff, which we consider to be inappropriate. In cases involving more than one respondent, all respondents are present (as they rightly should be) observing all evidence, including each others'. In terms of our staff, the reality is that genuine factual disputes are rare and it is overly cautious to exclude them from the hearing. The position should be that the Tribunal can exclude factual witnesses at its discretion, upon application and where there is a genuine justification for doing so.
68. The proposed rule could also have unintended consequences. It may be premised on the main witnesses to be excluded being SRA investigators but respondents could be motivated to generate spurious factual disputes in an attempt to exclude other SRA personnel.

Rule 35(9) and the media

69. We consider that proposed rule 35(9) has wide implications and should be removed and made the subject of a fully considered consultation.
70. While we are largely neutral on the rule's apparent intent (provided it does not, or is not used, to undermine the clear principles of law in SRA v Spector[18]) we believe that it requires careful discussion and delineation in a properly structured consultation. The consultation should invite views from the media, which would be directly impacted by the draft rule.
71. For example, the proposed rule raises the question of whether a media organisation is or is not bound by a direction "prohibiting the... publication of... any matter likely to lead to the identification of any person whom the Tribunal considers should not be identified".
72. Our view is that this proposal should be withdrawn and be the subject of a properly articulated consultation with the involvement of interested parties and a discussion of the related general law.

Allowing the SRA to make submissions on sanction – draft rule 41

73. Draft rule 41 states that the Respondent will be entitled to make submissions by way of mitigation. In our view, the procedure should be that the respondent is invited to make submissions on sanction by way of mitigation, the SRA should then make submissions on sanction (and any reply to the mitigation) and the respondent should be permitted a brief reply.
74. We consider that appeals to the High Court on sanction might be rarer if we can assist the Tribunal with submissions on sanction. Examples where that may have helped include SRA v Ali & Chan[19] (fines

overturned as unduly lenient, leading to suspensions in a case related to Stamp Duty Land Tax), SRA v Davies & Taman[20 [#n20]](one year suspensions increased to three years in the Ecohouse investment scheme case), and perhaps Manak v SRA[21 [#n21]]where parts of a restriction order imposed by the Tribunal were overturned by the Divisional Court on the grounds that the respondent had not been able to make representations upon them. In Manak, submissions on sanction from us may also have assisted in avoiding that outcome, particularly in view of our statutory role, and long experience, in imposing conditions on practising certificates and licences on a risk basis.

75. It would be helpful for all parties if the SRA assisted the Tribunal with its view as regulator of the appropriate public interest outcome. The High Court has consistently taken account of our views in the context of contested interventions: see Sheikh v Law Society[22 [#n22]], para 90, recently quoted in Neumans LLP v Law Society[23 [#n23]]a decision substantively upheld by the Court of Appeal[24 [#n24]]which quoted the trial judge's comment that one of six reasons for not ordering withdrawal of the intervention was "The SRA, whose views are entitled to respect, considers that the intervention should continue."
76. The convention that the prosecution does not make submissions on sanction has long been removed in the criminal courts. Prosecutors in criminal cases assist the courts in relation to sentence, as set out in Crown Prosecution Service guidelines:[25 [#n25]]

> "At the stage of sentencing the prosecutor has an important responsibility to assist the court to reach its decision as to the appropriate sentence. That role also extends to protecting the victim's interests in the acceptance of pleas and the sentencing exercise.
>
> Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise: Rule B:4 provides: The prosecution advocate represents the public interest, and should be ready to assist the court to reach its decision as to the appropriate sentence. This will include drawing the court's attention to: any victim personal statement or other information available to the prosecution advocate as to the impact of the offence on the victim; where appropriate, to any evidence of the impact of the offending on a community; any statutory provisions relevant to the offender and the offences under consideration; any relevant sentencing guidelines and guideline cases; and the aggravating and mitigating factors of the offence under consideration.
>
> The prosecution advocate may also offer assistance to the court by making submissions, in the light of all these factors, as to the appropriate sentencing range."

77. In September 2010, we suggested to the SDT that we should be able to make submissions on sanction. We consider that in a public protection and risk-based jurisdiction it is right and appropriate for the regulator to assist the Tribunal, and indeed respondents, in terms of understanding the sanction they may face, by setting out its view of sanction. The Tribunal's reluctance to allow submissions on sanction concerns us as a potential parallel with its previous failure to draw adverse inferences from respondents who do not give evidence.
78. Reducing the number of appeals against sanction would help to ensure appropriate public protection is put in place quickly and save Court and party resources. In modern, risk-based regulation, submissions on sanction by the primary statutory regulator are clearly in the public interest. It is difficult to see any disadvantage in such submissions being made.

Costs – draft rule 43

79. We welcome the clarity in draft rule 43 although we question whether it is strictly necessary.
80. Since the Tribunal does not discuss this proposed Rule in the consultation paper, it must be the case that it is not considered to involve significant change. On that basis, while we are concerned that Rule 43(4)(a) might lead to satellite litigation as each party seeks to argue about the "conduct" of the other, we do not object on the basis that the underlying principles are a matter of law and that the Tribunal cannot be seeking to change principles established in the Court of Appeal by way of a consultation that is silent on any such issue.
81. A statutory regulator has a duty to bring sometimes difficult cases and should not be equated with a civil litigant. The Tribunal should respect the public interest nature of applications made to it and not seek to water down by rule a legal principle which the courts consider important to ensure that regulators are not dissuaded from bringing difficult cases:

> "Unless the complaint is improperly brought, or, for example, proceeds as it did in Gorlov, as a "shambles from start to finish", when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event. The "event" is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage."[26 [#n26]]

82. An alternative wording could be:

"whether the application was properly brought or defended reasonably;".

Representatives – draft rule 48

83. We welcome the clarity in the draft rule 48 and the need for the Tribunal to ensure that representatives are either properly qualified or can assist only with the Tribunal's permission.

(f) Do you consider that any of the draft rules could result in any adverse impacts for any of those with protected characteristics under the Equality Act?

84. Many users of legal services have protected characteristics and it is important that they are properly protected. That makes it all the more important that the civil standard of proof is used to protect all legal services consumers, as is the case for the users of most professional services.
85. Amending draft rule 41 so that we can make submissions on sanctions could reduce the number of appeals by us against sanction, with several of the examples given illustrating that these are often cases where there is strong public interest in ensuring proper protections. That may be because they affect large numbers of people or people who are particularly vulnerable.
86. As set out at paragraph 52, allowing evidence of propensity could benefit vulnerable people. Propensity evidence may be particularly relevant in sexual harassment cases where people are particularly vulnerable and perhaps only one of several alleged victims is available to support a specific allegation, but evidence of other similar incidents may be useful.

Notes

1. For example, we sought to persuade the court to find that the civil standard was correct in 2009 but the point did not arise on the facts and so was not decided: Richards v Law Society[2009] EWHC 2087 (Admin) [http://www.bailii.org/ew/cases/EWHC/Admin/2009/2087.html]
2. Law Commission (2012) "Regulation of Health Care Professionals / Regulation of Social Care Professionals in England", (LCCP 202) [https://webarchive.nationalarchives.gov.uk/ukgwa/20241223105344/https://lawcom.gov.uk/project/regulation-of-health-and-social-care-professionals/]
3. Legal Services Board (2013) A blueprint for reforming legal services regulation http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/A_blueprint_for_reformin [http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/A_blueprint_for_reforming_legal_services_regulatio (p.57)
4. Solicitors Regulation Authority (2017) SRA response - BSB consultation on standard of proof https://www.sra.org.uk/sra/consultations/consultation-responses/bsb-response/ [https://rules.sra.org.uk/sra/consultations/consultation-responses/bsb-response/]
5. Bar Standards Board (2017) Review of the Standard of Proof Applied in Professional Misconduct Proceedings – Consultation Paper https://www.barstandardsboard.org.uk/media/1830289/sop_consultation_paper.pdf [https://www.barstandardsboard.org.uk/media/1830289/sop_consultation_paper.pdf]
6. [1971] Ch 388
7. [2017] UKSC 19
8. [2018] EWHC 1662 (Admin)
9. [1994] 1 WLR 172
10. [1996] 4 All ER 854
11. https://www.justice.gov.uk/courts/procedure-rules/civil/rules/disqualification_proceedings#12.1 [https://www.justice.gov.uk/courts/procedure-rules/civil/rules/disqualification_proceedings#12.1]
12. Rule 4 of The Solicitors (Disciplinary Proceedings) Rules 2007: "Subject to rules 6(1) and 6(3), a Division shall be constituted for the hearing of any application or matter relating to an application. Two of the Division members shall be solicitor members and one shall be a lay member and (unless the President shall determine otherwise) a solicitor member shall act as Chairman." Rule 6 relates to the certification of a case to answer.
13. Section 101(1)(d) of the CJA 2003.
14. R v D; R v P; R v U [2011] EWCA Crim 1474.
15. Section 112 of the CJA 2003.
16. See [] Donkin v The Law Society[2007] EWHC 414 (Admin) [http://www.bailii.org/ew/cases/EWHC/Admin/2007/414.html] and Bryant v Law Society [2007] EWHC 3043 (Admin).
17. [2014] EWHC 536 (Fam).
18. [2016] EWHC 37 (Admin)
19. [2015] EWHC 2659 (Admin)
20. [2017] EWHC 2882 (Admin)
21. [2018] EWHC 1958 (Admin)
22. [2006] EWCA Civ 1577 [http://www.bailii.org/ew/cases/EWCA/Civ/2006/1577.html]
23. [2017] EWHC 2004 (Ch)
24. [2018] EWCA Civ 325
25. https://www.cps.gov.uk/legal-guidance/sentencing-overview [https://www.cps.gov.uk/legal-guidance/sentencing-overview]
26. [2007] EWCA Civ 233