LEGAL SERVICES **CONSUMER PANEL**

Matthew Byng
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Sent by email only to PublicationPolicy@sra.org.uk

10 August 2022

Dear Mr Byng,

Consultation: Publication of Regulatory Decisions

The Legal Services Consumer Panel (Panel) welcomes the opportunity to comment on the SRA's review of its policy on the publication of regulatory decisions.

Reflection on Consultation Questions

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)

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)

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)

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)

The Panel agrees that publishing regulatory decisions is one way to raise awareness in the profession about appropriate conduct and the consequences of failing to live up to the required professional standards.

Evidence from other sectors suggest that consumers do not routinely seek or use this information. This is understandable as consumers' awareness of the role of regulators, and what they do, tend to be low. That said, regulators could do more to ensure that enforcement decisions are visible to consumers; by amalgamating enforcement information with basic data. If individual consumers do not use this information, it will still be of immense value to consumer groups, representatives or intermediaries who may use data to profile or bolster what they know around risk for example.

Consumers have the right to know about the shortcomings of the firms with whom they deal with, so they can protect themselves and be vigilant against unfair behaviour. Making information public could also encourage firms to work with regulators to achieve speedy resolution and in turn minimize reputational risk. Full disclosures of regulatory decisions is firmly within the regulators objective of consumer protection and giving consumers the information they need to help themselves. There should be a presumption to publish enforcement data by all Approved Regulators at the end of an investigation that leads to a sanction.

The Panel generally agrees with the SRA's approach to the publication of regulatory decisions. However, we feel that an additional principle regarding the SRA's obligations to provide useful information to consumers of legal services is needed. For example, providing information concerning any regulatory action taken ensures consumers are aware of important factors that may affect who they choose to provide their legal services, how they deal with legal professionals and what they do to prevent inappropriate behaviour. Being more specific with this obligation to prospective consumers and why the information is needed, rather than simply referring to a duty to be transparent with the public, will help inform how this information is communicated. We note that these considerations are more in line with the objectives outlined in the current policy on the publication of regulatory decisions as well as the statutory objectives of legal services regulation[1].

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

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)

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

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

Members of the Panel are involved in the LSB's Market Transparency and Coordination Oversight Group's sub-committee that is working on how to develop a Regulatory Information Service where regulators can make regulatory information accessible to consumers as well as digital comparison tools. This Task and Finish Group aims to improve information available to consumers on the quality of legal services in the marketplace. The type of information needed for this service would be very brief so that it could be included and convey necessary information in very quick search results. However, it would be useful for consumers to have a way to access additional detail if needed. If they are concerned that a solicitor they would like to engage or interact with has a regulatory citation, they may want to satisfy themselves that it is minor or not related to what they are asking them to do prior to going ahead with that engagement which would mean that additional detail was needed. Some consumers may even like access to the full decision where it is available.

[1] See section 1 of the *Legal Services Act* 2007, c.29.

Accordingly, the Panel believes that full text decisions would be useful to inform some legal services consumers, even though this information may be less accessible or meaningful for other consumers. It is also very important to ensure that this information is conveyed in plain language without reference to legal or regulation jargon. In order to provide accessible and full information to the range of consumers that use legal services as required, the Panel would like to see full text decisions available along with shorter summaries of the pertinent facts. Just as legal cases are often summarised to assist legal professionals and lay people alike in selecting relevant cases, a short summary of each decision would serve the purposes of open justice as well as the needs of consumers and solicitors.

The Panel has reviewed Annex 1 that contains the current provisions for publishing regulatory decisions. It is not clear when all the various actions are taken and how they differ from one another. For example, how does authorisation revocation (published for 3 years from decisions date) differ from revocation of authorised firm (where nothing is published)? Nevertheless, the Panel reiterates that where a decision has been made, the full decision should be made available to the public even after a penalty has ended if it is information that most prospective consumers may find useful. While it is appropriate to provide a brief overview detailing the facts, prospective consumers must be able to also access the full decision should they want to. Such an option could be provided via a link to click through to the full text of the decision from the brief overview. Thought should also be given to how this information will be made available via digital comparison tools and other similar mechanisms which will widen access to this information without requiring consumers to visit the SRA website.

The real concern that the Panel has with the publication timelines as set out in Annex 1 is that with suspensions, SDT restriction orders or suspensions on authorisation to practise (non-SDT), the publication period is the same as the life of the suspension (or restriction) or 3 years, whichever is longer. This means that a solicitor could be suspended, restricted or otherwise unable to fully practice for a period of longer than 3 years and immediately upon full reinstatement, there would be no publicly available record of what had occurred. Any of these actions being taken against a solicitor appear serious enough to ensure that prospective consumers and all members of the public are aware of them. It therefore seems to us that there should be a 3 year period of publication after the suspension or restriction has concluded, as in other cases. It is not only a relevant consideration most consumers would want to know about during the period of suspension or restriction, but also for some time afterwards.

The Panel is also concerned that where a practising certificate has been refused, or approval of a non-lawyer manager is withdrawn and these decisions are published for only 3 years, it may not be clear to consumers or the general public that these events have occurred after 3 years have passed. This issue may be especially relevant where no new practising certificate or approval is sought. Likewise, these concerns may also apply to decisions regarding permission to employ a struck-off solicitor. The worry here is that a professional may be offering legal services without authorisation or in the unregulated market and there may be no 'red flags' on record for what has occurred in the past.

For SDT referrals, it appears from the discussion further on in the consultation paper that a referral decision is published prior to the release of the final decision of the Tribunal. Care will have to be taken to explain the differences between this type of decision and a final decision of the Solicitors Disciplinary Tribunal.

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)

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)

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)

12 Do you have any other views on this topic that you would like to share (Free Text)

The Panel understands that balancing the various interests in these cases is tricky, and very important. It may be useful to define "well-being" in a way that indicates that the main purpose is to deter any risk to health, life or safety. This would help solidify the general approach the SRA appears to be taking in that loss of income, custom or incurring staff layoffs are generally not considered good reasons to refrain from publishing regulatory decisions.

Regarding the specific case examples outlined in the consultation paper, the Panel would like to note that where a solicitor faced a long history of harassment preceding an inappropriate social media comment, efforts to ensure the full context is communicated may still enable publishing. This example highlights another reason to publish the full decision where all relevant facts are set out. In addition, mitigation factors may also need to be reflected in the summary or shortened version of any publication to ensure that all those accessing this information are made fully aware of the circumstances of the case in a useful way.

We understand that each case must be judged on its own facts as to whether publication is appropriate, but we would like to affirm that open justice and transparency of regulatory information should be the default and that extraordinary circumstances should be demonstrated to deviate from it. It is the Panel's view that where there is a serious health or safety risk to someone, this should be considered and balanced against the presumption of publishing.

13 Do you think that our current approach to timing of publication of our decisions requires change? (YES/NO) If YES, please explain why?

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

15 What are you view about at what point we should publish referrals to the SDT? (Free Text)

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

The issue that the Panel would like to raise with respect to the timing of the publication of regulatory decisions is that publishing only at the very end of a process can introduce significant delays to when this information is publicly available. Beyond the issue of whether there is an imminent risk to the public, regulators must also do their best to provide relevant and timely information to consumers to help them make the best choice of legal professional in the market. Arguably, this threshold is much lower than imminent risk of harm to the public and we would prefer decisions to be reported as soon as information that would be valuable to prospective consumers is confirmed. The duty to provide prospective consumers with important information should also be factored into formulating a strategy on the timing of the publication of regulatory decisions. This approach would lead to regulatory decisions being published as soon as possible, ie as soon as it is confirmed that complaints or allegations are not baseless, frivolous or misleading. Administrative steps should not delay bringing relevant information to consumers.

It is hard for the Panel to stipulate further as to when regulatory decisions should be published, as we do not have information on the average timeline for processing a complaint or other action that instigates an investigation or administrative process. We are aware that there are significant delays in processing many cases at the Solicitors Disciplinary Tribunal and that more serious cases would be referred there. Given the extraordinarily low rate of cases that have not been certified by the Tribunal after referral from the SRA (less than 4 in the last 3 years), it does appear proportionate to publish this information at the time of referral as opposed to certification by the Tribunal, especially when considering that this information would be of interest to most prospective consumers.

The Panel is pleased that the SRA is considering its approach to the publication of regulatory decisions in light of the greater scope it now has to impose fines on solicitors. Having these cases decided at the SRA level will automatically help alleviate some of the backlog of cases awaiting adjudication at the Solicitors Disciplinary Tribunal and will hopefully help make most regulatory actions and publication of these decisions more timely overall. Faster timelines are beneficial for service providers and consumers alike.

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)
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)

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)

In the Panel's view, there are some regulatory decisions that should be publicly available for longer than the standard 3 years to allow prospective consumers to make informed decisions. As stated in the consultation, consumers are now more likely than ever to shop around prior to choosing a legal professional,[2] and the SRA's approach to publishing regulatory decisions should take this desire into account. In addition, it is important to emphasise how difficult it is for consumers to judge the quality of legal services and how the duty to act in the consumer interest places an obligation on regulators to provide any information on quality they have in an accessible manner. It seems likely that consumers would want to know about more serious breaches of compliant behaviour for longer periods of time. This would suggest it makes sense to link the severity of the regulatory decision with the length of publication.

The Panel does feel that a tiered approach should be considered where this type of information is published for as long as it would appear useful to consumers. While there may be detrimental effects on solicitors who have been subject to regulatory decisions, it should also be recognised that the negative effects associated with public regulatory censure will further encourage compliance and ethical behaviour in the profession as a whole. This reasoning also holds true for extending the availability of published regulatory decisions.

As always, we are happy to discuss our position on this consultation further and to provide comments on specific proposals. Please contact Heidi Evelyn, Consumer Panel Associate, with any enquiries.

[2] See LSCP, 2022 Tracker Survey: How Consumers are Choosing Legal Services found at < https://www.legalservicesconsumerpanel.org.uk/what-we-do/research-and-reports>.

Yours sincerely,

SChambers

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