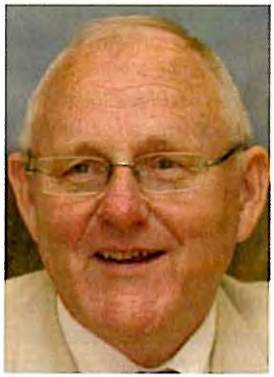
Guiding lights

Official guidelines are needed on how the Solicitors Regulation Authority should conduct its investigations, writes David McIntosh



Enforcing the Solicitors Code of Conduct has proved to be the Law Society's poisoned chalice. No wonder that, whatever the differences within the council of the Law Society towards separating regulation from representation, there was a concerted sigh of relief over passing the buck to the Solicitors Regulation Authority (SRA) and the Legal Complaints Service when it comes to the enforcement of regulations.

The SRA's investigatory role is not easy. So who knows whether the SRA will constantly be criticised (as is already beginning to happen) in just the same way as the Law Society was?

There is no lack of good intentions, but they need to be matched by a change in culture by those who carry out the investigations (most of whom were inherited) that truly favours the risk-based, proportionate and flexible approach the SRA repeatedly promises.

The code is a significant step in the right direction. It provides an improved understanding of what solicitors must and must not do. For example, it removes the confusions of the previous rules with regard to conflicts of interest.

However, in reality the SRA's promises are not being consistently met, even where those being investigated have made genuine efforts to comply with old and, admittedly, confusing rules and guidance. Unfortunately, where investigations are disproportionate, over-long, unfairly conducted or unjustified from a continuing risk or public-interest viewpoint, there is no acceptable process under which to challenge the SRA.

This is because of the absence of published guidelines on how SRA investigations should be conducted, with a process which allows disproportionality and lack of fair play to be challenged within the umbrella of confidentiality.

It is unacceptable for the SRA to state in matters under confidential investigation that it is sufficient for its conduct to be reviewed from time to time by the Solicitors Disciplinary Tribunal, after the gauntlet of publicity has been run and it is too late to stop possible abuses. This deficit contrasts with the published enforcement and investigation requirements for the Financial Services Authority (FSA) and the police.

As an example, while FSA inspectors and the police are personally required to caution an interviewee under personal suspicion, the SRA claims it is not under the same obligation because of the absence of any statutory provisions or rules requiring it to do so. It fails to recognise that the reasons for this protection for individuals under suspicion who might otherwise unknowingly incriminate themselves is based on natural justice, fairness and fundamental human rights.

Those under investigation are inhibited against making a challenge because of the difficulties in bringing successful judicial review proceedings during an investigation, and because to do so would involve courting publicity. This means unfairness is only likely to be challenged, if at all, long after it has occurred or when judicial review becomes irresistible. This is not a recipe for ensuring proportionality.

Solicitors whose futures are under threat and law firms that could be undermined in terms of recruitment, client retention and business tenders by long, invasive and eventually unjustified investigations deserve greater protection.

In his forward to the code, SRA chairman Peter Williamson encourages 'all of those who care about the quality of legal services... to contribute to the debate'. This, my call for guidelines which can be monitored within the SRA's confidential investigation process, is the first of my contributions.

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