

May 27, 2022

## Response to SRA consultation on rules changes on health and wellbeing at work.

### Introduction

We welcome the opportunity to respond to the questions raised in this consultation and believe this is an important step forward to addressing the deep-seated challenges in the culture and practice of law, which undermine mental wellbeing. Solicitors with poor mental wellbeing are more likely to make mistakes or poor ethical decisions, so addressing the factors that can lead to poor mental wellbeing in legal workplaces protects the public and maintains confidence in the legal profession.

LawCare has been supporting and promoting mental health in the UK's legal community for 25 years and in that time, we have listened to over 10,000 legal professionals talk about the pressures of Life in the Law. Last year we published the largest study to date on lawyer mental health in the UK, with over 1700 professional responding. Full findings of the research can be found here <https://www.lawcare.org.uk/life-in-the-law/>. Key findings of our research showed that:

- Legal professionals surveyed were at high risk of burnout, associated with having a high workload, working long hours, and a psychologically unsafe working environment.
- 69% of legal professionals experienced mental ill-health in the 12 months preceding the survey, but only half of them had talked about it at work.
- 1 in 5 legal professionals surveyed have been bullied, harassed, or discriminated against in the workplace.
- Things that could make a difference: Provide management training, regular catch-ups, work towards a psychologically safe and supportive workplace.
- The culture and practice of law needs to change. Improving mental wellbeing is all of our responsibility – practitioners, employers, professional bodies, legal educators and regulators each have a role to play
- Intersectionality needs to be considered – some people are more impacted by the practice and culture of law, particularly junior lawyers, females, lawyers with disabilities and lawyers from ethnic minority backgrounds.

Our research builds on a growing body of national and international research that demonstrates we have a mental wellbeing challenge in the law. About 20% of our support contacts in 2021 directly related to bullying, harassment, discrimination, ethical questions and concerns about regulatory investigations, all issues raised in this consultation. The most common reason we are contacted for support is stress, which accounted for 33% of all contacts last year.

### General comments

**Data** – the consultation has not set out how many regulated professionals have raised concerns about being treated unfairly and inappropriately, how many have raised mental and physical health concerns either voluntarily or as part of a disciplinary investigation or how many cases there have been where a practitioner's health issues have impacted their ability to practice safely or participate

in disciplinary proceedings. There is also no data provided on how many firms or individuals have been sanctioned for poor workplace behaviours. We believe this data is needed to understand the context of this consultation and the scale of the problem it is seeking to address.

**Education and training** – these rule changes are about responding to problems when they have arisen; we would advocate for more good practice guidance, training and education to enable employers to create psychologically safe workplaces with a healthy speak up culture, so that regulated professionals feel able to seek help when they are struggling or unwell earlier rather than later. We would like to see more training, education and guidance on best practice in people management and supervision. Our Life in the Law research showed that the most valued mental health support in legal workplaces was regular catch ups, yet less than half the people who responded to our survey who had management responsibilities, had had any training in managing people; yet 90% of those who had it, reported the training as being helpful or very helpful.

**Legal Education** – there needs to be a greater emphasis in legal education and training on the human skills that go alongside the technical legal skills in the delivery of legal services; and the importance of understanding competence and ethical decision making and how this can be undermined by poor mental wellbeing. This should include how to manage situations where things have gone wrong or a mistake made, or how to respond to a difficult client or colleague.

We know from our Life in the Law stakeholder consultation with legal education providers, that timetable pressures and the optional aspect of any training in this area, means that it is overlooked. Academic staff also revealed the lack of training and inadequate time for student support, led to additional pressure on them and teaching time.

**Legal representation** – it is a concern to us that not all regulated professionals have access to legal representation when being investigated for disciplinary matters and/or referred to the tribunal; many struggle to fund this. A case in point is that of Claire Matthews, who was unrepresented, raised her mental health condition during proceedings, but was struck off for dishonesty; with pro bono legal representation where medical evidence was obtained, on appeal was then reinstated (with conditions). Whereas Susan Orton who had legal representation, was also found to be dishonest, but was able to provide evidence of her mental health condition and was not struck off (she did have conditions imposed on her practicing certificate). How does this align with Article 6 of the Human Rights Act 1998, that everyone has the right to a fair and public hearing? We would like to know how many regulated professionals are unrepresented during disciplinary investigations and proceedings.

### **Support for those facing disciplinary proceedings or who want to report the poor conduct of a colleague**

We would like a formal referral system put in place for any regulated professional to be referred to us for emotional support when facing a disciplinary investigation or proceedings. Individuals who contact us for support when in the disciplinary process are vulnerable and often raise safeguarding concerns. We believe that if individuals were better supported both with professional legal advice and emotional support during an investigation, the process would be more efficient.

We know from our experience that it is difficult for legal professionals to challenge poor workplace behaviours for fear of negative repercussions. We provide emotional support to individuals who are experiencing harassment, bullying and discrimination and not being treated fairly and with respect

by colleagues, some do not report this to their employers, and most of this conduct goes unreported to regulatory bodies. Those who have experienced unfair treatment at work are vulnerable, usually experiencing stress and anxiety and are overwhelmed by the prospect of having to go through a formal process be that at work or through their regulator to call the behaviour out. We would advocate for a formal system that we could be funded to provide, to support those who are contemplating reporting conduct of this kind.

We would also like to see formal training and education for SRA staff who are working with regulated professionals in the disciplinary process on how to understand and respond to vulnerable people appropriately.

**Q1, Do you agree with our proposal to add to the Codes of Conduct an explicit requirement for regulated individuals and firms to treat people fairly at work?**

We very much welcome the SRA's desire to encourage a greater focus on workplace culture. The guidance which has already been published is a helpful start. The fair treatment of people at work is a moral duty and there cannot be any question raised in respect of the fundamental need to ensure this is protected for all.

However, we question the need for this explicit requirement in the Codes of Conduct for several reasons.

First, it is unclear how the proposed requirement will operate alongside the Equality Act 2010, which already imposes a legal obligation to treat people fairly at work, and not to bully, harass, or discriminate against them because of a protected characteristic. It is therefore unclear what additional purpose the proposed regulatory requirement will serve, beyond behaviour that is already covered by legislative provision, and bearing in mind that both individuals and firms already have a regulatory obligation to follow the law and regulation governing the way they work (Paragraph 7.1, Code of Conduct for Solicitors, RFLs, and RELs; Paragraph 3.1, Code of Conduct for Firms).

Secondly, SRA Principle 2 already provides a regulatory obligation on both individuals and firms to act in a way that upholds public trust and confidence in the solicitors' profession and in the provision of legal services, a breach of which may be clearly made out where there is evidence of unfair treatment.

Finally, we are concerned about how 'fairly' and 'with respect' would be defined. These terms are not only wide in respect of the various ways in which they may be interpreted, but they are also heavily subjective in their interpretation.

We are concerned that the proposed new rule is not sufficiently clear to be enforceable. To be effective as a mandatory rule, individuals and firms need to be very clear about how it will be interpreted and applied by the SRA. The difficulty with any obligation that centres on behaviours is that individuals will have varying views about whether certain behaviours are acceptable or not. Although guidance can be indicative of what is acceptable and what not, it is the rule which the SDT and court must interpret. Other regulatory bodies have tended to rely on guidance to bring about change (as set out in the consultation paper) and this may be because they have shied away from trying to draft an enforceable rule.

We think one answer may be to make more use of existing regulatory obligations as a means of improving workplace culture. Paragraph 3 of the Code of Conduct deals with competence. The LSB are already looking at the whole issue of what it is for a lawyer to be competent, including how staff are managed and how people within a firm treat each other. Competence has to embrace wider skills than just knowledge of the law and should cover things such as people management which brings in workplace culture. Another existing regulatory tool which could be used to deal with issues of lack of respect and unfairness is paragraph 1.2 of the Code which talks about not abusing your position by taking unfair advantage of clients and others. The "others" referred to must include fellow employees. Taking unfair advantage is probably harder edged and easier for people to interpret that "treating people fairly and with respect". Maybe these two existing rules should be used more than at present in the disciplinary process to bring about change.

Long term, the answer may be to introduce the proposed new rule, in conjunction with the guidance, and to see how easy or difficult it is to enforce and to tweak it as necessary. Bullying and harassment are examples of not treating people fairly and including these behaviours may give greater clarity to the rule. This may help the rule to be more easily enforced but it may also cause problems when claims are brought at the same time under the Equality Act in relation to the protected characteristics.

**Q2, Do you agree with our proposal to include an explicit requirement for regulated individuals and firms to challenge behaviour that does not meet the new standard?**

We do not agree that there should be an explicit requirement for all regulated individuals to challenge behaviour that does not meet the new standard. Our experience of 25 years of listening to legal professionals talk about their working lives, is that it is very difficult in practice, particularly for junior staff to call out inappropriate behaviour in colleagues. We do not have an accepted 'speak up' culture in law. This positive obligation could potentially lead to those individuals who witnessed poor workplace behaviours being in breach of the rules by not calling them out. We would suggest that there needs to be a campaign across the profession to encourage challenging unacceptable behaviours in the workplace and training and education provided to employers to enable this.

We agree that there should be an explicit requirement for firm managers or the management of other legal workplaces (i.e., in house teams) to report conduct of this kind to the regulator. However, the needs of the individual who has been treated unfairly and the person who has been accused of this conduct need to be considered sensitively and they both need to be supported emotionally and legally during any ensuing investigation. We also anticipate there will be some difficulty over interpretation and how 'challenge' may be interpreted in different ways. It is unclear exactly what actions will be expected of individuals, in order to satisfy their obligation to challenge.

**Q3, Do you agree this requirement should cover colleagues such as contractors, consultants and experts as well as staff in a formal employment relationship?**

In principle, the fair treatment of colleagues in a workplace should extend to all people that a person or organisation has dealings with; however, we reiterate our concerns as outlined in response to Q1 and Q2 above in terms of the need for an explicit requirement. Further we think the priority should be to concentrate on firms' internal culture. Where there are problems with external contacts, these individuals have the option to walk away or sue if there is a breach of contract.

**Q4, Do you agree that these new obligations should apply to behaviour outside the workplace or the direct delivery of legal services?**

Defining 'workplace' and the context of this is important as post covid the workplace is no longer a physical building, some legal professionals may be working remotely and meeting colleagues for meetings at convenient locations such as coffee shops or restaurants. We believe this question is getting at behaviour that takes place in a purely social context and that this should only be looked at in the light of the SRA Principles. If behaviour breaches Principle 2 in that it is sufficient to undermine confidence in the solicitors' profession and legal services, then the SRA already has a hook to take action. We do not think that anything beyond this is necessary.

We do hear via our support channels of inappropriate conduct at social events that can then impact and escalate problems in the workplace. Again, we would reinforce the need for a speak up culture that encourages and supports legal professionals to challenge inappropriate behaviour.

**Q5, Do you have any other changes to suggest to our proposed wording for this new requirement?**

None other than we have raised in our responses to the preceding questions.

**Q6, Do you have any comments on our proposed approach to enforcing the new requirements or unfair treatment at work?**

How will it be determined that a culture is one in which 'unethical behaviour can flourish' or that 'staff are persistently unable to raise concerns or have issues addressed'? Although it is stated in the consultation that the SRA would not expect to get involved in disagreements about targets or work allocation, our experience at LawCare would suggest that these are sometimes used as ways of discriminating against regulated individuals by setting unrealistic targets or the allocation of low-quality work.

**Q7, Do you have any comments on the regulatory or equality impact of our proposed changes to on wellbeing and unfair treatment at work?**

Ultimately, a legal profession that welcomes and includes a diverse range of people who are treated with dignity in the workplace, whose mental wellbeing is not undermined by the culture and practice of law, is in the best interests of clients and upholds the reputation of the legal profession.

We are not confident that effective measures are already in place in most firms to ensure staff are treated fairly and therefore question the assertion that these proposals should have no cost or other impact on firms. Our Life in the Law research found that only 47% of legal professionals with management responsibilities had had any relevant training, 20% of respondents reported bullying, harassment and discrimination and we found that legal professionals were significantly above the cut off point for being at 'high risk of burnout'. These findings do not speak to a culture in law where people are being effectively managed. We believe that to meet these proposals firms will have to significantly invest in providing training in people management and supervision, take steps to model and develop positive workplace behaviours, develop psychologically safe workplaces and respond to the challenge of the work intensity in law that undermines mental wellbeing.

We are not sure a rule change will promote the wellbeing of people who work in law firms by reducing the risk they will be treated unfairly. We would like to see these requirements framed in

the positive i.e., firms encouraged to recognise the benefits positive mental wellbeing of their people brings to their organisations and see it as a given that investing in management training, effective supervision and creating an environment that welcomes everyone and where everyone is treated with dignity makes good business sense.

We believe there is the potential for more reports of unfair treatment at work with these proposed changes and that resources need to be dedicated at the SRA to respond to these effectively, to include appropriate training of staff on how to respond to vulnerable people. If the floodgates open and these cases are subject to delay this will undermine the reputation of the regulator.

We also would question what serious means in the statement that the SRA will investigate 'serious unfair treatment at work'.

We know from our Life in the Law research that females, junior lawyers, people with a minority ethnic background and those with a disability are more likely to experience unfair treatment in legal workplaces. We would recommend working closely with all the stakeholder groups, including LGBTQ+ groups, which represent the interests of those that are most impacted by working practices in law to raise awareness about the implications of the issues raised in this consultation.

**Q8, Do you agree with our proposal to amend our Rules and Regulations to make it clear that fitness to practice covers all aspects of practicing as a solicitor, including the ability to meet regulatory obligations and be subject to regulatory proceedings.**

It could be argued that the Assessment of Character and Suitability Rules already give the SRA power to consider all aspects of fitness to practice, including health issues (rule 2.2). However, it may help to emphasise that health issues are an aspect of fitness to practice. We would agree in principle with the proposed rule change in so far as there needs to be a fair, transparent and independent process that operates outside of the formal disciplinary process for dealing with health (or other) issues that have impaired a solicitor's competence to practice. However, we feel this aspect of the consultation is lacking in detail, which makes it difficult to respond to fully. We would suggest that this aspect of the consultation is redrafted and put out for another consultation. We have highlighted our questions in the sections below.

As set out in the consultation in most cases, the SRA only becomes aware of health issues when they are raised when there is a concern about conduct or behaviour. However there may be a number of solicitors practicing when their health has undermined their ability to practice safely but they have no insight into this i.e. they may have dementia or burnout; or they may be aware of the issues but are reluctant to seek help for fear of negative consequences. In these circumstances who should inform the SRA of these issues and what would the process be? This needs to be handled sensitively.

***Proposed addition to Rule 2 of the Assessment of Character and Suitability Rules***

How will health issues be defined; do they need to be clinically diagnosed?

We do not consider that the sentence 'or be subject to regulatory investigations or proceedings' is necessary as it is already covered by meeting regulatory obligations.

Awareness of the need to declare health issues that may be affecting a solicitor's ability to practice safely and what the process is for how this will be dealt with is key to addressing the issues raised in

this aspect of the consultation. All regulated professionals should be encouraged and supported to raise health issues that may be affecting their ability to meet their regulatory objectives early.

***Proposed changes to Regulation 7.2 of the Authorisation of Individuals Regulations***

It does need to be addressed that there are cases where health issues have stayed a tribunal hearing as the individual is deemed not fit to participate in the process for health reasons, yet they may still be able to practice as a solicitor. If a solicitor is not fit to take part in the disciplinary process, then there needs to be a process to determine their fitness to practice in these circumstances to protect the public and uphold the reputation of the profession. We believe this process needs to be carried out by an independent panel.

We are concerned about a possible condition 'to follow treatment recommendations of an appropriate healthcare provider'. Whose view as to what a 'treatment recommendation' is, would be regarded? There may be differing opinions. Is it appropriate for the SRA to mandate that a solicitor follow a treatment recommendation? We would recommend that in these circumstances a solicitor with conditions imposed on their PC for health reasons is assessed after a period of time to determine if they are safe to practice, rather than being directed to follow a prescribed course of treatment.

Who will obtain the medical evidence in this situation and how will this be agreed? Who is going to assess the medical evidence and evaluate it? Who is going to pay for this? What constitutes medical evidence? We emphasise our belief that there will need to be an independent panel to determine and oversee this process.

We have a number of concerns about situations where conditions have been imposed due to the solicitor's inability to participate in the disciplinary process. If the conditions are lifted and the individual is then able to participate in the process, what emotional support will be provided for that individual? Legal representation in these cases should be assured. If that health condition led to or contributed to the misconduct, is it appropriate to conduct disciplinary investigations in the first place? What discretion will there be to discontinue any investigation in these circumstances?

There are serious implications for imposing health-based conditions, as practitioners may be obliged to disclose these to third parties, so a measured, transparent, fair, independent process is needed for determining this.

**Q9, Do you have any changes to suggest to our proposed wording for the amendments?**

7.1.(b) c wording we would delete the wording in brackets, it is not necessary.

**Q10, Do you have any comments on our approach to managing health concerns in the context of the proposed changes to our rules?**

We do not believe there is sufficient detail in the current process or the proposed process to comment fully on the proposal.

The current process needs greater transparency and should be outlined in detail on your website, it should be clear to any solicitor what happens if they raise a health concern during a regulatory investigation and who has responsibility for making decisions and why. Any solicitor in these circumstances should be actively referred for support and legal representation, not just signposted.

Any process needs to be expedited and followed efficiently, a common complaint from people we support through the disciplinary process is how long it can take to resolve matters leading to greater stress, anxiety and impact on existing health conditions.

We have some questions:

- What enhanced training will relevant staff have, what does this look like?
- Who are the subject matter experts, are they independent?
- What are the templates that individuals can use to ask their physician for medical evidence? And what does working with them to obtain further evidence mean?
- 'Making sure medical evidence is carefully considered early in the investigation process by experienced manager and lawyers. Who are these individuals and what are their credentials?
- What conditions can be imposed? Can this include following a recommended course of treatment? Who will monitor compliance?
- Will the SRA publish outcomes and the effectiveness of this process?
- What measures does the SRA have in place to make sure health processes are transparent and proportionate?

**Q11, Do you have any comments on the regulatory or equality impact of our proposals?**

Careful consideration needs to be given to the implication of any 'fitness to practice' regime and its impact on people with existing physical or mental health conditions or those groups who are most impacted by working practices and culture in the law. What steps will be taken to monitor this?

Data collection will be important to identify the factors that may be leading to health issues affecting a solicitor's ability to practice, so that steps can be taken to address these through education and training about any underlying causes that may be due to workplace practice and culture.