

A question of trust

Consultation questionnaire form

This form is designed to be completed electronically—in MS Word. Please save it locally before and after completing it.

Question 1a

Are these three categories clear?

Yes

No

Start of response from Law Centres Network

An overarching comment to the questionnaire is that the proposed framework offers the implementation of a matrix of criteria of intent, harm, impact and vulnerability: this is then overlaid on the principles of professional practice as a means of assessment of behaviour and potential rebuke/penalty. This process can be complex when trying to manage consistency in degrees of seriousness of behaviour and response and it does not lend itself easily to an analysis of the impact of singular and separate themes such as intent and no intent.

A consistent response will result from an agreement and understanding of the terms used and in the implementation: it can be a difficult process to get right, from the outset. To enable that understanding, examples of case descriptions and of possible outcomes would have been useful as illustration and could be developed for staff training and information to the profession. However, we recognise that it will take some time for example of cases and imposed penalties to work through to illustrate how the framework is working. We recommend to have a system of regular reviews to use what is learned.

Our response to the consultation questions, particularly 12 A should be read with these overarching comments on complexity and consistency.

Q1 The categories of intent / no intent / lack of knowledge are clear. Providing sample case studies with options for responses may assist to illustrate how the framework will be implemented.

To request an alternative format please visit www.sra.org.uk/contact-us.

Question 1b

If the categories of intent are not clear, how could they be improved?

Question 2a

Should 'lack of knowledge' be considered separately from 'recklessness'?

Yes

No

Neither.

Assessment of reckless behaviour is subjective and particularly in regulatory systems: to identify such cases may need sample cases. As with the SRA research which indicated that there are widely differing views on what is serious behaviour and what should be done in response to any particular issue, the concept of what constitutes recklessness attracts widely different views. It is less clear than intent or no intent, in our view and it is difficult to see how recklessness can be distinguished from intent without creating more complexity. Recklessness can be described as an awareness that there are rules, but a decision not to follow them. For example, a person aware that there are accounting rules but not fully understanding them, then using client money to fund an office account shortfall, in the expectation that it will be returned within a day and no harm done, may be considered by some to be reckless and by others to have intent.

For the same reason, the concept

".. recklessness where the person [... should reasonably have taken into account]."

is an uneasy fit for a system intended to provide clear guidelines.

If a person who, professionally, must maintain accuracy, knows that there are rules but decides not to review, read or consider them resulting in an action that would be reckless from a non-professional, then that indicates an intent to avoid professional obligations.

We recommend to drop the use of the concept of recklessness.

Question 2b

If 'lack of knowledge' should be considered separately from 'recklessness', which is the more serious?

- Lack of knowledge
- Recklessness

Response to Q2a is repeated here

Question 3

Do you have any further comments on 'intent'?

We refer to our comments above as to separating knowledge and recklessness

If the concern is to make a distinction between behaviour where there is knowledge, and behaviour where knowledge cannot be proved but the person was careless, then that gives scope for using knowledge as one criteria and adopt another clear criteria that recognises the person did not check the rules for themselves where they would be expected to have done so.

Harm is the most significant part of the matrix. Underpinning all the core principles is the fundamental ethos and requirement to do no harm in the conduct of professional activities when using the position of a solicitors authority.

Question 4

Do you think criminal convictions (excluding minor motor offences), should be treated as matters of concern whether or not they relate to the regulated person's professional work?

- Yes
 No

We have not answered yes or no for the following reasons. All convictions should not be considered with this blanket approach, when the conviction does not relate to or connect to the person's professional work.

As a general rule, activities of a professional person in their personal life should not be used to make a judgment of their professional standing. A person can be a solid reliable professional with integrity but have been vulnerable in a personal situation: as a result they have conducted themselves in a manner that has no impact on how they would act in the professional environment. A regular example is a one-off penalty for drink with driving that is not repeated but that attracts a severe sentence. In our view the fact of this behaviour does not automatically compromise the person's honesty and independence, or ability to act in their clients' best interests, and provide a competent service.

The context and repeat behaviour may have a bearing. If there is a long term personal problem with repeat behaviour that calls into question the individual capability and potentially, reputation for making good judgments, then that should be an issue of concern: we would suggest that is initially for their firm/partnership/company/ employing agency.

Where the SRA may be involved may be where a personal default can illustrate a lack of integrity that is core to professional dealings. For example, in dealings with statutory authorities that indicates an intention to avoid responsibility for, or application of, legislative requirements or legal rules where dishonesty is often an element: an example would be a conviction/penalty for personal tax avoidance.

the need to strike a balance between the client/consumer need and the fair treatment of the individual under scrutiny, must be an overarching principle of implementing the proposed framework, as has been identified in the consultation.

Question 5

Do you think that in considering complaints or making other decisions the SRA should include events that occur in an individual's private life, outside professional practice, that breach the professional principles?

Yes

No

yes and no proportionately

Complaints that relate solely to events in private life can contain subjective judgments and involve issues that are not made public. If they do appear to break professional practice or codes but are attributed only personally then the first approach, if a serious matter, must be to the firm or employing organisation to enquire of a response.

The SRA has limited capacity as it is and needs to adopt proportionality in deciding to monitor complaints of private activities.

Examples of these events/potential complaints often relate to publishing or stating views and opinions on a personal basis that conflict with professional attitudes: this is a complex area particularly if such events are a one-off. An example is making a statement at a rally that breaches an equality principle. To allow such complaints to be examined can then become mired in the issue of the extent to which a professional person's personal attitudes and beliefs are to be judged in a secular society based on freedom of speech.

There are behaviours where the private activity would breach principles of professional behaviour if made in a professional capacity and where the context has little separation in the roles of solicitor and private individual: the elements of harm and impact to professional standing and public trust, can then be serious. For example if, being invited to speak at a public event for reason of the professional status and making remarks of a personal opinion that breaches professional practice: this could have a major impact on trust in the profession if there is no response to a complaint. In such circumstances regulatory action should start with referral to firm or employing organisation for response; and consider then the behaviour in light of the framework proposed.

Question 6

Do you think breaches of clients' rights to rights to privacy, dignity and non-discriminatory treatment should be treated as causing harm in themselves, even where there is no financial impact on the client?

Yes

No

In our view, financial impact is only one example of harm. Harm and impact are inter-related: one can be judged substantial where the other is not: they need to be considered together.

Breaches of clients rights, as listed in the question and in this response, can have a greater impact than financial breaches.

We would also include breaches that result in an impact of lack of trust, or diminution in confidence, for the client individually and/or diminution in confidence in using further legal services for that person and others involved. Conduct that has harmful consequences to family members that are direct and could be anticipated should also be considered as cause for complaint

An example is theft of funds that are entrusted to the solicitor, to buy a family home: breach of that trust then results in both financial impact and health breakdown for client and partner: potentially elder and younger dependants.

Question 7

Do you think actions that have not resulted in harm, but have the potential to do so, should be treated as less serious than the same actions where harm has arisen?

Yes

No

The seriousness of the behaviour will depend on the event: actions can be as serious regardless of the harm or potential harm.

It is the nature of the response that we recommend should be considered. The question is in fact about a proportionate approach to the level of rebuke or penalty, in light of the impact of the behaviour and the framework criteria should be able to deal with these aspects. The level of response in a rebuke or penalty should address the harm and impact involved: in other words, where harm has resulted the response could be more serious than with the same behaviour where no harm is done. The latter is often termed incorrectly as a technical breach.

In parallel, being clear that actual harm will result in a more serious outcome, would provide the incentive to a person to act quickly to reduce harm or impact, once the behaviour is recognised (but before any harm done). If the penalty is the same regardless of the impact, there is little incentive to repair a breach of conduct, and they could revert to seeing if they could 'get away with it'.

For example, a failure to transfer client money to office, appropriately, at an early stage, may result in potential harm but no money lost: ideally the professional should repair the breach swiftly, to avoid serious penalty. However if it is allowed to continue longer it may result in actual harm –the money is lost or is then further mis-used.

If the penalty enacted for the person is the same, whether there is harm or not, this removes an incentive to act to return money at an early stage.

Question 8

Do you think actions that have not resulted in harm because they were identified early (eg by regulatory action), but had the potential to do so, should be treated as less serious than the same actions where detection only happened after harm had arisen?

Yes

No

The answer to question 7 covers this.

Question 9

Do you think that when we make decisions we should consider the impact of an individual's conduct on clients or other parties, as well as the nature and scale of the offence?

Yes

No

The answer to Question 7 is repeated here: this whole area relates to implementing that matrix of intent, harm and impact.

For example, where there is non-financial harm there may be significant harm to the client: but it is more difficult to objectively measure the relative degrees of harm.

The question of impact on third parties is problematic as it relates to the issue as to how the SRA responds to acting on 3rd party complaints. Consideration could be given to making a distinction between a 3rd party that is close to the client or the event, and as a result of that proximity there is an impact. It would not include (for example) the opposing party in litigation.

Examples may include where the integrity of the profession could be damaged as a result of the impact on the third party. But in applying the guidance, the assessors must be clear as to what harm, or impact has happened.

Question 10

Should we view breaches as more serious where they involve vulnerable clients?

Yes

No

One of the eight regulatory objectives of the Legal Services Act is improving access to justice and within that, to respond to those within vulnerable circumstances.

The nature of the harmful activity can mean that the breach itself is just as serious for a more robust client as for a vulnerable client; for example appropriation of client money on property purchase and the client loses their house. Where other variables are the same, this might have the same effect on both clients: but it's possible the more vulnerable client finds it more difficult to deal with and/or has less resources in family connections or social support to draw upon; in other words the impact is greater.

People use legal services at times of stress, particularly in transactions that are not commercial or that affect the individual both personally and in their business activity. Therefore, no matter how experienced a client may be, their individual characteristics may make them vulnerable. A range of factors, including physical and mental ability, language skills, their social and economic circumstances, how intractable the legal problem is or the impact on their homelife of the event, can contribute to a client being at risk of disadvantage. Added to that, some features of legal services, such as barriers to access and difficulty in judging quality, can increase the risk of disadvantage.

From the experience of our members, a client with characteristics described above may not only be at a disadvantage but also vulnerable. For example, they are less likely to be in a position to objectively understand and monitor flaws or failings in behaviour from a representative, when compared to consumers/clients who are less personally challenged and able to scrutinise and follow clearly the course of a legal case. This is particularly so where a case may be complex, or in a difficult area of law or particularly emotional for the client.

Question 11

Should we distinguish between levels of vulnerability resulting from:

- a) lack of legal knowledge or experience of legal services, and
- b) vulnerability arising from personal circumstances, including mental or physical ill-health or disability?

Yes

No

A person can be vulnerable in certain legal situations where they may be considerably not vulnerable, or robust, in other parts of their professional personal or social life.

To pitch different characteristics of vulnerability, or weight them against each other, would mean the regulator undertaking another round of definitions.

The SRA should avoid creating too many degrees or levels, and categories in the matrix and to avoid an overcomplicated formula. In reality many clients requiring help for personal or personal/business related matters are vulnerable in that position

Alternatively the framework could adopt the Legal Services Board Consumer Panel Guide to Consumer Vulnerability in its training practice and for reference and implementation when considering harm and impact on a vulnerable person.

http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/index.html

Question 12a

Are harm, intent and vulnerability the right factors for us to be taking into account?

Yes

No

We agree, and within the context of implementing the matrix of criteria and levels of response as mentioned in the answer at Q1 and Q11.

As the consultation recognises, the assessment of behaviour in the context of professional solicitors' services is not a linear process.

Question 12b

Are there any other factors you consider should be included?

Yes

No

The Law Centres Network is the membership body for Law Centres in England, Wales and Northern Ireland, each of which is a not-for-profit legal practice providing legal help and advice in civil law, with a particular focus on social welfare law. Law Centres support the rule of law and, as part of it, universal access to justice. In particular, they target their services at the most disadvantaged and vulnerable people and groups in society, helping make their rights a reality and aiming to tackle the root causes of their poverty or disadvantage.

Law Centres are embedded in local communities and run by committees of elected local people drawn from community, legal sector and health sector organisations. The Law Centres Network ('LCN', the trading name of the Law Centres Federation) has coordinated and represented Law Centres collectively since 1978. There are currently 44 Law Centres across the UK represented by the Network. They are primarily funded by a mix of civil legal aid contracts, local authority grants or contracts and fixed-term project grants from charitable trusts and foundations.

LCN members work with clients who are vulnerable, often because of social, cultural and/ or economic disadvantage. A good training for those involved in assessing improper or unprofessional activities must include understanding the context within which clients can be vulnerable when involved in a legal action.. No less important, is to understand the complexities that solicitors face in managing not only the action but also the needs, expectations, behaviours and responses of a vulnerable client. This can result in cases taking longer, needing more careful attention and producing high degrees of pressure for the solicitor. This pressure should be understood by all those involved in the implementation of the framework.

LCN submits this response on behalf of the Law Centres movement.

Question 13

We have focused on the professional principles set out in the Legal Services Act 2007. Do you think that we have covered the right issues and given clear examples?

Yes

No

We welcome the opportunity to respond to this consultation which is detailed and, in the outline framework, seeks to achieve a balance of the range of complexity in this area of regulation. It would have been useful to have more examples of events and linked to the different framework responses proposed. Subject to that, the right issues are covered.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to consultation@sra.org.uk, by **31 January 2016**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

A Question of Trust
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