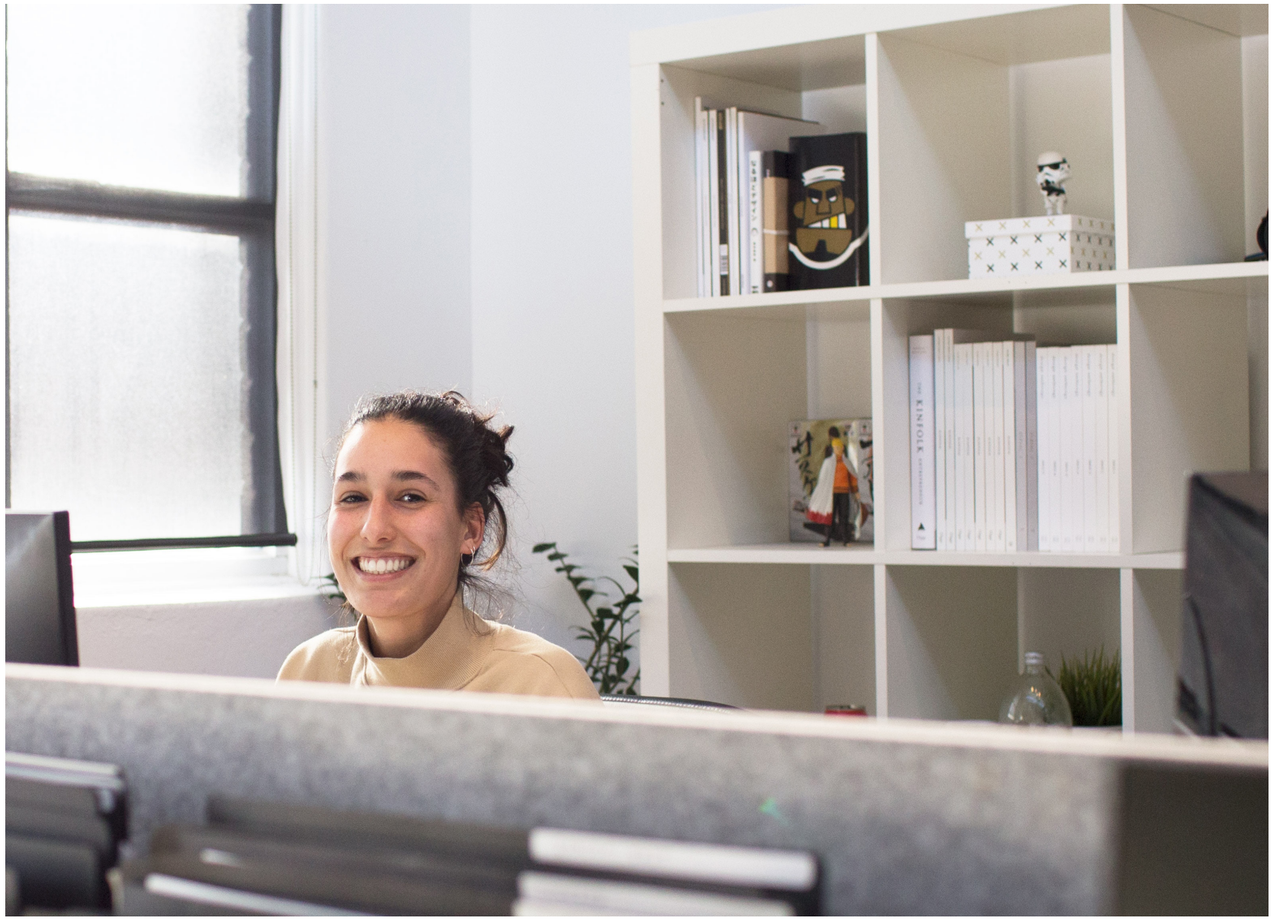
THE ONWARD MARCH OF THE SRA & ITS NEW RULES ON WELL-BEING AT WORK

The recent demand by the SRA for an additional £10m to fund its work for 2023/2024 reminds us what a leviathan organisation it has become writes Jayne Willetts Solicitor Advocate of Jayne Willetts & Co Solicitors Limited.



The SRA requires an increase in its budget from £88m in 2022/2023 to £97m for next year. The budget in 2021/2022 was £79m. In 2009, the budget was £20m so over 14 years has increased by £77m.

But it is not just the cost of the SRA that has increased but the extent of its reach into the day-to-day delivery of legal services by the profession. To use the vernacular the SRA has its fingers in many more pies than could possibly have been envisaged when it was set up in 2007.

It is readily acknowledged that some of its activities are imposed upon it by external events and government controls. For example, the war in Ukraine has resulted in an emphasis on sanctions compliance. The increase in financial crime has resulted in a focus on AML compliance. Such work is unavoidable but also essential to protect the public interest.

It could be argued that some other SRA initiatives may not satisfy the test of being essential work when one considers the ever-increasing cost of the SRA operation. Should there be a list of priority work or should the SRA be entitled to endlessly add to the list of regulatory obligations without a constructive debate and cost-benefit analysis?

The latest rules relating to well-being at work could fall into the category of desirable but not essential work by the SRA. It seems to many that this work interferes with the HR function within firms and duplicates work.

The ease with which a dissatisfied employee can complete the standard SRA report form and send to the SRA means that this can be done as a bargaining ploy before a complaint has been raised and investigated internally within the firm. Whilst HR teams are well accustomed to rooting out and dismissing worthless unjustified complaints, they will no doubt be more circumspect when faced with an employee complaint to the SRA whether or not it has any merit.

The new rules follow on from the SRA Workplace Culture Thematic Review published in 2022 which found that some respondents expressed concerns about the pressures on solicitors whereas 75% of respondents reported working in a broadly positive environment. Whilst the SRA's intentions are laudable, the evidence shows that the majority of firms are doing just fine or fine enough.

One questions the addition of these new rules to the existing heavy and delay ridden workload of the SRA investigation team. Such investigations will be time and staff intensive for the SRA. Additional training will be required to ensure that the SRA personnel are au fait with the employment law concepts and to cope with the need for sensitive handling of certain complainants and complaints.

THE NEW SRA RULES ON WELLBEING AT WORK

Turning now to the rules which came into effect on 6 April. The guidance and case studies were published on 4 May.

The new requirement for individuals is at paragraph 1.5 of the SRA Code of Conduct for Solicitors, RELs & RFLs:- ***You treat colleagues fairly and with respect. You do not bully or harass them or discriminate unfairly against them. If you are a manager you challenge behaviour that does not meet this standard.***

The new obligation on firms is at paragraph 1.6 of the Code for Firms: ***You treat those who work for and with you fairly and with respect, and do not bully or harass them or discriminate unfairly against them. You require your employees to meet this standard.***

TREATING COLLEAGUES FAIRLY

The guidance makes it clear that treating colleagues fairly and with respect is not the same as complying with employment law. The SRA assures us that it will not become involved in employment disputes but would become involved if there were serious unfair behaviour that poses risks for clients and the wider public interest.

In determining whether any unfair treatment is serious, the SRA will focus on whether others would regard the behaviour as intended to bully, belittle, harass, intimidate, undermine or take advantage of colleagues. The respective seniority of those involved will also be a factor as well as whether an individual has control or influence over another's career

And the final factor is whether the individual complainant and/or victim has specific characteristics or vulnerabilities such as age, sex, disability or ethnicity.

The SRA makes it clear that it will be applying the definitions of harassment, discrimination and victimisation as contained in the Equality Act 2010 – which at least gives the profession a legal structure for those terms. However, it is acknowledged that there is no legal definition of "bullying" – so this will be a matter initially for the SRA to determine until we have had some judicial input from the Solicitors Disciplinary Tribunal and/or the Administrative Court.

CHALLENGING BEHAVIOUR

The guidance requires managers to intervene "immediately" in stating that: "Where it is feasible for a manager who witnesses unfair treatment to intervene immediately to stop it, we expect them to do so"

What does this mean in practice? Is a manager required to shout across an open plan office to a male solicitor to stop touching the shoulder of a female colleague whilst they are discussing a client file? Would such action cause embarrassment to both the perceived offender and victim and to everyone else in the office when the female colleague was not in the least bit troubled by the touch on the shoulder? Will managers need training as to when to intervene "immediately" as required by the SRA and when not to? Whatever happens managers will need to keep a written record of all such incidents whether minor or major in case of subsequent issues thereby elevating such incidents to a higher level than would be strictly necessary if common sense were applied.

The guidance goes on to say that "In other cases it may be more appropriate for the manager to take action soon after the event. This could be by raising their concerns directly with the person who has behaved unfairly. Or by reporting to another senior colleague such as the firm's COLP; managing partner or the director responsible for HR issues"

The guidance presupposes that there is a hierarchy of people within all firms to deal with such incidents. In small firms there may only be one manager who fulfils all roles. He or she will be the manager required to challenge unfair treatment as well as being the COLP and the HR director. In a small firm there can be no independence of role. Such small businesses may require external regulatory and/or HR advice which will come at a cost.

DEFINITION OF "COLLEAGUES"

The definition of "colleagues" is wide and includes not only fellow solicitors, but barristers, contractors, consultants and experts with whom the solicitor works closely.

The term "colleagues" does not include clients or third parties such as those acting on the other side in a case. However, solicitors are bound by other obligations and must act in the best interests of each client and must not take unfair advantage of clients or others.

REPORTING TO THE SRA

Managers should consider reporting the matter to the SRA where for example a challenge to behaviour "is attempted but does not succeed" where it does succeed but there are still regulatory risks or in cases involving a senior member of staff "which cannot realistically be challenged within the firm"

WORK FOR FIRMS

Firms must ensure at the very least that their managers as well as their HR professionals have studied the SRA guidance and the case studies as well as the SRA Workplace Culture Thematic Review. Training with discussion on real life examples as to when and when not to intervene as well as how to intervene would also be worthwhile. Depending upon the culture of the firm mandatory training for all staff on what unfair treatment looks like would assist.

Space does not permit a complete list of all the steps necessary to satisfy the SRA's latest requirements but systems and controls are top of the list – i.e., more internal policies and procedures. Added to that is an effective reporting system for members of staff who feel that they have been unfairly treated. For some firms there will be a great deal on the "to do" list.

FINAL THOUGHTS

How the SRA will deal with these complaints remains to be seen but there is nothing within the existing guidance requiring a complainant to make a complaint direct to the firm first for investigation before the SRA embarks upon an investigation. There will be exceptions to such a rule but it could operate in a similar way to the Legal Ombudsman procedure which requires firms to be given the first opportunity to investigate before the LeO will investigate.

Whilst one would never devalue the need to be respectful, polite, and well-mannered towards colleagues, the imposition of a regulatory requirement to do so may to some seem a step too far. It adds to the ever-increasing regulatory burden; to the cost of practice and ultimately to the cost of legal services – which is certainly not in the public interest.