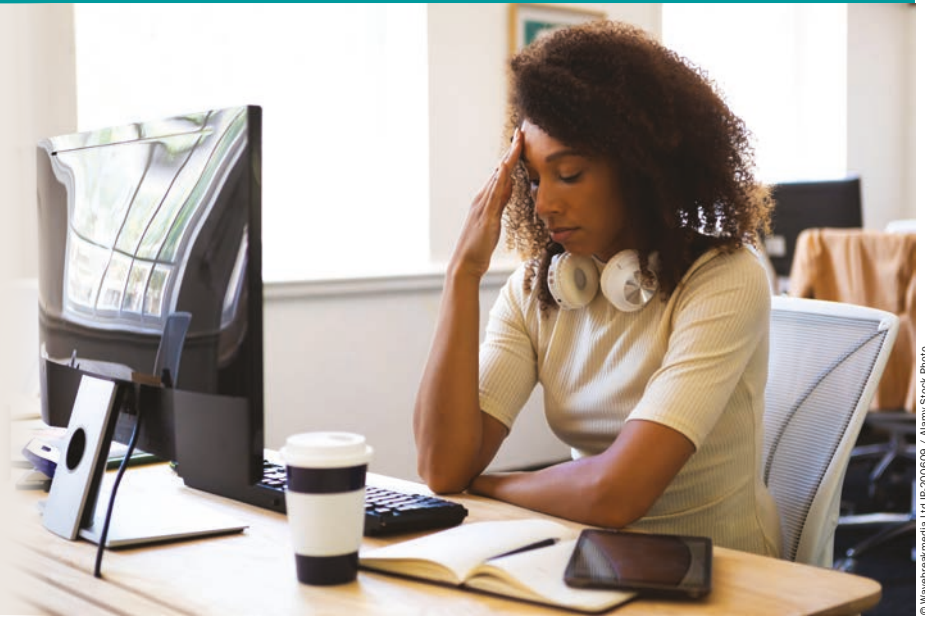


Tackling culture wars

Andrew Pavlovic discusses the SRA's approach to tackling toxic workplace environments



© Wavebreakmedia Ltd IP-200609 / Alamy Stock Photo

IN BRIEF

► SRA's publication of guidance on workplace culture and health and wellbeing at work raised questions on the role of regulators in firms.

► What the SRA's findings and guidance mean for firms.

The Solicitors Regulation Authority (SRA) published its long-awaited guidance and thematic review on workplace environments, focusing on the role that firm culture plays in regulatory misconduct, in February 2022 (see 'Workplace Culture Thematic Review' at bit.ly/3a4DhRI). This was closely followed by their launching of a new consultation on rule changes on health and well-being at work, which proposed changes to the relevant Codes of Conduct to introduce an express requirement on firms and individuals to treat colleagues fairly and challenge unwanted behaviour (see 'Rule changes on health and wellbeing at work' at bit.ly/3ubgslP).

For many, particularly those who are junior in the profession, the SRA's consideration of this issue will seem long overdue. However, both the review and consultation raise issues as to the role (if any) that regulators can play in improving firm culture, and whether some of the proposed rule changes will only serve to increase the regulatory burden on firms and individuals.

Background

In the last few years, there have been a steady stream of cases in the Solicitors Disciplinary Tribunal where junior solicitors have committed acts of dishonesty, usually in an attempt to cover up or conceal mistakes. Those solicitors have complained about toxic and unsupportive work environments, claiming that the mistakes arose as a result of unreasonable workloads and inadequate

supervision, and that they felt unable to admit or confess to those mistakes as they did not consider they would be supported if they did so.

In the majority of cases, those solicitors have been struck off the Roll, while the firms themselves have not been sanctioned. The SRA has been criticised in many quarters for pursuing individuals while failing to take equivalent action to address firm culture.

The review

The review is a substantial piece of work, incorporating the results of surveys, providing case studies, and highlighting examples of good practice. The guidance accompanying the review (see bit.ly/3ytpVYv) makes clear that the SRA is likely to take action against firms where there is evidence of a failure to:

- investigate abuses of authority by senior staff;
- deal promptly and fairly with complaints of discrimination, victimisation or harassment; and
- supervise junior solicitors or support staff, leading to serious competence or performance issues.

The guidance emphasises the need for firms to focus on the following issues:

- Wellbeing—firms should have in place mechanisms for monitoring staff well-being, providing access to psychological support or counselling services, and create a culture whereby individuals feel comfortable to report any mental health concerns or stresses associated with work.
- Creating a 'speak-up culture'—firms should strive to install a 'no blame' culture, looking at mistakes holistically and constructively, in doing so fostering an environment in which individuals making mistakes

do not fear coming forward. Similarly, firms need to have clear reporting channels to encourage the reporting of discriminatory conduct and harassment.

- Effective supervision and competence—the guidance emphasises that an important aspect of supervision includes assessing workloads and capacity and identifying any relevant training requirements. Supervision of client matters, without more, is unlikely to amount to effective supervision.

The consultation

The consultation, which closed at the end of May 2022, proposed the introduction of the following rule into the Solicitors Code of Conduct (with a similar rule proposed for the Code of Conduct for Firms): 'You treat colleagues fairly and with respect. You do not bully or harass them or discriminate unfairly against them. You challenge behaviour that does not meet this standard.'

The proposed change builds on many of the themes in the guidance around the treatment of colleagues, and is intended to be empowering, giving individuals a platform to challenge conduct which is discriminatory or unfair. It is proposed that the word 'colleague' should be interpreted broadly, to include third party contractors such as barristers, and that the rule should also apply to conduct towards colleagues taking place outside the workplace.

Can workplace culture be regulated?

There are some aspects of the review that even the most ardent critic of the SRA would struggle to take issue with. Having effective policies and procedures in place to combat discrimination, bullying and victimisation are essential in any workplace. Similarly, having systems

to supervise client matters and monitor employee health and well-being are vital, given the numerous cases in which individuals suffering from stress/anxiety or other conditions have gone on to commit acts of regulatory misconduct, as exemplified by the recent outcome of the *Claire Matthews* case (see bit.ly/3OPnYv3).

Where the review veers into more controversial territory is in relation to its comments regarding unreasonable workloads and working hours. Clearly there will be instances where individuals are overworked and insufficiently supervised and supported, leading to instances of regulatory misconduct (an obvious example of this being *Solicitors Regulation Authority v James* [2018] EWHC 3058 (Admin), [2018] All ER (D) 139 (Nov)).

However, working long hours remains the norm for swathes of the profession, driven by client demands and expectations (and the fees that those clients are willing to pay). Firms are increasingly seeking to address their work-life balance in a bid to attract and retain talent, demonstrating their commitment to the issue by making external commitments such as signing up to the Mindful Business Charter (see bit.ly/3nnCVZe). However, in reality, it is unlikely that working hours for lawyers will fall in response to this review, and the SRA does make clear that it is not prescribing working practices and methods. At the very least, firms will need to ensure that solicitors working long hours are adequately supervised and supported and that they are encouraged to speak up if those hours are taking a toll on their physical and mental health.

The consultation also raises a number of issues:

- (1) Treating colleagues fairly—at first glance an obligation to treat colleagues fairly may seem uncontroversial. However, there is a risk that

introducing such a requirement could create a parallel jurisdiction with the employment tribunal and substantially increase the number of self reports made to the SRA by law firm’s compliance officers, given the relatively low threshold required to trigger the obligation to self report. Clear guidance and case studies will be required from the SRA to indicate when a failure to treat a colleague fairly will become a regulatory matter. Furthermore, the SRA’s suggestion that the requirement to treat colleagues fairly should apply outside the workplace has been seen by some as an attempt to give it a further basis to intervene in sexual misconduct cases outside the workplace, given the current constraints placed on the SRA’s ability to prosecute such cases by the High Court’s decision in *Beckwith*.

- (2) Challenging behaviour—concerns have also been raised about imposing an obligation on individuals to challenge unfair and discriminatory behaviour, particularly in as far as this appears to introduce a ‘bystander obligation’ requiring individuals who are not the subject of unwanted behaviour to challenge it. The SRA did recognise in the consultation that junior lawyers may find it difficult to challenge the behaviour of more senior individuals, and that it is anticipated that their focus will be on senior individuals who fail to call out the behaviour of their colleagues. Nevertheless, there remains a risk that junior solicitors witnessing unwanted behaviour may now face the additional worry of potential regulatory action for a failure to challenge the behaviour of others.

What does this mean for firms?
In light of the public attention that the

review has received, it is reasonable to assume that the SRA will expect firms to consider cultural/systemic issues when self-reporting or investigating alleged misconduct. For example, where a partner has been accused of discriminating against a junior colleague, the SRA is likely to expect to see: (1) the firm’s policies on discrimination; (2) whether or not the relevant partner has received training on those policies or anti-discrimination training more generally; and (3) whether the partner has been the subject of any complaints for similar conduct, and, if so, how those complaints were investigated.

To the extent that firms will need to be required to consider these issues, the review and the consultation should be welcomed. The risk is that firms will be alive to the threat of regulatory action for cultural/systemic issues, and will attempt to attribute individual regulatory misconduct to individual ‘bad apples’, effectively cutting those individuals adrift from their organisation. If the SRA’s attempts to tackle firm culture are to be effective then they will need to be wary of such an approach and be willing to take on firms, who are likely to be better resourced than any individual.

Ultimately the threat of regulatory action is unlikely by itself to improve cultural issues in law firms. The real driver of cultural change is likely to be the firms themselves. The recent ‘great resignation’ has led many firms to consider what they need to do to improve culture so they can both attract and retain talent. Cultivating the right culture plays a vital role in establishing and maintaining a firm’s reputation. If regulators can assist in promoting cultural change, then this should be encouraged.

NLJ

Andrew Pavlovic, partner at CM Murray (www.cm-murray.com).

NewLawJournal

Career Hub

Are you looking to progress your career or gain new skills?

Visit our brand new Career Hub page now at:

[www.newLawjournal.co.uk/career-hub/training-courses](http://www.newlawjournal.co.uk/career-hub/training-courses)

