Solicitors Regulation Authority

Publication of Regulatory Decisions

Consultation response

February 2023

Contents

Background

We work to protect the public by setting high professional standards for solicitors and law firms and through enforcing compliance against these standards. We are open and transparent about the work we do.

Where we impose a sanction or control against a regulated individual or an authorised body, we believe it is in the public interest to publish that decision.

Our current approach to publishing regulatory decisions was implemented in 2007. We have not carried out a wholesale review of this approach since then, nor sought the views of the public, profession, and other stakeholders.

We recognise that much has changed in the last 15 years and that we live in a more digital-centric and data-driven world. This means there are increasing expectations around transparency of decision-making in the public domain, which has led to demands for more easily accessible information.

Given the length of time since we last consulted, we wanted to test with stakeholders their views about whether our approach remains fit for purpose. Or whether changes are needed.

We consulted on our approach to the publication of regulatory decisions, covering the following areas:

- the principles governing our approach to publishing regulatory decisions
- our approach to how much information is provided in any publication
- withholding publication in exceptional circumstances
- timing of publication
- length of publication.

We approached the consultation openly asking for views about whether our approach remains fit for purpose or whether change was needed. We did not set out specific proposals for change.

The consultation opened 10 May 2022 and closed 2 August 2022.

This report summarises feedback from the consultation and includes our final positions. The summary of responses and should be read alongside this document.

Responses to the consultation

We received a total of 33 responses. 21 were from individual solicitors and seven identified as ‘other’ (other legal professional, non-legally qualified person working in legal setting).

The further five were from these organisations:

- the Legal Services Consumer Panel (LSCP)
- the Law Society
- Birmingham Law Society

- LawCare
- the Land Registry.

We ran a social media poll which attracted more than 19,000 engagements. We also held three public focus groups, with eight members of the public at each.

We are grateful to all of those who responded to the consultation, and we have carefully considered all responses and feedback before reaching our final positions.

Executive Summary

This document outlines our response to our Publication of Regulatory Decisions consultation.

Having analysed each consultation response and other relevant information, we have decided to make several changes to our current approach. We will:

- introduce new principles for our approach to publishing regulatory decisions aligned to the Better Regulation Principles set out in the Legal Services Act 2007
- introduce and test a new template for our published disciplinary decisions to make sure that they:
    - are presented in clear and accessible language
    - contain a summary of the decision at the top of the published record, to allow the reader to see immediately what the decision is
    - contain enough information in the body of the decision to allow the reader to understand the facts of the misconduct or issue, the sanction and how the decision on sanction was reached (including any aggravating or mitigating factors)
- continue with our existing approach to withholding publication with a presumption of publication except in certain circumstances ie, where appropriate for safeguarding purposes. We will update our publication policy guidance to clarify key aspects of our approach
- continue with our existing policy of ordinarily publishing our regulatory decisions promptly after the review period (or the conclusion of any review)
- continue with our existing policy of ordinarily publishing decisions to prosecute allegations before the Solicitors Disciplinary Tribunal (SDT). This is at the point that the SDT certifies that it will hear the case
- set out examples in our publication policy guidance. These will be the circumstances where we might use our existing discretion to exceptionally publish details of an on-going investigation. And where it is in the public interest to do so
- introduce a clearer and more rational model for the length of time for which we publish regulatory decisions. This links the length of publication of different sanctions and controls to their severity and increasing existing publication lengths in some circumstances.

In relation to our Equality Impact Assessment, we know there continues to be overrepresentation of individuals from Black, Asian and minority ethnic backgrounds in our enforcement processes.

An external research team has been appointed to explore the reasons for this and the findings will be available later in 2023. Until then, we will make sure that regulatory decisions relating to this overrepresented group are treated consistently with decisions relating to others.

Our response

1. Principles governing our approach to publication of our regulatory decisions

What we consulted on

We invited views on introducing principles to underpin our approach to publishing regulatory decisions. These are:

- The presumption of open justice is paramount, and we will publish information relevant to understanding the nature of a regulatory decision and why it was reached, unless there is a good reason not to.
- We are transparent and accountable to the public and the profession for the decisions that we make and will promptly publish and disclose any information related to regulatory decisions or arising from investigations where it is in the public interest to do so.
- Through transparency of our regulatory decision making, the profession is informed of and encouraged to uphold the highest professional standards.
- To maintain transparency where matters are sensitive or confidential, we will seek to redact or reduce information rather than to remove decisions entirely.

What respondents said

Respondents broadly supported the proposed principles, agreeing that they provide a good framework for our approach to the publication of regulatory decisions.

There were also suggestions for additional principles:

- The Law Society suggested additional principles of proportionality, fairness, consistency, and accuracy.
- The LSCP proposed an additional principle regarding our obligation to provide useful information to consumers of legal services.
- Both individual and organisation respondents raised the lack of a principle around recognising the harm that publication causes to the reputation of the respondent.

Respondents agreed that the publication of regulatory decisions helps to raise awareness in the profession of appropriate conduct and helps to inform consumers and uphold the reputation of the profession. The Law Society said that publication of our regulatory decisions 'may also serve to act as a deterrent' and help 'to show which behaviours would be of concern and need to be reported. Publication also helps to maintain public confidence in the profession in that appropriate action is taken when regulatory rules are breached.'

The LSCP also agreed pointing out that 'Full disclosures of regulatory decisions is firmly within the regulators objective of consumer protection and giving consumers the information, they need to help themselves. There should be a presumption to publish enforcement data by all Approved Regulators at the end of an investigation that leads to a sanction'.

What we will do next

We recognise support for the proposed principles and will introduce new principles, adding incorporating the areas suggested by respondents to the consultation, as highlighted above.

We have however redrafted the principles to align to the overarching Better Regulation Principles of being transparent, accountable, proportionate, consistent and targeted. This is as set out in the Legal Services Act 2007. The final version of the principles can be seen in Publishing Regulatory Decisions principles.

2. Our approach to how much information is provided in any publication

What we consulted on

Our current approach to publishing regulatory decisions is inconsistent, with varying levels of detail for different decisions. We sought views on:

- how regulatory information is used
- the level of detail that we publish about our decisions
- any improvements that could make the information more accessible and useful for different audiences.

What respondents said

More than half of respondents said they accessed our publicly available record of regulatory decisions. They said that this helps them to understand how the SRA Standards and Regulations are applied, and the types of conduct that leads to a sanction. This information is also helpful to businesses and other organisations as a part of the employee recruitment process.

At our public focus group, participants were less familiar with the regulatory information we publish. But said they would likely access this information should they require legal services in future. Participants said they would like to use this to understand of a solicitor's specialisms as this offers more assurance of their skills and provides more accountability.

There were mixed views about the level of detail that we should publish. The largest group of respondents felt that we should publish the same level of information that we currently do. However, there were also calls for us to publish both more and less information.

There were also requests for greater consistency, improved clarity and accessibility of our regulatory decisions. And that this should be done with the different intended audiences in mind.

Some respondents also provided specific suggestions about information that should be included in our decision documents.

The Law Society said:

> 'More detailed information would be helpful to the individual solicitor, who is subject to the decision, as well as for legal professionals and personnel working in law firms. However less detailed information would be more helpful to an average consumer who simply wants to know if a particular law firm or individual has been subject to disciplinary action.'

LSCP suggested that consumers would often benefit from very brief summaries that would convey necessary information in very quick search results. However, it would also be useful for consumers to be able to access additional detail if needed.

LawCare said that the published decision needs to summarise the facts and identify the rules breached. And explain the sanction with reference to the factors listed in our Enforcement Strategy. They also suggested that we should explain whether the individual took independent legal advice to assist them with the regulatory proceedings and relate the facts to the rules including any relevant case law.

LawCare also said where the SDT makes a decision, such as approving an Agreed Outcome, we should make it clear that this was their decision.

Some individual respondents also highlighted the inconsistent approach to publishing regulatory decisions:

> 'If publishing decisions is designed to inform the public and professionals what is the rationale for short statements for some decisions and longer for others - it may be that some decisions are procedural but even so there is merit in providing detail on those.'

What we will do next

We have considered the feedback and agree that more detailed regulatory decisions can be helpful to some, such as members of the profession. However most consumers would benefit from simple and less detailed information.

We have also reviewed additional feedback related to the first fines we have imposed using our new higher fining powers. And expanded the detail provided in order to make sure people are able to understand the reasons for the fine imposed following our recent consultation.

We agree with calls for greater consistency in how we present disciplinary decisions. Having considered the various suggestions, we will ensure that all of our published disciplinary decisions are:

- presented in clear and accessible language
- contain a summary of the decision at the top of the published decision, to allow the reader to see immediately what the decision is.
- contain enough information in the body of the decision to allow the reader to understand the facts of the misconduct or issue, the sanction and how the decision on sanction was reached (including any aggravating or mitigating factors).

We think this approach is simple and proportionate with utility across different audiences.

We have introduced and are testing a new template, which is available in the proposed regulatory decisions template document. We will seek feedback about the information provided and its format and also undertake structured user testing with different audiences.

As we develop the template, we will refine our approach and test the value of other types of information suggested during consultation.

We also agree that publishing regulatory decisions is helpful from a professional development point of view. We will therefore explore the case for publishing additional learning resources. For example, an anonymised case digest to highlight the learning points for firms and individuals from the decisions we have recently made.

3. Withholding publication in exceptional circumstances

What we consulted on

We asked for views on whether our approach to publishing regulatory decisions appropriately balances the public interest with the need to protect the respondent's well-being and rights.

Our presumption is that publishing regulatory decisions is in the public interest. This means that we strive to maintain transparency even where matters are sensitive or confidential. For example, by seeking to redact or reduce information rather than to withhold or remove decisions from publication entirely. We will be this in that way that balances the public interest with the rights of respondents.

However, in some exceptional circumstances, we might also withhold publishing a decision. This could be if we conclude that publication itself will have a disproportionate impact on the safety or presents a risk to life to the regulated individual, or others. We will consider any representation made by the person subject to the decisions or relevant third parties in making decisions.

What respondents said

Some respondents disagreed that the balance is correct but did not give reasons why. Comments that were provided were largely supportive of our presumption towards publication with appropriate safeguarding provisions.

The LSCP said:

> ‘Whilst privacy is a relevant consideration, the public needs to have confidence in the integrity of individual solicitors, and of the profession as a whole.’

LawCare said:

> ‘In principle, the presumption must lean in favour of open justice. Without this, confidence in the profession and the SRA would be eroded over time. There must be an open, transparent, and progressive profession and regulator, capable of learning from mistakes.’

There were some calls, including from the LSCP, to be as clear as possible about our approach and criteria. The Law Society stated:

> ‘The SRA could make improvements by having a clearer policy outlining the criteria for when and how it will publish final regulatory decisions and a clear boundary for the decisions it will publish and those it will not or only publish in a redacted form.’

What we will do next

We consider that our existing approach does strike the right balance between the public interest and the need to protect the respondent's well-being and rights.

We also agree with The Law Society’s view that our publication policy guidance should be clearer on the criteria and circumstances in which we will withhold publication. We will update our publication policy guidance to clarify key aspects of our approach, including that:

- we will seek to redact information that cannot be published. This might be for example where information is confidential, legally privileged or might prejudice other investigations or legal proceedings.

- we will consider not publishing a decision in exceptional circumstances only. This will usually be when it is not practicable to redact any relevant information. Or where the publication itself will have a disproportionate impact on health, safety or presents a risk to life.
- we are unlikely not to publish based on loss of income, custom, potential impact on staff (eg redundancies) or because of embarrassment or reputational impact.
- we will continue to consider disclosing information outside of published case decisions on a case by case basis and in line with our disclosure policy. This may be, for example:
    - to comply with a court order
    - to provide information to another regulator or law enforcement agency in line with our information sharing agreement
    - on request, to provide relevant information to an insurer, lender, potential employer, or client.

Respondents also made suggestions to include specific steps in our processes. For example, to reflect learning from cases, and provide the opportunity for the respondent to comment before publication. These approaches are already present in our processes.

Other responses suggested that staff should be trained to identify risk factors, and signpost to support agencies. Our front-line staff will be trained to identify and support vulnerable people in our disciplinary processes, including referring to support agencies where appropriate.

We also have processes and guidance around appropriate evidence and expert opinion needed when considering safeguarding issues.

4. Timing of publication

What we consulted on

We sought views on our current approach to the timing of publication when an outcome has been imposed. Our approach is to publish promptly after the final decision and once any review has been determined, withdrawn or the review period has expired.

We also sought views on at what point we should publish our decision to prosecute a case before the SDT. We currently publish at the point that they certifies that it will hear the case. However, significant time can pass between us deciding to prosecute, lodging proceedings with the accompanying paperwork and the SDT certifying the case.

As we notify the respondent and any relevant third parties at the point that we make the decision to prosecute, the delay risks inaccurate or incomplete information entering the public domain.

We also raised in the consultation that we may exceptionally publish details of an on-going investigation where we consider it in the public interest to do so.

What respondents said

Most professional respondents felt the existing position was the right one, with comment that there may be a case to publish earlier if there is an immediate risk to the public.

For example, the Birmingham Law Society did not think that decisions should 'be published any earlier than is the current policy'. The LSCP suggested that we should publish as soon as information useful to consumers is confirmed.

In relation to SDT referrals the LSCP argued that there was no need to wait for certification and it was in the consumer interest not to do so.

However, many professional respondents argued that it would be disproportionate to publish before we had lodged proceedings and the SDT had certified. This was especially given the risk that the case is not progressed. The Law Society said:

> 'It would be against the principles of justice and fairness to publish referrals to the SDT before certification by the Tribunal'.

What we will do next

Having considered all the responses, we think that it is appropriate to maintain our existing position publishing our decisions. This is either:

- promptly after the review period (or the conclusion of any review)
- or exceptionally publish earlier where there is public interest (as highlighted above).

As highlighted by respondents, there is a strong case that it would be disproportionate to routinely publish regulatory information before a decision is made. This is because we close many investigations with no further action.

The position with regards to the SDT referrals is more finely balanced. This is because only a very small number of cases referred are not certified by the SDT. There were only two cases in the last three years, both of which were subsequently certified following further investigation (with one case having one allegation removed).

We also recognise that, in some cases, there is a risk of inaccurate or incomplete information entering the public domain. This is as we notify the respondent and any relevant third parties at the point of referral.

However, given the strength of feeling that we should not publish before certification by the independent SDT, we consider that we should maintain our current position. We can already and will in appropriate circumstances disclose relevant information about a particular case when requested by interested parties. Or publish information earlier if it is in the public interest to do so.

We will make sure that our guidance to updated to be as clear as possible about when it is likely to be in the public interest to publish details of an on-going investigation. This would include where we have decided to prosecute before the SDT).

This might be, for example:

- where there is a risk of misinformation entering the public domain, such as when a respondent or third party may brief the media

- where there is a high-profile case which is subject to public discussion and a vacuum of detail from the regulator would be against the public interest, such as an issue subject to a government inquiry

- where there is an intervention or other action that highlights an issue that is likely to affect a significant number of people and it is in the public interest that this is made known, including so they may take appropriate action to reduce any negative impacts.

5. Length of publication

What we consulted on

We publish a range of regulatory decisions for varied lengths of time. We invited views on our existing approach, including:

- any benefits to extending or shortening the length of publication
- whether it may be beneficial to link the length of publication to severity of the sanction.

What respondents said

The LSCP argued that more serious breaches should be published for longer to allow consumers to make informed choices and to encourage ethical behaviour. More than 50 per cent of respondents to social media polling directed at the public felt that even relatively minor sanctions should be published indefinitely. Some individual solicitors responding to consultation also took this position.

The Law Society and Law Care agreed that the length of publication should be linked to the level of sanction imposed and also the usefulness of this information to the public.

In our public focus groups, participants said that given the level of trust put in solicitors, decisions should be published permanently. However, others felt that length should depend on seriousness with not all breaches having career long impact. The Law Society questioned the public benefit of publishing decisions for longer and argued that publication should not act as a second penalty.

What we will do next

We recognise that there was strong support for linking the length of publication to the severity of the sanction. We have considered the feedback carefully and have reviewed different regulators approaches in the legal sector and beyond.

We are broadly on a par with other legal regulators although there is some variation (particularly with others publishing for shorter periods than us at the lower end).

There is a mixed picture across other sector regulators with some adopting significantly longer publication periods for certain sanctions. For example, doctors, accountants and surveyors.

There are also other legal regulators that tend to publish fines for three years or less. However, the Financial Conduct Authority, for example, publish fines for eight years, and the Care Quality Commission publish indefinitely.

There is no clear rationale for our existing publication length. We think that going forward it is important that our decisions, including the sanctions we impose, are in the public domain for sufficient time to:

- make sure that we are transparent and properly accountable for the decisions that we make
- protect the public by providing visibility about restrictions and conditions on the right to practice
- uphold standards through promoting understanding of unacceptable behaviours and the consequences for
- uphold public confidence by showing that the profession is regulated appropriately
- allow consumers to make informed choices.

We consider that the more serious the breach, and any related sanction or control, the greater the impact publication might have on the above choices and perceptions. And therefore arguably the longer that the decisions should be in the public domain.

We have therefore developed our approach with a view that a graduated framework. We believe this is proportionate and provides the right amount of transparency to support these outcomes.

We have also taken the view that we should not publish for less time than comparable regulators. And we have drawn on some of the longer publication periods of regulators of trusted professionals in other sectors.

The features of the new model include:

- All decisions will be published that result in a sanction or control resulting from a regulatory breach for a minimum of three years. This takes into account that even the lowest sanctions eg rebukes and reprimands, will only be issued where there has been a serious breach.

- There will be graduation within fining decisions to reflect differing levels of seriousness of breach (and therefore fining band):

    - For firms, we will publish fines at the less serious end for five years and at the more serious end for 10 years.

    - For individuals we will publish fines at the less serious end for three years and at the more serious end for five years.

  This reflects that firms are likely to receive a fine for the most serious breaches that they may commit, whereas for individuals, the most serious breaches will result in suspension or strike off.

- For all fixed penalty fines we propose publishing decisions for three years, reflecting that they are applied in cases of non-compliance with largely administrative requirements. Other legal regulators tend to publish fines for three years or less but some are longer or indefinitely.

- Where conditions or restrictions on practice are put in place for preventative reasons eg following an intervention and/or pending final determination of the issues. And there has been no finding of a breach or sanction, we will publish for the length of the control only.

- Where a person is suspended following a breach, we will publish for 10 years from the end of the period of suspension. We consider that breaches that lead to suspension to be of such magnitude that publication should be for a long time, but not forever - to allow for rehabilitation. Many legal regulators publish for three years or less. While the Bar Standards Board is for either five or 10 years depending on length of suspension and the General Medical Council is 10 or 15 years.

- For strike-offs and equivalent, we will publish indefinitely.

- We will provide a complete picture where there is a restriction on practice that remains in the public domain. This means we will publish any decision to lift, vary or qualify the restriction, eg a decision to approve employment of non-solicitors restricted from legal practice). This restriction will be published for the duration that the original restriction is published for and removed after that.

Next Steps

We will promptly take forward the actions outlined in the table below. We will also notify the Legal Services Board and seek approval to the change in our regulatory arrangements in relation to the length of publication of our regulatory decisions.

Next steps	Agreed action	Timescale
The principles governing our approach to publication of regulatory decisions	We will adopt the principles outlined in the Publishing Regulatory Decisions principles document. They will be incorporated into our revised publication policy guidance and published on our website.	Guidance to be published by summer 2023
How much information is published	We are now undertaking targeted user testing of the new template for different types of disciplinary decisions We will roll out the final template for a range of disciplinary decisions.	Testing completed by spring 2023 Roll-out completed by summer/early autumn 2023
Withholding publication in exceptional circumstances	We will revise our publication policy guidance clarifying the circumstances where we may withhold publication of a regulatory decision.	Guidance to be published by summer 2023
Timing of publication	We will revise our Publication of Regulatory Decisions guidance criteria with examples of where we consider it in the public interest to exceptionally publish earlier.	Guidance to be published by summer 2023
Length of publication	We will update the list of regulatory decisions and publication length in line with the approach set out in our Publication of Regulatory Decisions guidance.	Guidance to be published by summer 2023