



A vain search

Marc Beaumont questions the legality of SRA investigations and adjudications

There is a hiatus in the powers of investigation and adjudication of the Law Society and the Solicitors Regulation Authority (SRA). One searches text books and websites in vain for express written procedural powers: for an SRA case-worker to investigate an initial complaint; to require a solicitor to respond to a complaint; to impose time limits for a response; to refer the response to the complainant; to ask the solicitor written questions; to refer the initial papers to an adjudication panel; to arrange for an adjudication panel to convene; or even to regulate the meetings of adjudication panels. The criteria by which the adjudication panel decides whether or not to refer a solicitor to the Solicitors Disciplinary Tribunal (SDT) are also unclear, as is how the information and documentation placed before the panel are regulated. We are also left in the dark about how and when the panel should consider a complaint raised by the society rather than one raised by a client.

The society appears to be unique in this respect. The Bar Council, for instance—and now the Bar Standards Board—has for many years been governed by the Complaints Rules at annex J to the Bar's Code of Conduct. That document runs to some 71 paragraphs and 26 pages. Similar regimes of complaints investigation apply in the medical arena.

The Solicitors Act 1974 (SA 1974), s 31(1) as amended provides:

“Rules as to professional practice, conduct and discipline.

(1) Without prejudice to any other provision of this Part the Council may, if they think fit, make rules, with the concurrence of the Master of the Rolls, for regulating in respect of any matter the professional practice, conduct and discipline of solicitors [and for empowering the Society to take such action as may be appropriate to enable the Society to ascertain whether or not the provisions of rules made, or of any code or guidance issued, by the Council are being complied with].”

But the society appears not to have made any rules dealing with how it or its sub-committees are to process complaints. In fact, s 31 suggests that unless and until the society's council makes rules about conduct and discipline and investigation, it will not have any such powers as are adverted to in s 31(1).

REGULATION AND EMPOWERMENT

The key words of s 31(1) are “for regulating” and “for empowering”. To be “empowered” to ascertain if breaches of rules, codes or guidance have been committed, rules have to be made under s 31. The promulgation of a set of procedural rules is therefore a condition precedent to the legality of any investigation. It is clear from a straightforward reading of s 31 that there is no “empowerment” if there are no rules.

Even absent this construction of s 31, a disciplinary body which purports to investigate its members where there is no set of published rules governing how that investigation is to be performed, is a body acting not merely *ultra vires*, but without any *vires* at all. It is acting with jurisdiction in the sense of a general public duty to investigate alleged professional misconduct, but without jurisdiction in the particular sense of a set of rules setting out clearly how it will go about its process of investigation.

Caseworkers and adjudication panels may have a general power to investigate solicitors and to refer them to the SDT. This is because a general power of regulation and discipline vests in the society (at least because this is assumed by Parliament in legislation). Moreover, by virtue of SA 1974, s 79, the society can delegate such a general power to its committees, sub-committees, departments and officers.

Nevertheless, remarkable as it may seem, the society has not drafted, approved or published any set of procedural rules which govern how it or its committees, sub-committees or officers exercising such delegated functions, shall exercise the general power.

It is as if the SRA has been equipped with the hardware of regulatory powers, but has not been given the software with which to operate the system.

INTERVENTIONS

Just as worrying is the fact that there is no set of procedural rules dealing with interventions upon a solicitor's practice, other than SA 1974, Sch 1, which contains general powers of intervention, without any set of rules promulgated to implement those general powers of intervention.

An investigatory or regulatory public body with no rules is capable of acting—or of being perceived to act—wholly arbitrarily. It has, in principle, an unfettered discretion and “a truly unfettered discretion will at once put the decision-maker outside, or, as I would prefer to say, above the law” (per Mr Justice Laws (as he then was) in *R v Somerset County Council, ex p Fewings* [1995] 1 All ER 513 at 524).

“A body which acts without rules violates a quintessential feature of the rule of law”

THE RULE OF LAW

Citizens need to be able to discover the content of the laws which affect them. Solicitors pondering the procedure of adjudication panels cannot call for a set of rules which reveal that procedure. This is an infringement of the principle of legal certainty, which is itself an aspect of the rule of law in any civilised state. A body which acts without rules violates a quintessential feature of the rule of law (see *R (L) v Secretary of State for the Home Department* [2003] EWCA Civ 25, [2003] 1 All ER 1062 at para 17 per Lord Phillips MR (as he then was)).

Would the European Court of Human Rights decline to recognise the legality of the activities of the society in the form of investigation and/or adjudication and/or intervention, given that its procedures are not “adequately accessible”, eg because they do not exist?

THOMPSON v LAW SOCIETY

It is certainly the case that in *R (Thompson) v Law Society* [2004] EWCA Civ 167, [2004] 2 All ER 113, it was held that the adjudication

process which leads to a referral to the SDT is not itself the determination of a civil right for the purposes of Art 6 (right to fair trial) of the European Convention on Human Rights (the Convention). But *Thompson* did not decide that the adjudication process was compliant with SA 1974, s 31, or was *intra vires* or carried out with jurisdiction, or that it did not infringe Art 8 (right to private life) of the Convention.

Article 8(1) is plainly *prima facie* engaged during an investigation by an SRA case-worker and/or an adjudication by an adjudication panel and/or an intervention, because such activity is an interference by a public body with a solicitor's right to the privacy intrinsic to his professional/business activities (see *Niemietz v Germany (Application 13710/88)* (1992) 16 EHRR 97).

This being so, it could become essential for the SRA to show under Art 8(2), that its activities are "in accordance with the law", eg lawful. Absent procedural rules, the investigation and/or adjudication and/or intervention cannot be "in accordance with the law," because it is not being conducted pursuant to rules promulgated under SA 1974.

ABUSE OF PROCESS

What if the corollary of an investigation and/or intervention and/or adjudication without a basis of procedural rules is a referral of a case to the SDT? A solicitor might contend that the SDT proceedings are an abuse of the process of the SDT and should be stayed. The doctrine of abuse of process applies to disciplinary tribunals. The power to stay proceedings as an abuse of process is one which the law has long recognised. It was described by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, [1981] 3 All ER 727 at 729, as an:

"...inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

If a solicitor is prosecuted before the SDT

by the society pursuant to an unlawful referral by the SRA exercising powers purportedly delegated to the SRA by the society itself, that would (or should) bring the administration of the SDT into disrepute among right-thinking solicitors within the second limb of *Hunter*.

Surely right-thinking people would regard the failure of the society to have any set of (published) rules governing its powers of investigation, adjudication and intervention as bringing the system of the regulation of solicitors into disrepute? This is because the public cannot readily discover how the SRA goes about considering a complaint. The respondent solicitor is similarly in the dark. There is a stark lack of transparency about the system of investigation and adjudication. Where there are no published rules, there will always be a perception or suspicion of arbitrary or capricious decision-making.

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