

SRA BOARD
31 January 2023

CLASSIFICATION – CONFIDENTIAL



This paper will be published

Publication of Regulatory Decisions: recommended next steps

Reason for paper	This paper sets out our recommendations for next steps following our recent consultation and Board workshop discussion on 18 October 2022.
Decisions(s)	<p>The Board is asked to:</p> <ul style="list-style-type: none"> a) agree that we adopt new principles for our approach to publishing regulatory decisions aligned to the Better Regulation Principles of the Legal Services Act 2007 (paragraphs 5-7) b) agree our approach to improving the quality of the information that we publish in our regulatory decisions (paragraphs 8-10) c) agree that we should maintain our existing approach on withholding publication in exceptional circumstances (paragraphs 11 -16) d) agree that we continue to publish decisions where we impose an outcome promptly after any review is completed, withdrawn or the review period has expired (paragraphs 17 – 18) e) agree that we continue to publish decisions to prosecute allegations before the Solicitors Disciplinary Tribunal (SDT) at the point that the SDT certifies that it will hear the case (paragraphs 19 -23) f) agree that we should link the length of publication of regulatory decisions to severity of sanction and the associated publication lengths for different sanctions and controls (paragraphs 24-31).
Previous Board and committee consideration	<p>8 December 2020: Initial Board workshop to explore proposals to review our current approach to publication of regulatory decisions.</p> <p>1 February 2022: The Board approved our plans for consultation.</p> <p>4 May 2022: The consultation paper was shared via circulation with delegated approval to the Chair of the Board.</p> <p>18 October 2022: Board gave a steer at a workshop following consultation.</p>
Next steps	Subject to Board agreement with our recommendations and approach, we will seek LSB approval and proceed with implementation during 2023.

If you have any questions about this paper please contact: Chris Handford,
chris.handford@sra.org.uk

SRA BOARD
31 January 2023



CLASSIFICATION – CONFIDENTIAL

Publication of Regulatory Decisions: recommended next steps

Summary

- 1 This paper sets out recommendations for next steps following the recent consultation on the SRA's approach to publishing regulatory decisions and steer received from Board at the workshop held in October 2022.
- 2 We have provided recommendations for next steps on five key areas within this paper. These are: 1) The principles governing our approach to publication of regulatory decisions, 2) Our approach to how much information is published, 3) Withholding information in exceptional circumstances, 4) Timing of publication, 5) Length of publication.
- 3 The summary of proposals and consultation responses for each of these areas is available at annex 1.

Background

- 4 Following [consultation](#) on our approach to publishing regulatory decisions, we shared initial findings and thinking at a Board workshop held on 18 October 2022. The Board noted the mixed views received about the various issues that we consulted on and steered that we should carefully consider our way forward in the context of our wider priorities.

Discussion

Principles governing our approach to publication of regulatory decisions

- 5 We consulted on introducing principles to govern our approach to publication. These covered key areas including the presumption towards publication to support transparent and accountable decision-making, publishing decisions promptly and, where necessary, seeking to redact or reduce information rather than removing decisions entirely. A full list of the principles that we consulted on can be found at annex 1, paragraph 1.
- 6 Consultation responses were broadly supportive of the proposed principles (see annex 1, paragraphs 2-3). We therefore propose to adopt the new principles, adding some new aspects suggested on consultation. These include: highlighting our commitment to proportionality, fairness, consistency and accuracy; the importance of providing useful information to consumers and safeguarding around risks to health and wellbeing.
- 7 Following a steer from the Board in the October 2022 workshop, we have redrafted the proposed principles so that each key point flows from the overarching [Better Regulation Principles](#) of being transparent, accountable, proportionate, consistent and targeted, as set out in the Legal Services Act 2007. The principles remain the same while also providing the reader with line of sight to the overarching Better Regulations Principles that we are required to

SRA BOARD

31 January 2023

CLASSIFICATION – CONFIDENTIAL



have regard to in all our regulatory activity. Annex 2 sets out the recommended approach to presenting the principles.

Recommendation: the Board is asked to:

- (a) agree that we adopt new principles for our approach to publishing regulatory decisions aligned to the Better Regulation Principles of the Legal Services Act 2007.**

How much information is published

- 8 We sought views on the level of detail that we publish about our decisions and on any improvements that could make the information more accessible and useful for different audiences. We have considered the feedback received (see annex 1, paragraphs 4-8) alongside feedback received to our [fining powers consultation](#) and in relation to the first fines we have imposed using our new higher fining powers.
- 9 We agree with calls for greater consistency in how we present disciplinary decisions. Having considered the various suggestions, we propose that all our disciplinary decisions should:
- be presented in clear and accessible language
 - contain a summary of the decision at the top to allow the reader to see at a glance 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).
- 10 We consider that this is a proportionate approach with utility across different audiences. A draft template is set out at annex 3. We propose that the final detail be informed by user testing, enabling the inclusion of specific stakeholder suggestions about detail that should be included as we finalise and test templates with both the public and professional stakeholders. We would then pilot the template before fully rolling it out.

Recommendation: the Board is asked to:

- (b) agree our approach to improving the quality of the information that we publish in our regulatory decisions.**

Withholding publication in certain circumstances

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

SRA BOARD

31 January 2023



CLASSIFICATION – CONFIDENTIAL

- 12 A number of 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. There were some calls, including from the Legal Services Consumer Panel (LSCP), to be as clear as possible about our approach and criteria (see paragraphs 9-15 of annex 1).
- 13 Having considered the feedback, we think our existing approach does strike the right balance. We propose updating 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 on the basis of loss of income, custom, potential impact on staff (e.g. redundancies) or because of embarrassment or reputational impact.
- 14 We will continue to consider disclosing unpublished information 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 agreements; or, on request, to provide relevant information to an insurer, lender, potential employer or client.
- 15 We received specific suggestions to include specific steps in our processes, for example, reflect learning from cases, and provide the opportunity for the respondent to comment before publication. These approaches are already present in our processes.
- 16 Some responses suggested that staff should be trained to identify risk factors, and signpost to support agencies. We have established training for our front-line staff around identifying and supporting 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.

Recommendation: the Board is asked to:

- (c) agree that we should maintain our existing approach on withholding publication in exceptional circumstances.**

SRA BOARD

31 January 2023

CLASSIFICATION – CONFIDENTIAL***Timing of publication***

- 17 We sought views on our current approach to the timing of publication when an outcome has been imposed. This takes place promptly after the final decision and once any review has been determined, withdrawn or the review period has expired. Most professional respondents felt the existing position was the right one. The LSCP suggested that we should publish as soon as information useful to consumers is confirmed, rather than always at “very end of a process”. Further detail is at annex 1 paragraphs 16-20.
- 18 Having considered all the responses, we consider that is appropriate to maintain our existing position. As highlighted by respondents, there is a strong case that it would be disproportionate to ordinarily publish earlier than now as we close many investigations with no further action and decisions are occasionally overturned on review.

Recommendation: the Board is asked to:

(d) agree that we continue to publish decisions where we impose an outcome promptly after any review is completed, withdrawn or the review period has expired.

- 19 We also sought views on what point we should publish our decision to refer to the SDT to prosecute a case before it. We currently publish at the point that the SDT certifies that it will hear the case. Significant time can pass between us deciding to prosecute, lodging proceedings with the accompanying paperwork and the SDT certifying. As we notify the respondent and any relevant third parties at the point when we make the decision to prosecute, this delay provides opportunity for misinformation to enter the public domain.
- 20 The LSCP argued that there was no need to wait for certification and it was in the consumer interest not to do so, while professional respondents argued that it would be disproportionate to publish before we had lodged proceedings and the SDT has certified that there is a case to answer, especially given the risk that the case is not progressed.
- 21 We think the appropriate position with regards to when we publish details of a decision to prosecute before the SDT is less clear cut. On balance, given the strength of feeling that we should not publish before certification by the independent SDT, we consider that it is better to wait until this point. This is despite the risk of the case not proceeding and not being certified by the SDT being very small. However, we can already and will disclose relevant information about a particular case when requested to by interested parties, or publish information earlier if it is in the public interest to do so, including when there is a risk of misinformation being in the public domain as set out below.
- 22 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. Following a request made in response to the consultation, we will make sure

SRA BOARD
31 January 2023



CLASSIFICATION – CONFIDENTIAL

that our guidance is clear about the circumstances in which we might do so. 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.

23 It should also be noted that where we consider that there is an immediate risk to the public, we can and do take urgent protective measures such as an intervention or restriction on practice, details of which are published. The importance of this provision was emphasised by some respondents.

Recommendation: the Board is asked to:

- (e) agree that we continue to publish decisions to prosecute allegations before the SDT at the point that the SDT certifies that it will hear the case.**

Length of publication

- 24 We asked for views about whether there might be benefits to extending or shortening the length of publication and whether it may be beneficial to link the length of publication to severity of the sanction. There were mixed views about whether the length of publication should be changed but there was broad support for linking the length of publication to severity (see annex 1, paragraphs 23-25).
- 25 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.
- 26 In our public focus groups some felt 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. Some professional respondents argued that long publication lengths may be disproportionate. The Law Society questioned the public benefit and argued that publication should not act as a second penalty.

SRA BOARD

31 January 2023



CLASSIFICATION – CONFIDENTIAL

- 27 In considering the appropriate length of publication for different sanctions, we have reviewed different regulators' approaches in the legal sector and beyond. There is no uniformity of approach. We are broadly on a par with other legal regulators although with some variation (particularly with shorter periods than ours at the lower end). There is a mixed picture across other sector regulators with some also regulating trusted professionals such as doctors, accountants and surveyors adopting significantly longer publication periods for certain sanctions.
- 28 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.
- 29 We consider that the more significant the sanction or control, which is linked to seriousness of the allegations, 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.
- 30 We have therefore developed our approach with a view that a graduated framework 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
- 31 Some key features of our proposed new approach are that:
- We will publish all decisions 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 we have decided that there has been a serious breach.
 - There will be graduation within fining sanctions to reflect differing levels of seriousness of breach. For firms, we propose to publish fines at the less serious end for five years and at the more serious end for 10 years. This reflects that firms may receive a fine for the most serious breaches that they may commit. For individuals we propose to publish fines at the less serious end for three years and at the more serious end for five years,

SRA BOARD

31 January 2023

CLASSIFICATION – CONFIDENTIAL



reflecting that we would more regularly see breaches in relation to the most serious breaches resulting 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 our administrative requirements. Other legal regulators 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.

- Where conditions or restrictions on practice are put in place for preventative reasons e.g. following an intervention, and there has been no finding of a breach or sanction, we propose publishing for the length of the control only
- Where a person is suspended following a breach, we propose publishing for 10 years from the end of the 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, the BSB publishes for either five or 10 years depending on length of suspension and the General Medical Council either 10 or 15 years.
- For strike-offs and equivalent, we will publish indefinitely.
- To ensure we provide a complete picture where there has been a restriction on practice, a decision to lift this restriction will be published for the duration that the original restriction is published for and removed after that.

Recommendation: the Board is asked to:

- (f) approve that we should link the length of publication of regulatory decisions to severity of sanction and the associated publication lengths for different sanctions and controls at paragraphs.**

SRA BOARD

31 January 2023

CLASSIFICATION – CONFIDENTIAL



Date **23 January 2023**

Annexes

- Annex 1** **Publication of Regulatory Decisions – Consultation Responses Summary**
- Annex 2** **Publishing Regulatory Decisions Principles**
- Annex 3** **Proposed publication of regulatory decision template for all regulatory decisions**