

**Pearn Kandola disproportionality audit  
Recommendation 12 -  
Practising Certificate Conditions**

November 2011

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## Summary findings

1. This was a qualitative audit of a sample of files for Black and minority ethnic (BME) and White solicitors who had a condition or conditions imposed on their Practising Certificates (PC) during the 2009 calendar year. As with the earlier Pearn Kandola statistical assessment, those whose ethnicity was not known and those who had been issued with a PC free of conditions were not included. The aim of the audit was to consider the extent to which decisions were fair and non-discriminatory and to review the guidance that is available to decision makers.
2. In the sample there were significantly more BME than White solicitors who had been practising for 10 years or less with the inverse true for those practising for more than 20 years. Only 5 solicitors in the sample had a current status of sole practitioner and ten were not practising. It is not possible to draw any useful conclusions about sole practitioners or small firms because of the complexity of regulatory histories and changes in the status of solicitors over the years.
3. Thirty-one different conditions were imposed. These were grouped into 10 categories, the largest of which was accountant reports conditions (13 files) and approved employment and sole practitioner conditions with 7 files each.
4. Guidance included comments from the Master of the Rolls on public interest, risk and the reputation of the profession, the 2009 Practising Regulations, SRA regulatory objectives and 2009 technical guidance and the step by step procedure to be followed during the annual application process.
5. Generally, conditions will be imposed once a threshold has been reached, for example, a finding by the Solicitors Disciplinary Tribunal (SDT) or referral, a reprimand or bankruptcy, even if a solicitor has never breached any rules in the past, as it is the conduct and factors arising since the last PC was issued that are of concern. So, the same condition can be imposed on the basis of very different circumstances including where there has been no allegation or finding relating to the practice of law.
6. For the most part, the fifty files reviewed reflected the guidance given to decision makers, such as the Practising Regulations and associated procedures. However, there are a number of issues that the SRA may wish to consider including awareness training for staff, the risk assumed when certain circumstances or conduct is considered, a monitoring framework for the new Regulations, the impact of conditions and whether steps could be taken to assist solicitors in the areas where difficulties arise that can lead to the imposition of a condition.
7. The review did not demonstrate that there was unfairness in the way the files were considered or the decisions were made vis-a-vis the regulatory rules that are in place. Decision makers appear to follow the guidance and tests set down in decisions of the Master of the Rolls.

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## 1. Introduction

8. The Solicitors Regulation Authority (SRA) commissioned Pearn Kandola, a group of business psychologists specialising in the area of diversity, to research the disproportionality of regulatory actions taken against black and minority ethnicity solicitors, as reported by Lord Ouseley in 2008.
9. In July 2010, Pearn Kandola's findings were published and a number of recommendations made. The SRA commissioned an external consultant, Sheila Rogers, to carry out a detailed audit on recommendation 12, which states:

### **Review of decision making processes regarding Practising Certificate (PC) renewals**

'Given that PC renewals is the one area where ethnicity, amongst other demographics, directly predicts whether a solicitor is likely to have any restrictions placed on their PC, it is critical that the decision-making processes are reviewed for this case type. This review should include step-by-step written guidelines available to SRA employees, but also a review of how closely these are followed in practice'.

10. The full Pearn Kandola report, including recommendations, can be found [here](#).
11. This report sets out the findings of the audit conducted in accordance with recommendation 12.

## Background

12. The SRA's Equality Framework for 2011/12 adopts the organisation's vision and values into which equality and diversity have been embedded. The SRA's stated vision is to become 'an increasingly effective regulator acknowledged for setting high professional standards, for fair and transparent outcomes and for delivery of service excellence'. The SRA's values include being 'fair and consistent, and open and honest in our contacts with the public, consumers and regulated community' and being 'inclusive and actively promoting equality and diversity in the way we undertake all our activities'.
13. Work to deliver this vision has been ongoing for a number of years and included an assessment of disproportionality in respect of regulatory activities and BME solicitors (The Ouseley review) and the 2010 Pearn Kandola research which looked, in detail, at the statistical evidence that did or did not underpin continuing concerns about disproportionality. Pearn Kandola concluded that in one regulatory activity - the imposition of conditions on a solicitor's Practising Certificate (PC) - there was a direct link with ethnicity.

## Audit scope

14. An independent audit was commissioned on the back of this recommendation as a qualitative consideration of the extent to which the decisions made by the SRA in imposing a PC condition were fair and reasonable and, as far as could be determined, non-discriminatory. This comprised of a review of a sample of files and the guidance that the SRA provides to its staff.

## Methodology

15. Thought was given to how this review might ensure that a representative sample of files was considered, including drawing the sample from the three practising years included in the Pearn Kandola report; however, they considered '*matters*' rather than individual solicitors which makes it likely that the same solicitors appeared more than once, and in some cases three times.
16. As this was a qualitative audit, looking in detail and the decision making in each of the sample files, we agreed that the methodology recommended by the SRA audit team was not appropriate. Their advice and the approach taken in a number of the other audits conducted by the SRA in accordance with recommendations by Pearn Kandola was to select a sample size proportionate to the overall number of cases, which was large enough to provide a confidence level of 95 per cent in any statistical findings. This would have required a much larger number of files to be considered than could have been done in the time available and so it was agreed that, given these time constraints, a qualitative audit would be done based on 50 files from the total number of solicitors who had conditions imposed on their PCs during the 2009 calendar year. It was agreed that the sample would include 25 randomly selected White and 25 randomly selected BME solicitors. The contents of each file was considered in detail and a synopsis of the history and conclusions reached was prepared to facilitate comparisons. The ethnicity, age, gender and years admitted to the Roll was noted for each solicitor and efforts were made to include a selection of sole practitioners or those in small firms.
17. The SRA provided its guidance materials (see Section 5), and there is further guidance from the courts in cases which have gone to appeal. The appeals were formerly heard by the Master of the Rolls although they are now heard by the High Court. In July 2009, new Practising Regulations came into force which changed the direction and approach of some of the SRA's activities, including in relation to PCs. The new regulations were brought about mainly to implement changes made by the Legal Services Act 2007. The new regulations were supplemented by technical guidance provided for staff working in the SRA's Regulatory Investigations Unit which handled these applications. However, only 7 of the 50 files in this review were opened after the new guidance was issued and it is not clear to what extent SRA staff were expected to implement the new approach immediately rather than in a phased way, nor what has been done since by way of evaluation or monitoring of how the new approach has bedded in.

18. In approximately 16% of the total PC conditions in 2009 the ethnicity of the subject solicitor was not known. Ideally, a representative sample of these files should have been included in the audit but again time limitations did not permit this. A second category of files that could have been included were those where a PC was granted free from conditions where prior conditions had been in place. These files might provide a useful insight into the circumstances in which a decision maker considers that conduct that led to the imposition of conditions in the past is no longer relevant to their assessment in any given year.
19. The audit offers a preliminary understanding of how decisions were made and how they were reflected in the files of subject solicitors and identifies some further steps that might be taken to enhance the SRA's knowledge in this area or to inform mechanisms for quality assurance, particularly since the 2009 Regulations came into force.

## 2. The Sample

### Solicitor profiles

20. The SRA's [2009 Equality and Diversity Annual Report](#) noted that 679 individuals had conditions imposed on their PC in 2009. Of these, 80% were male, 32% of those for whom ethnicity was known were BME and 44% were 51 years of age or older. The tables below detail the profile of the 50 solicitors whose matters were the subject of this review.

**Table 1 – Years admitted to the Roll**

	<b>1-10</b>	<b>11-20</b>	<b>21-30</b>	<b>31-40</b>
White	3	4	12	6
BME (1 unknown)	11	9	3	1

21. As seen in Table 1, significantly more BME than White solicitors had been practising less than 10 years with the inverse true for those in the profession for more than 20 years.

**Table 2 – Age**

	<b>Under 30</b>	<b>31-40</b>	<b>41-50</b>	<b>51-60</b>	<b>61+</b>
White	-	5	6	9	5
BME (1 unknown)	1	7	13	3	1

22. As seen in Table 2, BME solicitors had a younger age profile with 21 compared to 11 White solicitors 50 years of age or younger.

**Table 3 – Gender**

	<b>Male</b>	<b>Female</b>
White	24	1
BME	17	8

23. As seen in table 3, less than 20% of the solicitors in the sample were female compared to the total female solicitor population of 45% female. However, this is the same percentage of the total number of women solicitors who received a PC condition during 2009.

**Table 4 – Ethnicity and gender**

<b>Ethnicity</b>	<b>Male</b>	<b>Female</b>
Asian	8	3
Black	7	4
Mixed	1	-
Other	1	1

24. The information in Table 5 is taken from the information included in Caseworker reports and reflects the status of the solicitor in 2009 when the matter was being considered. In most of the files, however, the subject solicitor had held a number of positions in a firm or firms and the conduct that was being considered as part of the 2009 application process may have related to former practising arrangements or have occurred a number of years earlier. See Section 3 in respect of sole practitioners and small firms.

**Table 5 – Solicitor status**

Partner	14
Former partner	8
Not currently practising	10
Consultant	3
Locum solicitor	1
Assistant/Assistant Solicitor	4
Former Associate Solicitor	1



Beneficial shareholder	1
Sole practitioner	5
Former associate	1
Employee	1
Member	1

## Decision maker profiles

25. Matters are escalated from a Caseworker to the Adjudicator and/or an Adjudication Panel where a solicitor disagrees with the condition, the structure of the practice will change or the matter is complex or sensitive. A separate audit has been carried out looking at the findings from the Pearn Kandola report that BME solicitors were disproportionately referred to an adjudication panel or committee, so that is not for comment as part of this audit. However, as Table 6 below shows, there is little, if any, difference in the sample group between BME and White solicitors in terms of who makes the decision to impose a condition on their PC.

**Table 6 – Decision maker profile**

Decision maker	BME applicants	White applicants
Authorised Officer/Caseworker*	16	15
Adjudicator	7	8
Committee/Panel	2	2

\* Six decisions (4 BME and 2 White) were made by a Caseworker which, the SRA advises, is the same as Authorised Officer

## 3. Sole practitioners and small firms

26. Both the Ouseley report and the Pearn Kandola research highlighted the fact that sole practitioners and small firms tend to be involved in more regulatory activities in proportion to their representation in the profession as a whole. This could lead to a disproportionate impact on BME solicitors who are often found in small firms, even if there is no unfairness or bias operating. It was hoped that solicitors in small firms would be clearly represented in the sample reviewed. However, the SRA advises that its systems do not retain historical data that would enable the identification of the size of a firm an individual was working in and they could only provide this information as of now which means that inaccurate assumptions might be made if firm structures have changed over the years or firms have closed or the matters being considered are historical.

27. In addition, the SRA classifies a 'small firm' as one where there are four or less partners. Such a firm could, of course, have a large number of assistant solicitors, consultants or trainees which would create a more complex dynamic in terms of managing a practice than if a small number of partners was practising on their own.
28. As Table 5 shows, only five of the subject solicitors' current status was that of sole practitioner. The review was keen to look at this group but this was not possible due to the way the SRA holds data as explained above. The SRA may wish to look more closely at regulatory activity specifically in relation to those practices where there are four or less partners and associates.

## 4. Conditions imposed

29. To enhance the opportunity to compare like with like the review looked at White and BME solicitors who had the same, or roughly similar, conditions imposed. The SRA provided the review with a list of the fourteen conditions that are most frequently imposed. This list is not exhaustive and there is flexibility to consider other conditions that are appropriate to the particular circumstances of the matter under consideration. The Practising Regulations state when the SRA may impose a condition but they do not specify the particular type or wording of the condition to be used.
30. There was a total of 31 different conditions in the 50 files reviewed, usually due to a combination of two or more main conditions. These were grouped under the first condition listed in each file. As Table 7 shows, the numbers of solicitors in each of the broad categories are small. The largest number of files with the same condition was 13 and the smallest only 3, with five cases having no BME or White comparators at all.

**Table 7 - The conditions imposed**

<b>Conditions imposed (grouped under main condition)</b>	<b>White</b>	<b>BME</b>
Restriction on client accounts	2	2
Requirement to attend a course	2	3
Not to be a sole practitioner	4	3
Half yearly accountants reports	5	8
Approved employment	4	3
Prohibition on trainees	1	2
Restrictions on financial promotions work	2	-
Restrictions on conveyancing work	3	3
Restrictions on immigration work	-	1

Criminal conviction	1	-
Referral reports	1	-
<b>Total</b>	<b>25</b>	<b>25</b>

### The nature of conditions

31. The files demonstrate a great variation in the regulatory histories of solicitors subject to PC conditions. Some have had many contacts with the SRA and/or the Solicitors Disciplinary Tribunal, others have not. Given that the PC application process is an annual one it is the conduct and situation of a solicitor since the granting of the previous PC that is the main consideration. While all of the files include a full review of the individual's regulatory history, short of refusing to grant a PC at all, if the conduct being addressed is similar or the risk is considered to be ongoing then the condition imposed will be the same for those with long, short or no regulatory histories. In other words there are no sub-categories of conditions. It is not apparent why an annual exercise is required or if there is any flexibility to alter this approach where a solicitor has been free of any regulatory intervention.
  
32. Until the 2009 changes, case notes contained pages and pages of detail, whether this was connected to the matters in hand or not. The new guidance now requires case notes to include only regulatory history that is considered '*relevant*' and this usually should not include conduct matters over five years old or decisions from the Legal Complaints Service unless they are linked to the current circumstances. No further guidance is in place to assist in determining relevance with a reliance being placed on Caseworkers' experience and expertise to make the correct decision. So, whilst full histories should no longer be before an Adjudicator or Adjudication Panel, it appears it will be before the Caseworker who will be responsible for making the judgement on relevance. Of the seven files reviewed after the introduction of the 2009 Regulations, two contained information that, it might be argued, was not 'relevant' to the conditions being imposed.' See section 6 below for more detail on the 2009 files.
  
33. The small numbers overall and the range of diverse conditions that can be imposed together with age and years admitted differences make it difficult to draw any conclusions at this stage. Where the same condition has been imposed comparisons can be made but the conclusions that can be drawn are tenuous at best.

### Solicitor objections

34. Many solicitors agree to having conditions imposed or continued although there is no way of knowing what their motivation for doing so is. Some files included a note or email indicating assent or representations where the condition being proposed was opposed by the solicitor in which case the matter was escalated to an Adjudicator.

35. In 2008-09 a new proforma was introduced which, in section 5.2, gives the solicitor the option to indicate if s/he would like existing conditions to be removed with their reasons to be set out on a separate sheet. This proforma, which seems to be the initial step in the application process coming before the SRA letter that outlines any proposed condition, was not found in the files and it is not clear where they are stored. It would seem logical, however, that they are included in files so that the entire process is transparent and any solicitor comments at the application stage are apparent.
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## 5. SRA Guidance

36. Of the guidance documents provided for the review a number came into effect mid-way through the year as a result of the new Practising Regulations taking effect and so cannot be linked directly to the majority of files in the sample. These included the the glossary and notes for Regulation 3 processes (applicable to 2010-2011 renewals); technical guidance to support the regulatory investigation process (July 2009) and the step by step procedure (August 2009). A brief overview of each is set out below.
37. SRA staff also take account of guidance from the courts and the SRA's own regulatory objectives.

### Guidance from the courts

38. Many of the files refer to comments made by the Master of the Rolls in court cases which considered the SRA's role in imposing regulatory conditions, in particular *Odunlami v The Law Society [2008]* and *Razeen v The Law Society [2008]*. These cases address the public interest test and reinforce the notion that conditions must be necessary, reasonable and proportionate.
39. *Razeen* also clarified the point that any reference in decisions to protecting the reputation of the profession is '*really an incident of the protection of the public interest*'. This case also cited *Re A Solicitor No 6 [1993]* which said that conditions are not to be punitive but are to ensure that '*a solicitor who has run into trouble in a professional capacity is subject to a degree of oversight....at least until he has demonstrated over a period that he is not in need of...such supervision to protect the public*'. The use of the phrase '*at least*' seems to leave the way open for the SRA to continue with a condition even where the need is no longer demonstrated. Also, the phrase '*over a period*' is unclear. Technical guidance issued to Caseworkers in August 2009 refers to an earlier policy of imposing conditions for a minimum of three years but notes that '*each circumstance should be assessed individually*' as it '*cannot reliably be said that a risk has a minimum or maximum existence*'. Such a flexible approach allows for conditions to be in place over a longer period if, for example, a solicitor has held a PC but has not actually been practising or has been working in a practice structure or employment where s/he has not had the opportunity to '*build up a history of compliance*' was the case in a small number of the files reviewed. On the other hand, flexibility and the use of discretion and/or the lack of a consistent approach can also lead to unfairness and,

potentially, either could result in unfairness and either a direct or indirect discriminatory impact.

40. *Razeen* concluded that to ensure that a decision was reasonable or proportionate required the identification of a risk. This links directly to the SRA's risk assessment mechanisms, processes and outcomes and the need to ensure that they are fair and non-discriminatory in practice. It is not clear how Caseworkers assess this beyond assumptions of risk being made on the basis of prior conduct.
41. Where there has been continuous or repeated non-compliance with certificate conditions, the 2009 technical guidance notes that appeals against a refusal to grant a PC will now go to the High Court rather than the Master of the Rolls who had previously been supportive of SRA decisions to refuse a PC and the SRA's approach will now need to be tested before the Court.

### Regulatory objectives

42. These objectives underpin the work of the SRA, should be apparent in decision-making and should help to promote and ensure fairness and the five principles of good regulation which are to be proportionate, accountable, consistent, transparent and targeted. It is possible to see how some of the objectives align with the approaches adopted when PC conditions are being considered although this cannot be taken as representative of the extent to which the principles are actually delivered.
43. *Protect and promote the public interest* - the files regularly refer to the guidance of the Master of the Rolls (discussed above) and consistently indicate that the decision is being made '*in the public interest*'
44. *Promote and protect the interests of consumers* - this is similar to the public interest test and also includes the SRA's policy to publish conditions imposed on a PC on its website and the requirement on solicitors to notify their employer or prospective employer of conditions imposed. It is not known to what extent the public is aware of the publication policy.
45. *Promote and maintain adherence to professional principles* - conditions that a solicitor attend a course, not act as a sole practitioner, work in approved employment or place limits on particular types of work can help to meet this objective. It is not clear, however, if and to what extent the impact of conditions is monitored or evaluated in a proactive fashion. For example, if a solicitor is required to attend a course what is done to assess its effectiveness, the level of understanding gained and how the learning was put into practice?

## Practising Regulations 2009

46. SRA staff are working in line with these Regulations, of which Regulations 1, 2, 4 and 6 are relevant to PC conditions. They state that a PC condition may be imposed where:
- the individual is considered unsuitable to undertake certain activities and the condition will limit, restrict, halt or prevent this
  - the individual is putting or is likely to put at risk the interests of clients, third parties or the public and the condition will limit, restrict, halt or prevent this
  - the individual is considered unsuitable to engage in certain business agreements etc and the condition will limit, halt or prevent a risk to clients, third parties or the public
  - the condition will require the individual to take specified steps conducive to the carrying on of efficient practice
  - the condition will facilitate closer monitoring of compliance
  - it would be in the public interest to impose the condition
47. It is not clear if further guidance is available for decision makers on risk, suitability or *'likelihood'*.
48. These are supplemented by the glossary and notes for the Regulation 3 process which apply to the 2010-2011 renewals and which set out the *'events'* that can trigger a condition such as a reprimand or disciplinary sanction, an un-delivered accountant's report, bankruptcy or an IVA, lack of capacity under the Mental Capacity Act 2005 etc.
49. These *'events'* were reflected in all of the files reviewed with the possible exception of one where two warnings had been given to the solicitor.

## Technical guidance to support the regulatory investigations process

50. This document details the changes that came into play in July which *'resulted in a major change to the requirements for the annual renewal exercise...'*. These primarily are that all firms and sole practitioners are to be recognised annually in addition to the annual applications by individual solicitors for a PC. Caseworkers are to consider PC applicants and firm recognition together to ascertain if there are linked applications and timescales for applications of 90 and 180 days apply.
51. A Caseworker can make the decision on a condition him or herself *'where the solicitor...agrees...,or your conclusion is no condition, and you are able to demonstrate...that the decision itself does not pose a risk to the organisation.'*
52. More than one purpose can be used in relation to a PC application and staff are directed to outline the purposes as set out Regulation 6 with detailed reasons, so that the decision is clear and can be justified. They are advised not to re-impose earlier conditions where an unconditional PC has been granted or earlier conditions have been removed.

53. Only 7 of the sample files were relevant to the 2009 changes and these are discussed briefly in Section 6.

### Step-by-step procedure

54. This guidance note flowed from the 2009 Regulations although similar guidance was in place previously. It sets out the process that Caseworkers follow when considering a matter in the first instance after regulatory checks have been completed. The file remains with them if the solicitor, having been given 14 days to comment, subsequently agrees to or does not comment on the condition proposed after which the file is closed if there has been no appeal. If there is an appeal this is heard by an Adjudicator.
55. Where a solicitor does not agree to the condition that the Caseworker is proposing; and/or the structure of the practice will be changed; and/or the application is complex or sensitive then the matter is escalated to an Adjudicator with appeals to an Adjudication Committee.
56. The note states that the Caseworker submits their decision for '*checking*' or '*approval*', the former where the solicitor agrees and the latter when they do not, but it is not clear who undertakes this assessment function, nor what criteria the checks are made against or how this is monitored or evaluated for consistency and transparency.

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## 6. The 2009 files

57. Seven of the sample files were opened after August 2009, within just a few weeks of the new guidance coming on stream. The information included in these files in most cases appeared to be related to the nature of the conduct being considered although two included outstanding matters, yet to be investigated. The courts have made it clear that allegations that have been considered and referred, but not yet adjudicated upon by the SDT, can be taken into account when considering a PC condition. However, the SRA might consider whether it is fair for matters that have not yet been investigated or considered to be before a Caseworker.
58. One file included information about a 1998 complaint of a breach of an undertaking and a subsequent complaint of failing to obtain proper instructions, and a further file referred to a 2006 FI report and referral in relation to Accountant Reports where the condition currently being imposed related to trainee restrictions. The review would query whether information such as this is '*relevant*' to the conditions being imposed.
59. It is important that steps are taken to review how case notes comply with the guidance to ensure that unrelated, irrelevant factors do not cloud or influence the perception of someone considering whether or not to impose a condition. The new rules should mean that extraneous and irrelevant issues are not included in the materials that will be viewed by Adjudicators or Panels; however, as noted above, the Caseworker, who in many

cases will be the decision-maker, will see all of the solicitor's history in preparing the case note.

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## 7. Review of conditions imposed

60. For the purposes of Section 7, five files have been excluded because they were one-offs or there was no White or BME comparator. One of these cases dealt with referral arrangements; one dealt with financial promotions; two dealt with immigration work; and one involved a criminal conviction. Files were grouped together under the heading of the first condition imposed.

### Undertake a course - Appendix 1(a)

61. Of the five solicitors whose PCs included this condition three were BME and two White, three were female and two male, two had been practising circa 30 years, one was not on the Roll at the time of her application, another was no longer practising and one had been practising two years. Of the BME solicitors two were Black and one Asian.
62. In terms of their regulatory histories one had received a fine from the SDT in 2009, a second a severe reprimand in 2008, a third had received a warning in relation to an undertaking in 2008, a fourth was awaiting an appearance before the SDT and the fifth did not intend to practice again (and in this case the condition was varied so that she did not have to attend unless and until she decided to practice again). The public interest is cited as the reason for the condition in four of the five files and in the fifth the condition is deemed to be '*appropriate*' and so, by implication, was in the public interest.
63. The conditions in these files appear to be relevant to the allegations or findings with two BME and two White solicitors having SDT involvement or a severe reprimand. In the case of the other BME solicitor, only warnings had been given although she was found to be in breach and there were concerns about her previous firm. Given the SRA comment about her short time in practice and low level of culpability query whether it would have been open to the SRA to ask her to undertake the necessary training and monitor attendance rather than impose published conditions on her PC.

### Trainee restrictions - Appendix 1(b)

64. Of the three files imposing trainee restrictions two were Asian women solicitors in BME owned firms - one with 20 years admission and the other 8 years - and the third was a White male solicitor admitted for over 20 years. For all three the training conditions are similar and there is SDT involvement (two findings and one referral). The SDT outcome for the White solicitor was a six month suspension plus substantial costs and for the BME woman a £10,000 fine plus costs but neither have lengthy regulatory histories, limited to inadequate costs information in 2008 in the case of the woman and earlier PC conditions on trainees and to attend a course for the man. In both cases the



files include mitigating comments giving the woman credit for recognising her errors and the man being described as '*decent, honest and upright*'.

65. The file on the third solicitor, who was still awaiting the SDT hearing, did not contain much detail on the allegations around trainee or supervision failings and her history is unrelated to the current matter involving accounts reports, indemnity insurance and a reprimand in 2006.

#### Client accounts - Appendix 1(c)

66. Of the four solicitors who were subject to this condition two were BME females, both Asian, and two White men. The two women - both of whom were recently admitted - had judgements against them unrelated to the practice of law. In both cases the files note that the imposition of the condition is not to be seen as a judgement about the individual's integrity.
67. Both men had been practising over 30 years. One, whose firm had ceased trading, had entered into an Individual Voluntary Agreement as the result of a downturn in business and a failure to reduce overheads quickly enough. The second solicitor had a lengthy history with the SRA including an SDT finding and £20000 fine, intervention and suspension, a reprimand and findings of inadequate service.
68. These files illustrate quite clearly how the same condition can be imposed on the basis of very different circumstances and, in the case of the women, where there is no adverse allegation or finding against them relating to the practice of law. This raises a question around the proportionality of the regulatory rules and systems.

#### Conveyancing conditions - Appendix 1(d)

69. Of these files, two were BME, both Black, and three were White solicitors. There were some differences in the approach taken with absolute restrictions on practice in two cases and more '*tailored*' conditions imposed in a further two matters.
70. There were referrals to the SDT in the case of both BME and one White solicitor and findings against the other 2 white solicitors both of whom had 30 or more years admission. The BME solicitors - one male and one female - had been admitted for 11 and 6 years respectively. The woman did not object to the condition that she not act for borrowers or lenders as she did not intend to do any more conveyancing work. It can only be assumed that the extent of the condition - which appears to restrict her activity completely in an area of law - was based on the seriousness of the allegations against her which included a sham partnership, making a secret profit and cash shortages. However, if she has no intention of doing conveyancing work query what impact the condition has in practice. In the case of the BME male the SRA noted that the majority of his work was in this area of law and any prohibition that he not act for lenders would have a serious impact on his practice. A condition that he submit 6 monthly audit

reports was imposed which seems fair given the circumstances. Both had a limited regulatory history with the SRA.

71. Of the three white solicitors one had been admitted six years and immediate conditions had been imposed upon his referral to the SDT in 2007. He had received a reprimand in 2005 and there were 3 complaints of inadequate service but he was not seeking to have the conveyancing conditions removed.
72. SDT sanctions against the remaining two White solicitors were substantial. In one case the solicitor's conduct was criticised and he received a fine and the SRA imposed a condition prohibiting any commercial or residential conveyancing. Similar to the BME solicitor discussed above this solicitor did not object to the condition as his practice was now mainly in another area of the law. The second solicitor had been suspended and fined £25000 plus substantial costs for conduct unbecoming and was subsequently prohibited by the SRA from acting in relation to a particular property purchase scheme which appears to be a qualified rather than a complete restriction in relation to conveyancing work as in the case of the other solicitor. He had a regulatory history stretching back to 2002 including a multiple complaints investigation in 2004 alleging persistent breaches. It appears that he, too, agreed to the condition.

#### Accountants reports - Appendix 1(e)

73. There were 13 of these files in the sample, all with the same condition, with one solicitor having an additional condition on training. Eight matters concerned BME solicitors and all but one were male. Of the BME solicitors 4 were Black, 2 were Asian, 1 Mixed and 1 Other ethnicity.
74. Of the BME solicitors four had SDT findings with two solicitors reprimanded and two fined, in one case £2500 and in the other £25000. The reprimands were given to solicitors with 3 and 4 years admission and the fines to solicitors with 20 and 28 years admission. The files reflect comments in mitigation in a number of these cases including that it would be *'disproportionate to impose a condition that would result in a solicitor going out of business'*; noting *'powerful testimonials'* on behalf of the firm; and the solicitor having *'learned from mistakes'*.
75. An SDT reprimand was the justification for the condition in a case where the solicitor now had no control of finance and was specialising in a completely different area of the law so it is not clear what impact, in practice, the condition would have. As with the two solicitors referred to above who had conveyancing restrictions imposed despite having moved on to a different area of the law imposing a condition in these circumstances is not likely to have an impact in terms of monitoring conduct or regulatory outcomes. Presumably, however, doing nothing based solely on an individual's current status is not considered to be an option where there has been a breach.
76. Of the remaining four BME solicitors one, with six years admission, had been referred and immediate conditions imposed with the SRA noting that he had remortgaged his

own property *'in order to put things right'*. Two others, both with many years admitted, had been reprimanded for breaches and the files reflect mitigation, due to ill health in one case and because attempts had been made to put things right in the second. Compared to others in this sample one solicitor, a woman, had a relatively clear regulatory history which illustrates that any adverse finding at Adjudicator and Panel level or the fact of an STD referral will attract a condition irrespective of past involvement with the SRA. The final BME file concerned a solicitor who had been referred to the SDT only to have all of the allegations withdrawn before the hearing with the SRA ordered to pay his costs and remove any PC conditions. In his case, however, there had been a intervention order and another referral thus justifying the imposition of conditions.

77. Of the White solicitors four had SDT findings and one had been referred. The latter's regulatory history included a severe reprimand, a reprimand and a warning. The SDT findings went back to 2005 in one case but this solicitor had a continuing IVA, a previous intervention and significant cash shortages. In more recent cases the SRA noted SDT comments in mitigation including attempts to remedy things and minimise the effect of failings.
78. More BME solicitors have Accountant Reports conditions than White solicitors but, with the exception of two BME files where the solicitors were reprimanded by the SRA, the reasons cited for imposing the condition do not seem to vary on the basis of ethnicity with files reflecting substantial regulatory histories and SDT findings or referrals. Nevertheless, it would be worth considering the imposition of this condition in somewhat more detail as it is the one area where BME solicitors do seem to be over-represented.

#### Sole principal - Appendix 1(f)

79. There were four White and three BME solicitors in this sample, 2 Asian and 1 Black. In all files the conditions were the same although two of the White solicitors had additional Accountant Report conditions and two BME solicitors were required to undertake a course.
80. Bankruptcy and an IVA featured as the reasons in three of the four White solicitor files with an SDT finding of recklessness and a suspension in the remaining case. Their years of practice ranged from 7 - 36 years and their regulatory histories varied with the solicitor with the least years having had limited contact with the SRA, a second having been found to have acted deceitfully, although according to the SDT this was *'foolish rather than wicked'*; and the remaining two having had rather more contact involving severe reprimands, disapprovals, breaches of the Code and inadequate service findings.
81. Of the BME solicitors one was Black and the other two Asian practising between 11 and 20 years. One had SDT findings and a fine of £10000 and one month suspension. The file notes that his partnership proposal would be approved thus avoiding the serious consequences for him of not doing so; it appears the solicitor was content with this.

82. The other two BME solicitors had not practised for some time, this being the rationale for the additional conditions to attend a course. One solicitor objected given how much time had passed since his SDT appearance (2002), saying it was an embarrassment and hindered him from getting work. However, the SRA noted that claims of hardship need to be balanced against the risk to the public due to his lengthy absence from practice. His regulatory history included a severe rebuke, severe reprimands, bankruptcy and abandonment, all of which were before the 2002 findings. The other solicitor had been suspended for six months but it appears he had not practised since around 2000. He said he did not intend to work as a sole practitioner but the SRA was of the view that he needed to build up a history of compliance before it would be appropriate to issue a PC without conditions.
83. The reasons behind the conditions imposed in relation to a sole practice appear to be fair in the circumstances.

#### Approved employment - Appendix 1(g)

84. There were five White and three BME solicitors in this sample, two Asian and one Black.
85. All of the White solicitors had been practising for 28 years or more and four had SDT findings, although in one case this was in 1997 when he was suspended and it appears that he had not practised since. In two cases there were restrictions on probate work, one involving an SDT referral and allegations of dishonesty. This solicitor agreed to the conditions continuing. In his case there was also a decision to intervene. The second probate restriction followed an SDT hearing where it appears no sanction was imposed although costs were. This solicitor also seems to have consented to the conditions but the file shows that his employer had informed the SRA that he had had to let him go as things had not worked out. In this case there was to be a *'fast track'* to the SDT as further allegations had arisen.
86. The remaining two White solicitors both appear to have accepted the conditions with one having additional requirements to undertake a course and not to be a signatory to client accounts. In his case the matters before the SDT related to driving convictions and breach of a community order. The solicitor was in receipt of job seekers allowance and housing benefit and had no savings or assets.
87. Of the three BME solicitors one had an additional condition not to be a signatory on a client account. He had been found guilty of conduct unbecoming in 2004 and was fined £10,500. He had previously been a sole practitioner and the Law Society had intervened. The file noted how difficult it was for a young solicitor to *'go it alone'* and he was given credit for his admissions and the contrition he had shown.
88. FI reports were the basis for conditions in the other two cases. In the first there had been an intervention and suspension in 2007 with allegations of dishonesty and a County Court judgement. In the second there was a 2009 referral with the Adjudicator noting there were *'hallmarks of property fraud'* which, it appears, over-rode the solicitor's

argument that he would be deprived of his livelihood and staff would lose their jobs if the conditions was imposed.

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## 8. Conclusions

89. This exercise reviewed 50 files of BME and White solicitors and selected SRA guidance. The aim was to determine whether there was any discernible difference in the decision making process that could be attributed to ethnicity and to assess whether decision makers were adhering to the guidance on the imposition of conditions on an individual's annual practising certificate.
90. Significantly more BME than White solicitors in the sample had been practising for less than ten years and, overall, had a younger age profile which might suggest that relative newcomers to the profession, with less experience, are more likely to run afoul of the regulatory regime.
91. It was difficult to compare '*like with like*' because of the variations in solicitor histories and the fact that the process triggers the imposition of a condition when a certain threshold is reached largely irrespective of the extent of previous regulatory interventions. So, for example, any adverse finding at Adjudicator or Panel level or an SDT finding or referral is likely to attract a condition.
92. It must be remembered that the imposition of a condition is largely dependant on the decisions others have made about the conduct of an individual solicitor or the occurrence of a specified '*event*' such as a criminal conviction or bankruptcy. The fairness, or otherwise, of those decisions is not a consideration at the stage a condition is being imposed. Therefore, if choices have to be made in terms of further investigations into disproportionality it may be more fruitful to select process that lead to sanctions in the first place. The question of delay when referrals are made is a further issue that should be looked at.
93. The review did not demonstrate that there was unfairness in the way the files were considered or the decisions were made vis-a-vis the regulatory rules that are in place. Decision makers appear to follow the guidance and tests set down in decisions of the Master of the Rolls. In many cases they are prepared to take into account mitigating factors although it is clear that, ultimately, the public interest test is of paramount importance. This being the case, even if a larger number of solicitors had been included in this qualitative review, the conclusion may have been similar due to the rigidity of the regulatory rules and systems.
94. If the SRA ensures that quality is assured and monitored particularly in areas where discretion can still be exercised then this should provide a sufficient level of confidence in the fairness of the decision making process around the imposition of a condition. However, in line with the notion of outcome focussed regulation and the 2009 Practising

Regulations the SRA should consider whether the current levels of tolerance used to inform decisions on PC conditions are, in all the circumstances, fair and proportionate.

95. Finally, the risk remains that unconscious bias will creep into the process and the SRA may wish to address this risk or possibility through an open dialogue with staff to share the findings of the Pearn Kandola research and the work that has been done to address its recommendations and an ongoing programme of awareness raising which will enable staff to understand how bias and unfairness can taint decision making. This issue and a number of other points which the SRA might wish to consider are set out below.

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## 9. Issues for further consideration

### Conditions

1. Consider the impact, proportionality and fairness of conditions where:
  - the current practice and status of a solicitor is unrelated to the nature of the conduct being regulated
  - there is no adverse finding or allegation against a solicitor relating to the practice of law
  - matters that have not yet been considered are included as part of the decision making process on PC conditions
2. Investigate the reasons why more BME than white solicitors appear to have Accountant's Report conditions imposed on their PCs
3. Assess the effectiveness and impact of courses undertaken by solicitors as a condition on their PC

### Process

4. Consider the impact of conditions on solicitors who currently have lengthy waits before allegations against them are addressed.
5. Consider what options are available for 'fast tracking' a solicitor to the SDT and in what circumstances this is appropriate.
6. Consider if the process would be improved if Caseworkers who consider all of a solicitor's history in preparing a case note did not also make the decision on a condition.
7. Section 3 application forms and any associated correspondence should be included in the files considered by Caseworkers.

## Monitoring and Evaluation

8. Develop and implement a quality assurance and monitoring framework for PC conditions from January 2012 onward to include:
  - The way in which Caseworkers and Adjudicators consider and reflect the Practising Regulations concepts of risk, suitability and likelihood in their decision making
  - The extent to which decision makers are adhering to the 2009 guidance on the inclusion of 'relevant' matters and history in case notes
  - The extent to which Caseworker decisions are checked and approved and the basis upon which this is done
  - The length of time a condition continues to be imposed on a PC
  - The circumstances in which previous conditions are removed and a PC is granted free of conditions
  - Improving ethnicity data on solicitors

## Addressing Bias and Raising Awareness

9. Investigate ways in which to identify if unconscious bias or unfairness is present and how to address this.
10. Consider awareness raising sessions for decision makers and seek their input and views on issues of bias and impartiality.

## Prevention and Education

11. Consider what matters lead to the most PC conditions and what the SRA or others might do to address these in advance.
12. Review the nature of business start up support provided to new solicitors or those setting up a practice for the first time.
13. Consider what support needs are highlighted by the regulatory histories of solicitors in small firms i.e. those with four or less partners or associates.
14. Consider what support needs are highlighted by the regulatory histories of solicitors who have been practicing for five or less years..

## Consumers

15. Consider the impact of PC conditions, and the risks associated with them as part of the regulatory process, on consumers of legal services.
16. Review the extent to which consumers are aware of and take account of the publication of PC conditions on the SRA website.