

Solicitors
Regulation
Authority

Pearn Kandola Disproportionality Audit

Recommendation 9: Decision making at first stage of
matter handling

November 2011

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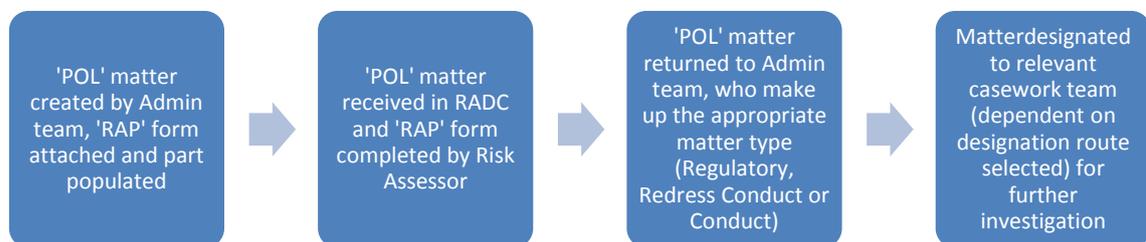
Introduction

1. 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 (BME) solicitors, as reported by Lord Ouseley in 2008.
2. In July 2010, Pearn Kandola's findings were published and a number of recommendations made. The SRA's Risk-Audit team was commissioned to carry out a detailed review of recommendation 9, which states:
'A review of the decision-making processes at the first stage of case-handling is required. Initial assessment outcomes result in a disproportionate number of cases being taken forward for BME solicitors as fewer of these cases are not upheld. This suggests that either these cases are more complex or there is a more conservative, risk-averse decision being made in these situations. If the processes are correct, then how closely these processes are followed in practice should also be reviewed.'
3. This recommendation covers two distinct processes; the Risk Assessment and Designation Centre (RADDC) risk assessment process which determines where the event assessed is designated, and the casework process which determines the ultimate outcome of the case and decisions in respect of those individuals involved. Whilst this report concentrates primarily on the RADDC risk assessment process and establishing whether criteria for designation to the appropriate casework unit was followed, for the sake of completeness, it was also appropriate to comment on the procedures and criteria applied by the casework unit, who are responsible for concluding the matter.
4. A further, more detailed study into the casework process was also undertaken in respect of cases not upheld, which can be found in the report titled 'Recommendation 10: Cases not upheld by the SRA'.
5. The full Pearn Kandola report, including recommendations, can be found [here](#).

Background

6. When we receive information about a regulated individual or entity, a 'POL' reference is created on our IT system. Within this, a Risk Assessment Profile (RAP) form is created by the Administration team, who part-populate basic details including date of receipt, the name of the instigator and name(s) of the individual and/ or entity to which the event relates. This is then referred to the Risk Assessment & Designation Centre (RADDC), who perform a risk assessment on the event, based on the information available. Constituting the initial stages of risk-based regulation, further details regarding this process are published on the SRA website and can be found [here](#).

7. Having risk assessed the event and populated the 'RAP' form in accordance with the procedure, the Risk Assessor in RADDC selects an appropriate designation route, which is determined by the outcome of the risk assessment. Designation routes refer to the unit of the SRA to which the risk assessment is passed for further investigation.
8. The 'POL' reference to which the assessment is attached is then referred back to the Administration team, who create a further matter to which the 'POL' is linked. In relation to this recommendation, the events concern conduct issues, so matters created are represented as either CDT (conduct) or RDC (Redress Conduct).
9. The process is illustrated below:



9. Once created, the conduct matter is passed to the relevant casework team to be investigated and progressed. Where the 'RAP' form selects the designation route 'CIU – Closure Summary', these are passed to caseworkers in the Conduct Investigation Unit – Closure Summary team.
10. Upon conclusion of the casework investigation, the caseworker dealing with the matter will close the matter, selecting an outcome relevant to the investigation. There are numerous process outcomes available to the caseworker, details of which are found in Annex 2. This recommendation focused on the outcome 'Not upheld'.
11. As the risk assessment process carried out on the 'RAP' form (which is linked to the 'POL' reference) does not allow for process outcomes, the process outcome of the associated CDT or RDC matter became the 'Grouped final outcome' for the 'POL' reference in the dataset used by Pearn Kandola.

Audit scope

12. With reference to the original dataset, it is believed that this recommendation was reached by filtering all 'POL' references with a 'Grouped final outcome' of 'Not upheld', and then reviewing the ethnicities of those individuals associated to the 'POL' references.
13. The scope of this audit was to review a sample of cases assessed by the Risk Assessment & Designation Centre (RADDC) with a 'Grouped final outcome' of 'Not upheld'. Such assessments are likely to have been referred by RADDC to the CIU – Closure Summary team, whose responsibility it was to review the

assessment and then decide the appropriate action, invariably dealing with matters which fit the criteria to be closed with the outcome 'Not upheld'.

14. Where the original dataset consisted of all matters closed between 2007 and 2009, Policy (Inclusion) commissioned this audit to look at a cross section of data from matters closed in 2009, as well as more recently, matters closed in 2010. It was felt this approach would provide a more up-to-date picture and be of more relevance in 2011. In order to do this, an additional dataset containing matters closed in 2010 was requested from the Management Information team, to allow selection of an appropriate and proportionate sample.
15. The Management Information Team informed that the data capture processes changed in 2010, so to ensure consistency between the datasets to be used for this audit, only data captured in the same way as the 2009 process was retrieved for the 2010 dataset. This meant that some matters closed in 2010 were not recorded in the 2010 dataset, although still returned more than 500 entries to select the audit sample from.

Population and sample size

16. The population size for the audit was determined by filtering from the two datasets (2009 & 2010), all 'POL' references with the grouped final outcome of 'Not upheld'. Consistent with Pearn Kandola's approach, matters concerning individuals of 'unknown' ethnicity were removed, leaving a total population of 2182 matters. These are shown with a line through in the table below.
17. A brief break-down can be seen below:

Year	White	BME	Unknown	Total
2009	1428 (87.0%)	213 (13.0%)	223	1641
2010	473 (87.4%)	68 (12.6%)	35	541
Combined totals:	1901(87.1%)	281(12.9%)	258	2182

18. Based on the total population figure, recognised audit sampling guidelines indicate that reviewing a sample of 117 matters would provide a confidence level of 95 per cent, with an expected error rate of no more than three per cent. Had we looked at numbers of matters proportionate to the ethnicity breakdown (87.1% / 12.9%), this would have meant reviewing a total of 15 matters relating to BME individuals. Agreeing that that this may not provide any meaningful analysis, Policy (Inclusion), the commissioning unit, instructed this audit to look at equal numbers of matters for each year and each ethnicity group.

The sample was broken as follows:

- 58 white individuals (29 from 2009, 29 from 2010)

- 59 Black and Minority Ethnicity (BME) individuals (30 from 2009, 29 from 2010)

Key headlines

- 98.3% of matters met the criteria for being closed with an outcome of 'Not upheld'
- Caseworkers agreed with initial assessment and recommendation by RADC in 100% of matters

Criteria

19. The role of the RADC is to assess and evaluate information received from various sources, and to designate the information to the appropriate unit. All information is processed through a consistent risk assessment model, to ensure any issues are correctly identified and designated for action. Where recommendations are made by RADC staff, the casework unit in receipt of the information is required to assess the information and recommendation, before considering the next course of action. The caseworker dealing with the matter will decide whether to request further information, or make a decision based on existing available information.

RADC criteria for designation to CIU - Closure Summary

20. The Risk Assessment & Designation Centre (RADC) Business Rules April 2010, stipulate that matters are suitable for CIU-Closure Summary where one or more of the following criteria are met:
 - There is no issue of misconduct
 - There is no evidence of misconduct
 - The matter is excluded under the [Excluded Matters Policy](#)
21. The following definitions were extracted from the RADC Business Rules:
 - No issue of misconduct**
22. These are matters where there is no professional duty owed by the solicitor e.g. failure to reply to third party, breach of confidentiality to third party and no other conduct issue(s) has been raised.
23. This does not include allegations where a professional duty is owed but there is no evidence, these require a full risk assessment.

- No evidence of misconduct**

24. These are matters where on assessment the informant has been invited but not provided evidence in support of their allegation(s) or matters where the Assessor is satisfied there can be no evidence.

Excluded matters

25. The Assessor should refer to the [excluded matters policy](#) and the further guidance on interpreting the policy.

CIU criteria for recording a conduct matter as 'Not upheld'

26. As explained above, it was also necessary to consider the criteria relied upon by the caseworkers in CIU, who are responsible for recording a conduct matter as 'not upheld'.
27. The criteria which caseworkers refer to when considering that a conduct matter should be closed with an outcome of 'Not upheld' is consistent with the criteria mentioned above, although there are a number of additional criteria which the RADC Business Rules do not cover. In a document titled 'Closure letter training' (AE October 2009), the following criteria also apply when the caseworker considers closing the matter as 'Not upheld'.

Other Investigations

28. Occasionally, it may not be appropriate for CIU to continue to investigate a matter on the basis of an existing or new investigation being undertaken elsewhere in the SRA. In these instances CIU will write to the informant and close the conduct matter as 'Not upheld'. The conduct matter will be referred to the investigating unit for information only.

Unadmitted persons

29. Our powers in relation to [unadmitted](#) persons are currently limited to [section 43 of the Solicitors Act 1974](#). This allows us to make an Order which restricts the way in which the unadmitted person can work in connection with a solicitor's practice, by requiring the solicitor's practice to seek permission to employ the individual. The effects of such an Order are serious and the potential consequences if permission is refused. As such, we would usually only consider an Order under S.43 in relation to more serious matters. Conduct which is minor or technical in nature would be insufficient to warrant an Order under S.43.

Insufficient evidence

30. When considering the evidence available in support of an allegation of misconduct, the civil standard of proof, namely the balance of probabilities must be applied. Taking into account all the relevant circumstances and on careful consideration of the evidence, the caseworker needs to be satisfied that it is more likely than not that the misconduct occurred. In CIU investigations, there may sometimes be an issue of misconduct and there may be some evidence to support the allegation, but it is insufficient evidence to make a finding.

No jurisdiction

31. If a subject individual is not a solicitor and is not a person involved in legal practice, then we have no jurisdiction and we are not able to investigate their conduct.

Matters lying on the file

32. There may be circumstances where we decide not to formally adjudicate upon a matter although there is an issue of misconduct and instead, allow the matter to "*lay on the file*". This may be appropriate, for example, if there are ongoing disciplinary proceedings but the additional matter will not affect the outcome. It may also be appropriate in circumstances of ill health where it is unlikely that a solicitor will return to practice.
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Results

33. From the sample of 117 matters reviewed, results found that 115 matters (98.3%) were accurately recorded with the process outcome: 'Not upheld', further to investigation and closure by the investigating casework unit 'CIU'.
 34. The criteria applicable to these matters are broken down as follows:

No issue of misconduct	35 matters (29.9%)
No evidence of misconduct	17 matters (14.5%)
Excluded matter	39 matters (33.3%)
Other investigations	24 matters (20.5%)
 35. This left two matters where it could not be established that the criteria had been met; details can be found at [Annex 1](#).
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Conclusions and recommendations

Conclusions

36. The audit found that at least one of the eight criteria had been met in 98.3% of matters reviewed. However, in order for the audit to ascertain whether or not the criteria had been met, manual scrutiny of each individual matter, from initial assessment on the 'RAP' form to investigation on the 'CDT' matter, was necessary. Interpretation of some of the Risk Assessors comments was required where the criteria 'Other investigations' applied, but where the criterion was 'no misconduct' or 'excluded matter', this was made clear.
37. An [Equality Impact Assessment \(EIA\)](#) on the risk assessment process was published in January 2011 and did not identify any significant concerns.
38. This audit found the risk assessment process to have been followed in accordance with the documented procedure on all matters reviewed.

39. The risk assessment process will be changing significantly as we move toward outcomes-focused regulation. We no longer maintain communication with informants, so no longer have a 'CIU - Closure Summary' team. A Triage team is now dealing with some of the matters previously deemed suitable for the CIU - Closure Summary team, and these will not be subject to the risk assessment (in RADC) process. Most information will be risk assessed in RADC and then referred to the Supervision, Risk and Standards directorate, who will consider the wider picture. However, there may be instances where RADC conclude the information received does not warrant passing on.

Recommendations

40. It is important to note that the risk assessment process involves assessing the **event**, not the **individual**. Given that this audit has demonstrated that the risk assessment process is fair and consistent, any disproportionality that exists in matters sent for investigation is likely to reflect a disproportionality in the make up of individuals involved in those events that meet the criteria for investigation.
41. As the risk assessment process is presently changing, it is recommended that a further audit be undertaken in 12-18 months, to establish whether disproportionality still exists under new ways of working. This will allow sufficient time for the new process to be established and in turn, meaningful data to be made available for analysis.
42. Should disproportionality be evident in 12-18 months, a further study of the types of events assessed is recommended. In order to establish the reasons 'why' disproportionality exists, a more in-depth review into the events which trigger investigation may be required. This will involve considering additional factors such as firm structures, areas of law practised, practising history of individuals in the firm, client pool and so on.

Annex 1

Matter 1

Reference: POL/1233-2009

Ethnicity group: BME 2009

Background:

Correspondence received from a solicitor's firm, requesting a file (relating to an intervention) be passed on by SRA to the subject solicitor.

Why reviewer felt the criteria had not been met:

In this matter, the informant was not making a complaint about the subject solicitor, instead requested the SRA forward a file to the subject solicitors firm. This information should not have been made into a 'POL' matter or risk assessed.

Matter 2

Reference: POL/14811-2010

Ethnicity group: BME 2010

Background:

RADC received information regarding the subject solicitors website not having a link to the Code of Conduct or a VAT number.

Why reviewer felt the criteria had not been met:

The 'RAP' form designated this matter to 'CIU – Closure Summary', yet the caseworker wrote to the subject solicitor regarding the two points, requesting their website be changed. In view that this particular matter was investigated, perhaps a more appropriate process outcome would have been 'Complaint upheld but no action'.

Annex 2

Final outcome codes with definitions		
Code	Definition	Comments
A. Complaint outside our jurisdiction	The complaint is outside the Law Society's ¹ jurisdiction	
B. Within jurisdiction but investigation declined	The Law Society will not investigate a complaint that falls within our jurisdiction (normally as part of a policy decision).	Includes 'excluded matters'
C. Referred back to firm under Rule 15	The complaint is to be referred to the firm for them to invoke their complaints handling procedure.	
D. Complaint withdrawn by customer	The customer has requested their complaint be closed.	The intention is that this is an active request from the customer.
E. Customer has not responded	The customer has failed to respond to requests for information. As a consequence the investigation cannot continue.	The intention is that no communication has been received rather than the customer supplying inadequate information
F. Complaint resolved without our intervention	The complaint has been resolved between the parties without any involvement of The Law Society	
G. Complaint conciliated	The Law Society has actively assisted the parties in reaching a mutually acceptable resolution.	

¹ The SRA is the independent regulatory arm of the Law Society.

H. Sols reasonable offer	The Law Society considers the solicitor has made a reasonable offer to resolve the complaint that is not acceptable to the customer. The Law Society will not investigate further.	
I. Closed temporarily	The investigation cannot continue at the time of closure but is expected to reopen at a future date for the investigation to continue.	Examples of reasons for a temporary closure may include illness of customer, ongoing court proceedings.
J. Complaint not upheld	The case has progressed to a formal decision process and there is no decision that results in a finding, action or a sanction against the solicitor/ firm. <u>Or</u> The complaint has been adequately investigated; it does not demonstrate poor service or breach of the rules and has therefore not progressed to a formal decision.	Formal decisions will include adjudication and panel decisions.
K. Compliant upheld	The case has progressed to a formal decision process and at least one decision resulting in a finding, action or a sanction against the solicitor/ firm.	Formal decisions will include adjudication and panel decisions.
L. Complaint upheld but no action	The case has been investigated and a technical breach of the rules found but it has been decided to take no action as no adverse consequences suffered by the parties.	

Source: Internal (untitled) document dated 28 April 2004