

Policy - Public & Private Hearings

POLICY – PUBLIC/PRIVATE HEARINGS

1. INTRODUCTION

- 1.1 This document sets out the key principles regarding the Solicitors Disciplinary Tribunal (SDT) and its approach to conducting hearings, or parts of a hearing, in private.

SUMMARY

- 1.2 The SDT is committed to upholding the principles of open justice. While that is a guiding principle, the SDT is also committed to ensuring that interference with Article 8 rights of those involved in cases before it, in one way or another, is proportionate. This policy provides a framework for balancing open justice with the need to protect individual rights and ensure a fair process for all involved. Any derogation from open justice must be justified, necessary, proportionate, and the minimum required to meet these ends. This briefing highlights the complex balancing act required by the SDT to maintain both transparency and fairness in its proceedings. The core challenge for the SDT is balancing the fundamental principle of open justice with the need to protect individual rights, ensure fair proceedings, and comply with relevant legal frameworks, particularly the Human Rights Act 1998 (HRA) and the Solicitors (Disciplinary Proceedings) Rules 2019 (SDPR 2019).

2. CORE PRINCIPLE: OPEN JUSTICE

FUNDAMENTAL IMPORTANCE

- 2.1 The fundamental nature of open justice is a cornerstone of the rule of law. This principle facilitates public scrutiny, promotes understanding of the SDT's processes, and fosters public confidence in the justice system.
- 2.2 Open justice encompasses the public's freedom to attend hearings, freedom to report proceedings, and the freedom to identify persons involved.

DEFAULT POSITION

- 2.3 The default position for the SDT is that hearings should be held in public. Any departure from this principle must be justified as an exception.

PRIVATE HEARINGS AND REPORTING RESTRICTIONS

- 2.4 Courts in general have a right to hold private hearings where justice requires it. However, unless legislation expressly provides otherwise, no court or tribunal has the right to restrict the press and public from reporting what happens in a public hearing. Even where the legislation permits such a reporting restriction, it normally only does so prospectively rather than retrospectively - it does not, therefore, prevent anyone from reporting something that took place in a public hearing at a time when there were no reporting restrictions.

3. LEGAL FRAMEWORK

SDPR 2019

- 3.1 Rule 35 of the SDPR 2019 governs the SDT's power to hold private hearings. Rule 35(1) stipulates that hearings must be public unless specific exceptions apply.

EXCEPTIONS (RULE 35)

- 3.2 **Rule 35(2):** Allows for applications for private hearings based on exceptional hardship or prejudice to a party, witness or any affected person.
- 3.3 **Rule 35(5):** Allows the SDT to direct a private hearing without an application if it would have granted one had it been made or if a public hearing would prejudice the interests of justice.
- 3.4 **Rule 35(8):** save in exceptional circumstances, the final decision of the SDT must be given in public, even if the hearing has been in private.
- 3.5 **Rule 35(10):** Allows the SDT to prohibit the disclosure of a document/information to a person if disclosure would likely cause any person serious harm and it is in the interests of justice to do so.

ECHR

- 3.6 **Article 2** of the European Convention on Human Rights (ECHR) provides a right to life. This can impose positive obligations on the state to take reasonable steps to prevent an individual from taking his or her own life if the decision has not been taken freely and with full understanding of what is involved. It does not follow that the state must take every measure which would mitigate a risk of suicide, and it is not required to take measures that would be contrary to the public interest or disproportionate to the risk.

- 3.7 **Article 6(1)** of the ECHR provides for right to “*a fair and public hearing*”. This includes a right to judgment “*pronounced publicly*”. However, Article 6 does not give a right to a hearing entirely in public as “*the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*” An individual may waive their rights under Article 6 ECHR.
- 3.8 **Article 8** of the ECHR provides for a qualified right to respect for private and family life.
- 3.9 **Article 10** of the ECHR provides a qualified right to freedom of expression. This includes a right of the public to receive information about court proceedings

HUMAN RIGHTS ACT 1998 (HRA)

- 3.10 The SDT must ensure its policies are compatible with the HRA, specifically with Articles 2 (right to life) 6 (right to a fair trial), 8 (right to respect for private and family life), and 10 (right to freedom of expression).

S.48 OF THE SOLICITORS ACT 1974

- 3.11 The SDT is obliged to file, with the SRA (acting on behalf of the Law Society), the order they have made in relation to a respondent and the findings which led to that order. Such orders and findings should not be anonymised but do not need to contain all the reasons. The findings filed with the SRA need not, and generally should not, include reference to evidence given in private hearings as the filed findings will be available for inspection by the public.

4. GROUNDS FOR PRIVATE HEARINGS

SPECIFIED GROUNDS

- 4.1 Exceptional Hardship/Prejudice: The primary ground for holding a private hearing is exceptional hardship or prejudice to a party, witness, or affected person.

INTERESTS OF JUSTICE

- 4.2 In addition, a private hearing may be necessary where a public hearing would prejudice the interests of justice.

4.3 Examples:

- **Protection of Private Life:** Hearings may be held privately to protect the private life of a respondent, complainant, witness, or service user. However, the 'strictly necessary' test set out below should be applied. There is no right for respondents to be protected from the intrusion into their private life that is a necessary consequence of open justice. It would not be appropriate to hold a private hearing just because the respondent would be embarrassed by a public hearing in relation to the allegations against them.
- **Vulnerable Witnesses and Children:** Special consideration is given to vulnerable witnesses and children. Private hearings, in part or whole, are permissible to protect their interests and enable their participation.
- **Confidential Information:** The presence of sensitive personal or financial information *may* warrant a private hearing to avoid damaging disclosure.
- **Nature of Allegations:** It may be necessary, in cases involving health issues, sexual allegations, or particularly sensitive issues to hear at least some of the evidence in private. For example, if a respondent wishes to rely on relevant medical evidence in his defence to an allegation but might be inhibited from relying on or referring to that evidence if the hearing were entirely in public, then it would be appropriate to hold a private hearing to receive that evidence.

5. THE TEST

'STRICTLY NECESSARY' TEST

- 5.1 Any exclusion of the public must be the minimum necessary. The test is whether "by nothing short of the exclusion of the public can justice be done."

PRESUMPTION IN FAVOUR OF OPEN JUSTICE

- 5.2 The SDT must balance the principle of open justice against other rights (Articles 6, 8, and 10 ECHR). However, it does not follow that the scales start evenly balanced. The Court must start from the position that very substantial weight must be accorded to open justice. Any balance starts with a very clear presumption in favour of open justice unless and until that is displaced and outweighed by a sufficiently countervailing justification.

PROPORTIONALITY

- 5.3 Before opting for a private hearing, the SDT must consider whether other measures could achieve the desired outcome without interfering with open justice to such a serious extent. For example, where the trial will hear confidential information which is subject to legal professional privilege, it is better to anonymise the relevant clients and then hold a public hearing than to hold the hearing in private.

6. PROCEDURE FOR APPLYING FOR/DIRECTING PRIVATE HEARINGS

APPLICATION

- 6.1 Any person affected by an application can apply for a private hearing. Applications must be made with a supporting statement and served on all parties.

TIMING

- 6.2 Applications should be made as early as possible.

CONSIDERATION

- 6.3 If there is no objection to the application for a private hearing, it should be considered on the papers by the SDT unless it is in the interests of justice to hold an oral hearing. Any such oral hearing should take place in private, unless otherwise directed.

SDT INITIATIVE

- 6.4 The SDT can direct a private hearing on its own initiative without a party application.

THE AGREEMENT OF THE PARTIES IS NOT DETERMINATIVE

- 6.5 The SDT is not bound by any agreement between the parties as to whether the hearing should be in private. The interests and focus of the parties may not be on open justice. The SDT must have regard to the strong public interest in open justice.

OPPORTUNITY TO OBJECT TO A PRIVATE HEARING

- 6.6 The cause list should identify whether any part of a hearing will be in private and should explain that members of the public can still attend and make representations as to why the

hearing should be in open session. Any third party who attends such a hearing, whether they be a member of the press or public, should be informed, in so far as possible, of the reasons why some or all of the hearing will be heard in private and given the opportunity to object. If they do so object, the decision to hold a private hearing should be reconsidered in light of their objection. The SDT should inform the objector of their decision, on reconsideration, and give reasons for that decision, in so far as possible.

REASONED JUDGMENT

- 6.7 If any part of a hearing is held in private, the SDT must give its reasons for permitting a private hearing in its final decision.

7. TRANSPARENCY AND ACCOUNTABILITY

PREVENTING INDIVIDUALS FROM BEING IDENTIFIED

- 7.1 **Rule 35(9)** gives the SDT the power to make a direction prohibiting the disclosure or publication of any matter likely to lead to the identification of any person whom the SDT considers should not be identified. However, this power should be exercised sparingly as the ability to name individuals is an important part of open justice. Stories lose interest when the individuals cannot be identified. There is a particularly strong public interest in naming respondents, but there is a public interest in naming others too, e.g. witnesses. There would need to be a compelling public interest to justify anonymisation, e.g. where such a direction is necessary to uphold the public interest in legal professional privilege. The SDT regards it as necessary, in most cases, to anonymise the names of clients. Clients instructing solicitors do so in the expectation that their affairs are confidential. Only if the nature of matter for the client is central to the allegation, and other than a routine (even if substantial or complex) matter, will the SDT be likely to decline to anonymise the identity of clients.

REDACTED/ANONYMISED DECISIONS

- 7.2 Even where a hearing is held in private, the SDT should (save in exceptional circumstances) announce its decision in a public session. The SDT should provide its full written reasons to the parties. However, where that is necessary to protect the confidentiality of information provided during a private hearing, the SDT may publish a version of its written reasons which has been, anonymised or redacted as needed, to protect sensitive information. Similarly, although the SDT must file with the SRA an order naming the respondent, together with its findings, it may withhold some or all of the reasons for those findings in order to protect confidential information. In such cases the SDT may decide to issue a judgment that is briefer than would otherwise be the case, setting out the name of the Respondent, the detail of the allegations, the findings made on those allegations and outline reasons for those findings.

AUTOMATIC DISCLOSURE POLICY (ADP)

- 7.3 The SDT has an ADP which automatically releases certain documents during public hearings without the need for a specific request. However, a party affected by ADP can apply to prevent or delay disclosure, providing supporting evidence.

8. OVERRIDING OBJECTIVE & OTHER CONSIDERATIONS

OVERRIDING OBJECTIVE

- 8.1 The SDT must act in line with its overriding objective (Rule 4 of the SDPR 2019) to deal with cases justly and at proportionate cost.

CIVIL PROCEDURE RULES (CPR)

- 8.2 The SDT will have regard to relevant CPR rules (especially CPR 5.4C, 32.13, and 39.2) and will treat them as a benchmark for good practice.

SRA AND CANDOUR

- 8.3 The SDT does not assume the SRA, when acting as prosecutor, will be responsible for advancing the interests of open justice. The SDT will itself uphold the public interest in open justice.

9. REVIEW

REGULAR REVIEW

- 9.1 SDT policies and procedures on private hearings should be regularly reviewed to ensure they remain consistent with legal principles and best practice.

