

City of Westminster and Holborn Law Society

Response to the Call for Evidence published by Lord Hunt on 15 January 2009

Introduction

The City of Westminster and Holborn Law Society ('CW HLS') enjoys perhaps the most diverse membership amongst local Law Societies, encompassing as it does, a membership ranging from larger firms, including those which have been called in recent years "the silver circle" down to small high street practices and individual in-house solicitors, including those working for public bodies and government as well as incorporating a number of highly specialist "niche practices" located in London's West End. Our membership includes those who practice at all levels of the profession, those who regularly represent solicitors in SRA investigations and members of the Solicitors Disciplinary Tribunal.

We believe that our diverse membership makes CW HLS ideally placed to respond to Lord Hunt's review of legal regulation.

CW HLS is committed to ensuring fair and proportionate regulation enabling solicitors to maintain the highest professional standards whilst remaining competitive and relevant in a fast changing market place. Solicitors face not only new challenges from the Legal Services Act and alternative forms of practice and regulation but also an erosion of their traditional place in society as many of the traditional areas in which it would have been natural to seek the advice a solicitor have been opened to competitors, resulting in an effective reduction in "reserved business". Immigration, conveyancing, probate and tax affairs have all been liberalised and opened to competitors from other regulated sectors.

We must state at the outset that we believe that this review should not result in a fragmentation of the solicitors' profession. Although we are a diverse profession serving a varied client base, we have common standards which must be maintained and protected. The "badge" of solicitor does not denote a specific area of practice or any client base but rather a commitment to the highest professional standards and we do not think that that should change.

Format of Response

The call for evidence published by Lord Hunt is necessarily wide. We therefore believe that it is helpful to divide our response into specific areas which we believe to be of paramount importance. These are:-

Part I: Current Position

1. The Role of A Solicitor And The Legal Framework
2. The Role of The Regulator
3. Current Challenges In Practice
4. Investigation and Enforcement
5. An Overregulated Profession?

Part II: The Immediate Future and The Legal Services Act

6. Non-lawyer Managers and the Expansion of the Legal Services Market
7. Entity Based Regulation
8. Publicity
9. Multi-disciplinary practices and Alternative Business Structures

Part III: Improving The Profession

10. Education and Training
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PART I: THE CURRENT POSITION

1. ROLE OF A SOLICITOR AND THE CURRENT LEGAL FRAMEWORK

1. Solicitors occupy a unique position of trust in our society and the public should, without hesitation, be able to “trust them to the ends of the earth.” This is the phrase used and approved by successive Masters of the Rolls and is the laudable principle to which all legal professionals, not just solicitors, should aspire.
2. The Call for Evidence sets out in some detail the regulatory maze which led to the recommendations of the Clementi review. Part of the reason the regulatory maze developed was the erosion of the traditional role of solicitor by, for example the introduction of Licensed Conveyancers to open up the conveyancing market, the Bar’s Direct Access initiatives and the market driven tendency to outsource certain legal services which fell outside of the scope of “reserved business.” It is worthy of note that the withdrawal of Civil Legal Aid and the introduction of Conditional Fee Agreements as well as the relaxation of the rules on referral fees all contributed to a market which enabled claims farmers to flourish and left solicitors unsure of how to cope with the scope and pace of the changes. In house and government solicitors have likewise been faced with uncertainty in the face of a professional regulator which has focussed primarily on solicitors in private practice.
3. It is important to consider what it is any review of regulation may hope to achieve in the context of solicitors. It is therefore important to begin by considering what it is to be a solicitor. To define the essence of what it means to be a solicitor in the twenty first century is more difficult than one would imagine.
4. Solicitors (and certain other regulated legal professionals) are in the unique position that they hold significant amounts of client money for prolonged periods of time. This appears to be peculiar to our profession in common law jurisdictions. We cannot look to our counterparts in Europe for guidance on how

lawyers should handle client monies because their systems are set up in a very different way although the alternative systems may be worthy of scrutiny.

5. There is also a significant knowledge gap between consumers and providers of legal services which in itself imposes an obligation on solicitors not to take unfair advantage of the knowledge gap but at the same time, bridging the knowledge gap is the service offered by solicitors and it has a commercial value. This dichotomy must mean that the regulator must provide proportionate and fair guidance on how to ensure that the risk of injustice arising from the imbalance of power is mitigated. This is of particular importance in a profession such as ours, which is dedicated to the pursuit of justice.
6. This much would appear to be uncontroversial. Solicitors – whether in private practice, in-house or working in other parts of the world - would universally agree that they must look out for the best interests of their clients and take compliance with accounts rules very seriously – any other viewpoint would indicate a person unfit to be a solicitor.
7. Beyond these basics, views on whether a solicitor is first and foremost a guardian of justice, a business person or a repository of legal information is open to debate. Certainly the developments during the 1990s were towards a more commercial approach and, indeed, this is further envisaged in the advent of alternative business structures under the Legal Services Act 2007. It is, however, important not to lose sight of the basic principles which define our profession.
8. In recent years, pressure for a less commercial approach has been applied. The backlash of public opinion in relation to miners' cases and concerns relating to claims farmers and conveyancing factories have led to calls for an end to self regulation and the perceived failings in the self regulation system have led to the introduction of increased oversight through the introduction of the Legal Services Board.

9. CWHLs believes that the vast majority of solicitors do seek to do their best for their clients. Solicitors should be encouraged and assisted to work towards this end. There has been a tendency, identified by Sir David Clementi towards prescriptive regulation; this stifles ingenuity and leads to solicitors having to choose between compliance with technical requirements and devoting sufficient time to their clients to ensure that clients' needs are met. The costs of compliance, in time and money, are ever increasing and the "regulatory maze" is becoming more rather than less complex and confusing - by the SRA's own admission. In-house solicitors are not immune from the regulatory maze, it being increasingly difficult to ascertain which provisions apply to them and which do not.

Problems With The Current Legal Framework

10. Solicitors have to comply with a complex system of rules and regulations, some of which are contradictory and/or ambiguous, some of which are out of step with ordinary principles of law and some of which are otiose and some of which are subject to exemptions and modifications for solicitors working in different areas or for certain types of employer. The introduction on 31 March 2009 of "entity based regulation" has only added a further tier of regulation to an already overloaded system.
11. As an example, even representatives of the SRA at the highest level have conceded that it is simply not possible for a solicitor to be fully compliant with the Accounts Rules at all times. That being the case, one must ask; are the obligations placed on solicitors realistic and can they be sustained in an ever changing and more demanding market place?
12. The SRA's recent consultations on proposed new rules are an indication that it has not abandoned a prescriptive approach to regulation as recommended by the Clementi review. Although the Code of Practice is intended to be principles based, it is undeniable that the Code, the notes and the various additional rules and regulations contain a great deal of technical detail which is unnecessary.

13. Furthermore, the SRA will obtain new powers under s.44D Solicitors Act 1974. In its recent consultation paper 14, the SRA set out the circumstances in which it could use those powers. The prescriptive list of circumstances occupied almost a page of writing and was so wide as to be wholly unnecessary. This may go some length to explaining the vast disparity between the SRA's 302 pages of regulatory material as against the Council for Licensed Conveyancers' 9 pages.
14. CWHLs is in favour of a move towards clearer principles based regulation, supported by education and encouragement from the regulator to ensure compliance. Whilst the regulator has a duty to investigate and prosecute misconduct; a public interest regulator must have a primary obligation to educate those it regulates and to promote and assist in future compliance. To maintain a primary objective of the prosecution of misconduct is akin to closing the stable door after the horse has bolted.
15. CWHLs is also concerned that the SRA's position on the guidance available to solicitors is not clear. The SRA's general position is that it is not bound by guidance handed out by its practice standards unit or by the Professional Ethics helpline however this is not necessarily widely known amongst those who seek guidance from those sources. This means that a solicitor faced with an ambiguous rule or unusual situation and wishing to ensure compliance can seek guidance from two approved sources but still be liable if, at a later stage, the SRA's position as to what the rule means changes. The difficulty facing solicitors is further exacerbated by the lack of formal written guidance. Whilst it may be open to debate whether the regulatory body or the representative body should take responsibility for issuing guidance, it is not acceptable that solicitors are left in a position of uncertainty in circumstances where they demonstrably seek to comply.
16. There are also specific concerns facing in-house solicitors. We have noted above that the regulator tends to focus on solicitors in private practice and indeed, much of the guidance available is aimed at such solicitors. In house solicitors therefore must address not only the general lack of guidance facing the profession but also

the specific lack of guidance which addresses the concerns peculiar to being employed by your client.

17. In CWHLs's submission, there is a real concern that a failure to produce proper guidance, or recognise formal guidance previously given on a case by case basis, may be a breach of the rules of natural justice and indeed, the spirit of Article 7(2) European Convention on Human Rights. Moving forward, CWHLs would like to see clear guidance on the issues of retrospectivity and limitation which have repeatedly troubled the Courts in this area.

2. ROLE OF THE REGULATOR

18. The SRA has taken steps to distance itself from the perceived "pro-solicitor" stance of the Law Society. Indeed, the SRA has publicly blamed many of the failures of which it has been accused on the legacy and policies it inherited from the Law Society. This position is evident in Mr Smedley's report on his review of corporate regulation. The SRA now takes every opportunity to remind the public and the profession that it is a public interest regulator. Whilst CWHLs has no doubt that the SRA must be a public interest regulator, we have concerns about what that phrase appears to mean and about the SRA's commitment to the principles of better regulation. We will return to this point later.
19. In our view, regulation cannot simply be investigation and enforcement relating to breaches of the rules; it must encompass a commitment to ensuring a proper understanding of the rules and to better education and information to enable solicitors to comply. The vast majority of solicitors seek to comply with the rules; more breaches occur through inadvertence or overwork than by deliberate acts. It is, however, right to recognise that there are those among our profession who have a deliberate intent to defraud clients or their own firms and that no amount of regulation or oversight will ever lead to a profession completely free of fraudsters. It is our responsibility to educate our own members and to see that these people are expelled from the profession promptly.

20. Where breaches occur through inadvertence or overwork, the regulator should not automatically adopt a prosecutorial stance. Whilst it should not excuse poor performance, it should consider whether working with the solicitor in question to improve future performance may be a more effective step in the public interest than formal prosecution. The SRA has made some headway towards such approaches by the introduction of regulatory settlement agreements but its approach is let down by its insistence on the publication of the agreement on its website and the long periods between the investigation stage of disciplinary proceedings and the prosecution of any misconduct found. It is fair to say that many solicitors are fined or suspended by the Tribunal many years after the misconduct occurred. One wonders what potential damage could have been caused by their lack of understanding of professional rules in the interim period.
21. It is our view that many of the common failings we are now seeing and the apparent breakdown in the relationship between the profession and the regulator can be attributed to the trend towards regulation being carried out by “career investigators” – those without a proper understanding of the practical implications of being a solicitor, whether in private practice or in-house, and to an extremely adversarial approach on the part of the SRA. It should be noted that even HM Revenue & Customs, when dealing with issues as serious as (if not more serious than) many of the issues investigated by the SRA pursue a compliance focussed approach to promote co-operation. Whilst non co-operation is dealt with severely (and rightly so), there is no automatic presumption of a failure to co-operate.
22. Members who regularly deal with the SRA note that the SRA tends to write to solicitors in an aggressive manner, demanding information and explanations within 14 days, notwithstanding that the SRA may not have communicated with the solicitor for many months – or even years – before the letter is sent. The SRA process is bedevilled by delay and a failure to communicate with those it regulates.
23. By way of example, the SRA investigation letters invariably “stress” that no conclusions have been drawn but often enclose forensic investigation reports which use headings such as “inappropriate use of client account” or “misleading

costs information.” The use of such headings may create the impression that the solicitor is guilty until proven innocent and greater care should be taken to avoid descriptions which may be unnecessarily pejorative. It is small wonder that solicitors, generally facing no small amount of everyday stress, can be pushed to the edge of their tolerance by the aggressive tone of correspondence received.

24. The role of the regulator should be primarily to promote and assist in compliance; this requires a good relationship with those it regulates as well as fair and transparent policies. The investigation and prosecution of misconduct is a secondary, albeit important, role which should be made easier by the proper execution of the primary role. Promoting and encouraging compliance, as well as simplifying and clarifying rules of conduct, should minimise technical and inadvertent defaults allowing the investigative branches of the SRA to focus more swiftly on serious and deliberate breaches. Better education amongst professionals and the encouragement of the highest professional standards should also result in each member of the profession taking a more active approach to compliance, which must be to the overall advantage of the profession.

3. CURRENT CHALLENGES IN PRACTICE

25. The legal profession is entering a period of rapid and unprecedented change. At present 2 major concerns face the legal profession: the current recession and associated banking and financial crisis; and the changes under the Legal Services Act 2007. The former presents practical difficulties and particular short term regulatory problems, the latter raises unique opportunities as well as the possibility for unprecedented abuse of our legal system.

The Recession

26. It is perhaps somewhat ironic that the regulatory issues thrown up by the recession could not have come at a more opportune time for the purposes of this review. Whilst the profession is suffering financially and emotionally, there are

important lessons which we can learn for the future – assuming, of course, that we all survive the downturn.

27. It is already clear that many solicitors have become involved in schemes which appeared to have sound commercial reasoning but which, with hindsight, can now be seen to have been - to a greater or lesser extent - fraudulent. Some of the solicitors who have been involved in such transactions will undoubtedly have known exactly what they were getting into and will have acted deliberately and dishonestly. Many more solicitors will have been duped by colleagues, clients and/or other professionals into being an unwitting part of the transaction often for the purposes of lending it legitimacy. These are the people, particularly in smaller firms who would have benefited from clearer education and guidance. Whilst the fraudsters become ever more sophisticated, the profession and the regulator should not be complacently resting on their laurels assuming that the safeguards in place will suffice.

28. There is a failure in the education and training of solicitors, both in the formal education of younger solicitors (who in the current recession may never experience working life) and in the lack of any requirement for more senior solicitors and partners to undertake specific refresher training on their professional regulatory obligations. In the absence of adequate education and training, the difficult times ahead may prove too much for some members of the profession.

29. We must not underestimate the effect of the recession on in-house solicitors. Where employers seek to reduce costs, legal expenses will be high on the list of potential savings and in house solicitors may face pressure to cut costs or cut corners and advise on matters outside of their area of expertise. Maintaining the standards of the profession becomes increasingly more difficult when those standards are unclear.

Legal Services Act

30. The introduction of the sweeping changes in the Legal Services Act creates an ideal opportunity for our profession to take stock of where it is now and where it would like to be in the future. The concept of firm based regulation is novel to

many solicitors and should be regarded as a positive step towards recognising the commercial aspects of legal practice such as the extremely limited role often played by junior and salaried partners in connection with policies and practices of the firm beyond their own department. The move should allow the regulator to place blame for misconduct where it lies without affecting the disciplinary history of wholly innocent partners. This is not to say that the SRA should abandon the principles of strict liability but rather to suggest that flexibility will enhance the interests of justice by ensuring fair outcomes.

31. The introduction of new forms of practice, including legal disciplinary partnerships and alternative business structures will present novel challenges for both regulator and regulated. The possibility of “regulator shopping” may result in disparate standards with firms decamping to regulators with less stringent requirements for commercial reasons. It is all the more important for the regulator now to strike the right balance in performing its duties otherwise there may be a risk of large scale defection, particularly as it will no longer be an absolute requirement for partners to be solicitors. If such defection occurred on a large enough scale, the regulator may not have sufficient resources at its disposal to operate efficiently, potentially placing the overall system in crisis.
32. It is essential that the regulator of solicitors, be it the SRA or another body in future ensures that there is a level playing field when formulating rules. The purpose of the Legal Services Act was to promote competition in the legal services market, it is not for the SRA to stifle that aim through unnecessary regulation or by placing too great a burden on solicitors in comparison with other branches of the profession. If maintaining professional integrity requires that we are subject to a higher standard than other branches of the profession, the SRA and the Law Society should be robust in ensuring that the public is aware that solicitors are held to higher standards of accountability.
33. In the context of “regulator shopping,” it is important to bear in mind that the regulators of each branch of the legal services market have a distinct approach. The approaches of the different regulators, as well as our foreign counterparts, have to be considered in order that we can work together, both within the English

legal services market and on an international footing, in an increasingly diverse and international profession. Regard should be had in particular to the issue of conflicting deontology in a market which is increasingly concerned with cross border transactions and disputes and international rights of practice.

4. INVESTIGATION AND ENFORCEMENT

34. This is the area in which the SRA attracts the most criticism. Regulated persons who have been subject to the attentions of the SRA are shocked at the treatment that they receive, one of our number was recently informed by a solicitor under investigation that suspected criminals are treated far better than solicitors in that they are offered legal assistance and entitled to know the charges against them. There are also limitation periods in respect of many criminal offences. This is not so in the regulatory context - with some justification, but there can be no reason for pursuing solicitors – and putting their health and the interests of their clients at risk – by dilatory prosecution and unnecessary prosecution of minor infractions. CWHLs members report that there is a perception within the profession that the SRA will prosecute minor offences in an effort to justify the resources put into an investigation. This is clearly damaging to the relationship between regulator and regulated.

35. The SRA has adopted its current stance on investigation and enforcement against an unfortunate background. The political backlash against unethical practices by solicitors as well as the threat of the removal or reduction of self regulation has created something of a monster. Whilst well intentioned, the SRA has allowed itself to be distanced too far from the profession and the day to day difficulties faced by solicitors. A lack of understanding of the issues facing most members of the profession coupled with apparent disdain for those it regulates have created the unfortunate gulf commented on by Mr Smedley in the course of his report into regulation of corporate work. The “check box” mentality identified by Mr Smedley is an issue of general concern.

36. The SRA may investigate an allegation of misconduct many years after the event based only on paper records and partial recollection. Notwithstanding the obvious difficulties in maintaining fairness in these circumstances, it is the impression of the profession that there is a presumption of “guilty until proven innocent.” This is reflected in the tone of SRA letters, the aggressive attitude of some prosecutors and investigators and the secrecy in which the policies and procedures of the SRA have, until recently, been shrouded.
37. The SRA has made remarkable progress in some areas of investigation and enforcement and it should be applauded for its efforts and the laudable principles to which it aspires. There are however many other concerns which must be addressed and, regrettably, some of these issues have seemed beyond the reach of the SRA. Indeed, there is some suggestion that the political pressure driving the SRA in certain of its endeavours has resulted in the concept of “regulation for regulation’s sake”, in other words, the need to be seen to be doing *something* in order to appease critics rather than genuine regulation in the interests of the public and the profession.
38. CWHLs believes that the key issues are:-
39. **Transparency:** this includes publication of all policies as well as the publication of objective standards – such as the SRA’s formal understanding of the meaning of “public interest” – to achieve consistency in decision making and to enable solicitors to have a proper understanding of their obligations. Whilst the SRA is making progress in making some of its policies transparent, there remains a resistance to providing relevant information openly and in a timely manner.
40. **Proportionality:** The SRA must be robust in ensuring that the decisions it makes are proportionate. As recently as December 2008, the SRA adjudicators were criticised by the Master of the Rolls for failing to ensure that the test applied in deciding whether to impose conditions on a solicitor’s practising certificate included the relevant test of reasonableness and proportionality. The SRA has publicly conceded that it is not possible for solicitors to comply at all times with all relevant rules. Against this background, the issue of proportionality is of key

concern to the profession. Furthermore, with the advent of the SRA's new powers and the possibility of abuse of those powers due to their nature, it is vitally important that safeguards are in place to maintain proportionality in regulation.

41. **Communication:** The SRA routinely demands answers from solicitors within 14 days or 21 days in respect of conduct matters. It is often the case that the solicitor will not have heard from the SRA for many months prior to the demand for information and there is no real communication between the parties. The solicitor, having assumed that nothing is amiss following six months or more of silence from the SRA will be understandably aggrieved to receive a lengthy forensic investigation report. Opening lines of communication would assist the solicitor in correcting any areas of bad practice as soon as they are identified and would prevent the stress and anxiety caused by not knowing what may happen and when.

5. AN OVER-REGULATED PROFESSION?

42. As noted above, the Solicitors Code of Conduct, its associated guidance and supporting notes runs to over 300 pages of text. While Sir David Clementi recommended a move to more principles-based regulation, this has yet to be forthcoming. Much of the detail of the previous rules has been retained, albeit in the form of guidance rather than binding provisions but one must ask whether such changes are actually significant in any meaningful way. There has always been an argument that the solicitors' profession really needs only Rule 1 and all other rules flow from the manner in which Rule 1 has been applied and interpreted in successive regimes.

43. Solicitors are really not all that different from licensed conveyancers in their dealings with clients and one must consider whether the mass of regulatory detail really is necessary to ensure clients are protected. In-house and government solicitors in particular are likely to be confused by the mass of detailed rules which cannot or may not apply to them. That said, it is vitally important, in the face of an uncertain future for the profession to maintain the highest standards

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and the role of the regulator is not to be underestimated. It is also of crucial importance that the concept of being a “solicitor” is not corrupted dependent on employer or work area. The regulator must set standards which are applicable across the board. The more detailed the rules and regulations, the more likely it is that exceptions will need to be created and the more scope there will be for confusion and divergence of standards.

44. CWHLs is in favour of proportionate and timely regulation which has due regard not only to the mistakes of the past but also to the lessons which the profession should be learning from them. It is our position that the quantity of the rules is less important than the quality of the principles underlying them and the understanding of the individuals applying them and striving to comply with them on a day to day basis.

PART II: THE IMMEDIATE FUTURE AND THE LEGAL SERVICES ACT

6. NON LAWYER MANAGERS AND THE EXPANSION OF THE LEGAL SERVICES MARKET

45. The introduction of approved non-lawyer managers is a major change in the provision of legal services and it marks the first major step towards the liberalisation of the legal services market as envisaged by the Legal Services Act. The current limitations on the role played by non-lawyer managers are essentially a short term measure and will effectively be swept away with the advent of alternative business structures when these come into being. It is difficult to assess the short term impact of non-lawyer managers however their introduction should be regarded with a certain amount of caution.

46. Whilst a certain number of non lawyer managers are likely to be those who have extensive legal training but have not been able to become partners such as legal executives and barristers, there will be an increased risk of “sham” arrangements to facilitate organised crime and fraud. Opening up the legal services market is not without risk and the regulator’s job will be made increasingly complex through the differing layers of regulation and the expansion of regulation to employees and non-lawyer managers.

7. ENTITY BASED REGULATION

47. Our members are not in complete agreement on the prospect of entity based regulation. We count among our number those who welcome the development as removing barriers to partnership and permitting a flexible approach and those who strongly dislike the suggestion on the basis that personal responsibility may be abandoned or because solicitors may be put in “double jeopardy”. By the time the review of regulation is complete, entity based regulation will be a reality. It is difficult to assess in how far personal responsibility may be avoided by the concept that the firm may be held responsible for misconduct and some regard the introduction of such policies as the first steps on a slippery slope.

48. We are united in hoping that the regulator will adopt a sensible and proportionate approach to the new regime and that those who abuse their position as solicitors will continue to be held to account, promptly and effectively. The issue of “phoenix firms” is a live one, as is the manner in which individual’s records may be affected by a finding against the firm in which they happen to be a partner when they may well be personally wholly innocent of the misconduct found. We must hope that the regulator will keep a close eye on the issues associated with entity based regulation, regularly consult with the profession and interested parties to ensure that the issue does not result in irreparable damage to the profession and use its new powers constructively to ensure that the public interest and the interests of justice are served.
49. Regrettably, it is more likely, based on our members’ experience with the SRA and those under investigation, that increased confusion will reign, at least for a time and litigation will arise. Unfortunately, by the time the confusion is resolved, it is likely that the issues will be obsolete and any guidance issued will be far too late in the day to be of any assistance.
50. The timely issuing of guidance is a serious issue which needs to be addressed by the regulator, whether the SRA or another. The Law Society has previously failed to take pro-active steps to educate and issue guidance on major changes to the law. This is perhaps part of the reason for the scale of the investigation into miners’ compensation claims and the seemingly unending controversy surrounding referral fees.
51. We feel that we should express our sincere hope that the regulator will act swiftly on issues thrown up by entity based regulation and will take a proactive approach to ensure that relevant guidance is distributed in a timely and user friendly manner to the profession.

8. PUBLICITY

52. A substantial part of the SRA's expressed commitment to transparency is its desire to publish details of the regulatory action it is taking. We have previously expressed our profound concerns to the SRA about its publication policy. Whilst we do not wish to rehearse potentially irrelevant arguments here, we feel that it is important to address certain concerns about the manner in which publicity concerning regulatory and disciplinary action is handled.
53. Our first, and most pressing concern, is the lack of adequate publication of Tribunal Findings. Although the findings are published to the parties and are available on the internet, they are not available in any searchable database. The possibility of a potential client locating a copy of tribunal findings is slim and there is a real risk of inconsistency in circumstances where those appearing before the Tribunal cannot review previous similar cases. Whilst in some instances, this is immaterial since a decision must be made on the facts, there is a real issue when it comes to proper construction of the law. It is not only possible but probable that questions of law will not be consistently answered in view of the wide differences in approach between advocates before the Tribunal. A proper database of Tribunal decisions would resolve this issue, although it must be borne in mind that the Tribunal would not wish to be taken to every decision it had ever made in relation to breaches of accounts rules!
54. We also have concerns about the standard of publications and the potential infringement of both the Data Protection Act and Human Rights provisions. These points have been put direct to the SRA and we do not propose to rehearse them here. It is sufficient for these purposes to highlight that the publication policy is of extreme concern to members, it is likely to lead to more contested decisions and appeals and it cannot be objectively said to be operating in the public interest when one considers the nature of publications made to date.
55. Transparency in the decision making process is important but not at the cost of proportionality and effective regulation. It is important for the SRA to ensure that its activities are conducted properly and openly but publication of regulatory action against individual solicitors is not the correct way to achieve that aim and indeed, is counterproductive.

9. MULTI DISCIPLINARY PRACTICES AND ALTERNATIVE BUSINESS STRUCTURES

56. At this stage, there is little that can be constructively said about alternative business structures. Many in the profession will, quite naturally, regard them with suspicion. Others will welcome them as commercial opportunities. We must not lose sight of the fact that the introduction of Alternative Business Structures and Multi-Disciplinary Practices may have far reaching consequences for the profession and others involved. Solicitors traditionally are fiercely protective of their collective professional reputation and the tensions inherent in any firm subject to possible action by multiple regulators are probably enough to prevent all but the most determined from considering multi disciplinary practices on a small to medium scale as realistic in the short term.

57. When the SRA publishes its proposals as to how such firms should be regulated, and the associated cost, the issues will be clearer. For now, the accountants and other professionals we have spoken to concerning this issue have expressed a certain horror at the potential prospect of such practices being subject to overarching regulation by the SRA.

PART III: IMPROVING THE PROFESSION

10. EDUCATION AND TRAINING

58. We have commented above that we believe that there have been failures in education and training. We believe that regulation cannot simply be equated with enforcing the rules made, there must be a system whereby compliance is promoted through proper education and communication.
59. The first key point which must be addressed is the issue of consistency in law degrees and the Graduate Diploma in Law (or Common Professional Examination). A wide range of Universities offer qualifying law degrees and the GDL or CPE. The quality of law degree awarded by various institutions varies widely and the issue is exacerbated where periods of study or qualifications obtained abroad are recognised. The effect of the diverse standards applicable to formal qualifications is that there is no way for law schools and employers to ascertain the foundation of education upon which they are building. This results in potential gaps in knowledge and/or the inattention of bored students and trainees. Certain foreign jurisdictions have a state examination covering all key areas of law which students are required to pass before admission to the bar. It may be that a standardised assessment of this nature could replace the concept of the qualifying law degree or the GDL/CPE.
60. We take this opportunity to express some concerns about the current system of Continuing professional development. Whilst the system is sound in principle, it is open to abuse and there are few safeguards to ensure that appropriate training is obtained. Many solicitors will rush to undertake any course available in October, in a blind panic because they have not completed sufficient CPD hours. Some of the profession regard CPD as an inconvenience rather than an opportunity to refresh or obtain knowledge which may assist them. We feel that there should be stronger safeguards in the CPD system. There should be greater clarity as to what training is appropriate and the SRA should take the opportunity to ensure

that everyone in the profession obtains proper training on, for example, key changes to the rules.

61. CPD providers should also be subject to closer review and there should be a set of objective standards with which providers must comply.
62. There are many potential routes which the SRA could adopt to ensure that solicitors maintain up to date knowledge of professional standards and the accounts rules. The SRA could take advantage of the CPD system to impose an obligation on firms that, for example, each partner must attend accounts rules refresher courses on a five yearly basis.
63. In relation to major changes such as the Code of Conduct, the SRA could have enclosed a letter with each solicitors' practising certificate explaining that each solicitor would have to attend training on the provisions of the Code of Conduct and that the following year's practising certificate would not be issued unless and until a certificate of attendance was provided.
64. The SRA has developed email newsletters which could be used to improve communication with the profession and could take advantage of those newsletters to offer updates on compliance.
65. The annual accountant's report or, in future, the renewal of a firm's registration could require a partner to certify that certain key aspects of training have been undertaken.
66. It should be noted that there is already a mandatory requirement for every junior solicitor to attend the Law Society Management Course Stage 1 in the first three years of practice. Overseeing mandatory CPD requirements should not place too great an administrative burden on the regulator.
67. Finally, on this topic, we would wish to highlight that there should be a mechanism for issues of general concern to the profession to be determined promptly, if necessary by the High Court, and for the result to be communicated

effectively to the profession in order that any misunderstanding of the rules is contained and controlled before it becomes endemic.

11. THE BETTER REGULATION PRINCIPLES

68. CWHLs believes that the better regulation principles are important. The current perception is that the SRA is not living up to the requirements of the better regulation principles. Solicitors complain of an unnecessarily heavy handed approach together with an unrealistic attitude to the issues facing solicitors. The SRA has made efforts to improve the transparency of its processes and procedures and it should be commended for this as well as the move towards a more targeted risk based approach. There is definite movement in the right direction in some areas. There appears however to be a blinkered refusal to grasp the nettle on issues of proportionality and accountability and there remain serious concerns as to consistency. To a certain extent, the latter could be explained by the lack of proper information as to previous penalties imposed in similar circumstances and the fragmented nature of the decision making process. The SRA would be the first to admit that their databases leave a lot to be desired in this respect.

Transparent and Targeted Regulation

69. We accept that the SRA is making progress towards a more transparent and targeted system. We applaud the intent behind those moves and would comment only that the SRA needs to maintain a constant review of the position to ensure that the right issues are addressed in a timely manner. For the present, we would like to see the SRA publishing an objective list of criteria defining what factors must be taken into account in considering action in the public interest, what factors may be taken into account and what factors should not be taken into account. This is all the more important as the SRA has powers to depart from its own procedures when it considers that it is in the public interest to do so. It is our submission that the “public interest” should be capable of being objectively defined in order that the regulator can ensure consistency of approach.

Proportionality and Accountability

70. The SRA has developed an institutional mindset against being accountable for its actions. The Tribunal will rarely, if ever, make an order for costs against the SRA and the “comfort zone” created by prosecuting with apparent impunity has led to complacency about accountability. Many of the SRA’s processes are not subject to any appellate jurisdiction and there is, in practice, no remedy for any solicitor aggrieved by the experience of a lengthy investigation which has resulted in no findings and only limited prospects of obtaining any restitution where the solicitor pursues a successful appeal. The SRA is generally not held accountable for the inordinate delays seen in resolving allegations and there is little impetus on it to improve its performance.
71. The SRA implies that any shortcomings are forgivable as protection of the public is paramount. Whilst there is no doubt whatsoever that the SRA does have an important and difficult task, this does not mean that it should be entitled blithely to ignore the rights of solicitors and their responsibility to those it regulates. Furthermore, the delays which have bedevilled the SRA processes are inherently dangerous to the public and to clients. It is patently obvious that people who are not fit to be solicitors should be identified and expelled from the profession as soon as possible for the benefit and protection of all concerned.
72. The mindset of the SRA appears to be that the importance of the role it is fulfilling means that it can ride roughshod over the principles of natural justice for the greater good. The argument appears to be that it should not matter how investigations are carried out if the end result is the right one.
73. The result of this mindset is that the SRA is dismissive of complaints by solicitors, pointing to its “record of wins” in the Tribunal and taking the view that the complainants are simply aggrieved wrongdoers who have been caught out. This is somewhat unfair in the light of the recent criticism heaped upon the SRA by the Tribunal for failing to give adequate guidance and for the extremely lengthy delays in issuing proceedings. The SRA does not appear to have taken any note of these criticisms – or at any rate, has done nothing about them.

74. The SRA needs to address the deficiencies in their system of accountability. To a certain extent, these concerns could be ameliorated by a more proportionate and open approach to regulation. If the SRA dealt with cases on a wholly disinterested basis, without regard to political pressures or the need to be seen to be doing something, the results would be more proportionate and consistent and the checks and balances which are absent in some aspects of the SRA's work would come into effect naturally. It should be noted that there are a number of checks and balances in the prosecution of cases before the Solicitors Disciplinary Tribunal and we do not suggest that there is an endemic lack of proportionality in the end result of the majority of cases. There is however a wide variation in the approaches of investigation officers, caseworkers and adjudicators and there is undoubtedly political pressure on the SRA as a whole. Failures in proportionality tend to be evident in the manner in which cases are dealt with before they reach the Tribunal.
75. It is fair to say that "proportionality" is, in itself, a fairly novel concept in English law. Whilst it has long been recognised by our European counterparts, English law has held to the belief that the principles of natural justice, together with the common law concept of reasonableness and the impartial observer test should be preferred. Against this background, there is little guidance on issues of proportionality and the regulator should compensate for this by setting objective standards – and keeping to them.
76. At this stage, we would highlight the specific issue of telegraphic transfer fees. The BACS system was introduced in 1996. Solicitors were charged by the bank for making the transfers and the charges were passed on to the clients. As time and technology moved on, the charges were decreased because the solicitors took on the administrative functions of authorising the transfer through dedicated computer systems.
77. During the 1990s and early 2000s it became prevalent for solicitors to charge an administration fee in addition to the bank charges. Provided that the fees are identified as profit costs, there is no mischief. The mischief which is now commonly alleged by the SRA is the solicitors' failure to separate out the

disbursement element from the profit cost element, although it is conceded that the total figure was generally specifically notified to the client. This issue came before the Master of the Rolls in October 2007 [No 8 of 2007]. The Master of the Rolls was eventually persuaded that there was some mischief in the misdescription but stated that it was mischief which did not carry much opprobrium.

78. Barely one month later, in a case before the SDT, the partners of a law firm were heavily fined by the SDT for having made “secret profits” in this manner. The Master of the Rolls’ comments were not put before the SDT, notwithstanding that they were clearly relevant judicial pronouncements which were within the direct knowledge of the SRA. In that case, the SRA was criticised for the lack of guidance on the issue. The SRA’s only response was to publish an article in the Gazette bemoaning the practice and highlighting the excellent work the SRA had done in obtaining the ruling before the SDT.

79. Since that time, the SRA has consistently raised the issue with many firms, they have still not issued any formal guidance and the approach taken in relation to the different firms varies to an astounding degree. Some firms have secured regulatory settlement agreements with the SRA (which are generally published on the SRA website for three years) in which they admit misconduct, agree to repay the “secret profits” and accept a reprimand, others have been referred to the SDT and still others have had internal sanctions imposed. The lack of consistency and the lack of accountability on the part of the SRA, notwithstanding the comments of the SDT are regrettable to say the least.

12. REGULATOR SHOPPING

80. The concept of entity based regulation is raising the somewhat vexed question of “regulator shopping”. The potential choice of regulator, together with the advent of alternative business structures could spell disaster for the SRA unless the regulator begins to understand the issues facing those it regulates. It certainly seems that the SRA expects to be the default regulator of choice for all entities providing legal services in the future however one must ask which of us, given

the choice, would elect to be subject to the current practices of the SRA? Even those who would be the first to advocate for a robust and independent regulator would shudder at some of the practices of the SRA.

81. We should not get too carried away with the concept of regulator shopping. Individuals wishing to be solicitors will still be subject to personal regulation by the SRA. This in itself could prove problematic in that there may be separate tiers of potentially conflicting regulation. This is an issue which needs to be addressed, coherently and openly.

13. "SOLICITOR" AS A BRAND?

82. In the future, the legal services market will be open to competition from other professions and other regulators. It is important that solicitors retain their independence and integrity in order to ensure that the interests of justice are met. Whilst it may be tempting to move to a regulator with a more easy going approach, one must ask whether there is a risk that standards might slip as a result.

83. It is time that the profession and its regulator worked together to ensure that the solicitors profession is a profession we can all be proud of for the protection of the public and in the interests of justice. The most important elements of the relationship going forward are to ensure proper communication between the regulator and the profession. We believe that simple steps aimed at keeping the profession informed could have avoided the divergence we are now seeking.

84. As stated above, we believe that there should, as far as possible, be a level playing field between solicitors and other branches of the legal profession. The regulator can assist in promoting such a level playing field. There will always be incidences where the solicitors profession must, by its very nature, be held to a very high standard of accountability. It should be made clear to the public that the "badge" of solicitor is not worn lightly and comes with a requirement to meet rightly high standards.

14. SUMMARY

85. We have set out above detailed submissions covering key areas of concern, both in the current legal services market and looking to the future. We hope we have made our belief clear that the solicitors' profession plays an important role in society and its regulator needs to be robust and independent. There are many failings at present and it is our suggestion that these should primarily be addressed through better training and communication, both for solicitors and the professionals that support and advise them.

86. To summarise our suggestions, we would be in favour of:-

- a system of accreditation for reporting accountants;
- mandatory accounts rules and management courses at regular intervals for those who are or intend to become partners;
- A review of the regulator's practices and procedures to ensure proportionality and accountability;
- The introduction of safeguards to ensure that entity based regulation does not lead to the abdication of personal responsibility for misconduct;
- Greater communication and openness between the regulator and the profession;
- A system to ensure that issues of general concern to the profession are addressed in a timely manner and fairly;
- Written guidance from the regulator and/or the representative body to assist in compliance;
- Safeguards to ensure consistency and a level playing field in circumstances where multiple regulators may be given jurisdiction.

87. The most important considerations moving forward are how best to educate the profession and ensure that it is kept up to date and relevant in a fast changing market place. The regulator needs to ensure that appropriate safeguards are in

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place to ensure that the profession does not get left behind in the marketplace and to ensure that the changes do not lead to a slipping of professional standards.

City of Westminster And Holborn Law Society

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