

CWHLs Response to SRA Consultation Paper 16

Legal Services Act: New forms of practice and regulation

This is the Response of the City of Westminster & Holborn Law Society to the Solicitors Regulation Authority Consultation Paper 16.

The Consultation Paper speaks of a “New Approach” to regulation. At present, the SRA has to apply a “one size fits all” approach to regulation of a diverse solicitors’ profession, covering all kinds of firms, from the smallest sole practice to the largest multi-national corporate practice.

We accept that the SRA, as regulator, should have the flexibility to apply appropriate regulation to all kinds of practices and to be equipped to be able to adapt to new forms of practice, LDPs in the immediate future and ABSs in the near future.

The Chair of the SRA Board has said that he appreciates the danger of “consultation fatigue” and we are sure that we and other consultees have been affected in this way by the scope and volume of the regulatory changes so far consulted upon and introduced by the SRA.

The SRA has introduced this Consultation Paper saying that its proposals are designed to concentrate resources on dealing with serious risk and

“... to encourage law firms to tackle risk themselves wherever possible, reducing the overall regulatory burden and allowing [the SRA] to concentrate upon those who can’t, or won’t put things right. To do that, we need to build a new relationship between the SRA, as regulator, and the firms we regulate”.

We applaud these objectives, notwithstanding our sense that the SRA’s actions hitherto have seemed to us not always to have been in that spirit and we continue to fear the burden of excessive, oppressive or unreasonable regulation. That is particularly so given the economic pressures we all now face, even though we recognise that precisely those pressures may have swung the pendulum back towards greater regulation in the financial sector and elsewhere.

We accept that the SRA has a public interest duty to regulate the solicitors’ profession properly and proportionately but it would be most unfortunate if that disadvantaged our profession as against our competitors who may be facing lighter - or no - regulation.

Paragraph 4 of the Consultation paper says that the SRA recognises

“... that the vast majority of firms wish to act ethically and to be compliant with the rules and regulations. Firms who respond positively to the new relationship can expect lighter regulation.”

We hope that this will be so but we question the notion implicit in this paragraph that only those firms who respond positively to this approach wish to act ethically and be compliant. We regard this statement as unfortunate. In our view the vast majority of firm and our members already comply with the SRA’s regulatory processes and consider themselves ethical. It seems to us somewhat heavy handed to suggest that compliance with the new

relationship will result in lighter regulation. Our members belong to a profession; the SRA should not in our opinion, lose sight of this.

We are concerned at the effect upon removal of the £5,000 cap on the SRA's power to fine. Unlimited powers are dangerous and should be resisted.

While we understand the SRA's motives for promoting firm-based regulation, it seems to us that the Consultation Paper downplays the negatives consequences.

In our view the whole concept of firm and manager responsibility for professional misconduct of individuals is flawed, analogous to muddling up civil and criminal responsibility. For example, if an individual gets round a firm's accounts system and steals client money, then the partners are liable to the defrauded clients at civil law. We do not quarrel with that. Beyond that however, it is absurd to say that the partners in a large firm have any moral responsibility for the theft - or should suffer any professional sanctions – provide always that they had a perfectly good system in place, and that they put the depletion of client account right as soon as they discovered it. No firm of any size could operate on the basis of all the partners checking the accounts system. Proper delegation is a sign of good management, not of misconduct.

If we end up with the position that entirely innocent solicitors are found guilty of professional misconduct, they will attract the sympathy rather than opprobrium from fellow practitioners, giving no benefit to the profession or the public. In our view, the SRA should concentrate on the rogues and those who really pose a risk, as indeed is their stated intention in the introduction to this Consultation Paper. It will mislead the public as to who to avoid if such findings are publicised, and will give clients no extra protection. Indeed, it could have the reverse effect of discouraging firms from reporting problems promptly and of discouraging good individuals who might otherwise wish to take on management responsibilities.

We deal with the numbered questions posed by the Consultation Paper as follows:

Question 1

What are your views on the suggested criteria and decision tree?

- a) The criteria - Annex 2

It seems to us that most of these criteria are reasonable. However, the category "personal responsibility at law" needs to be clearly defined; surely this is already covered by the other criteria heads and if anything else is envisaged it should be clearly stated. The last two categories are too wide and subjective. Either SRA policy applies or it should be struck out. How is it proposed to define issues of particular sensitivity or importance in the last category? The problem with all such subjective exercises is that they are essentially personal and liable to prejudice. It should not in our view be included.

- b) The decision tree

This is somewhat confusing. For example, why, if the matter does not require SRA consideration, is there a referral to the firm? Does that mean that the firm itself is required to deal with it?

In what circumstances will a reference to the firm be made? Comparative examples need to be given as measured against the list under the head “fitness to practise issues”. In that list the words “or repetition” should be deleted.

Question 2

What are your views on the adoption of a new core duty defining a firm’s relationship with the regulator?

We are against this suggestion and do not consider there is any good reason for it. There is a real danger that a succinct forms of words similar to the FSA principle may, in fact, create a “catch-all” situation where it will be difficult or impossible to defend a complaint by the regulator.

We agree with paragraphs 17 and 18. As to paragraph 19 it is noted that the SRA seeks to impose a new duty on firms. Individuals are already subject to strict regulation. We do not consider that a further bureaucratic level of regulation should be imposed in this way. There is a clear danger in over-regulation and an uncritical burdening of the profession will not work. At this time the solicitors’ profession is in need of positive and sensitive assistance rather than government led prescription. Of course firms of any size should have heads of legal practice (compliance) and finance and administration. That is axiomatic and will reinforce the process of regulation.

Question 3

Where a disciplinary penalty has been applied to a firm, do you agree that it is important for the record to show those who were the managers in a firm that has been disciplined?

We are emphatically against this suggestion, for the reasons given in our introductory comments above.

The Society has already expressed its material concerns about the publication of disciplinary records in its Response to Consultation Paper 14, and for the need for proportionality.

In any case, subject to that:

- a) It is important to clearly define the term “managers”; some managers would clearly be involved far less in management than others. In principle, therefore, and for the reasons already give, we believe that only those directly involved in circumstances giving rise to disciplinary findings should be include in any record;
- b) The individual(s) responsible for acts giving rise to such decisions should remain the primary objects of concern; to involve other innocent parties under a doctrine of collective responsibly would in our view be statist and flawed.