



The Law Society

**Solicitors Regulation Authority consultation on  
transforming the SRA's regulation of legal services**

Law Society Response

27 July 2010

supporting  
solicitors

## Introduction

The Law Society supports OFR in principle, as a mechanism by which the over-prescriptive regulation currently applied to the profession can be relaxed where appropriate.

It is essential that the establishment of OFR is not undermined by SRA treating non-compliance with the “indicative behaviours” as suggesting failure to achieve the required outcomes. To give indicative behaviours a semi-mandatory status would indicate that the avowed move away from over-prescriptive regulation has not been realised in practice and that the essence and spirit of a genuinely outcomes and principles based system has been lost.

The Law Society considers it imperative that, before OFR is introduced, there should be a significant and demonstrable change of approach within SRA so as to emphasise a move to a regime that is based on securing compliance rather than imposing disciplinary sanctions - except in cases of very serious or flagrant breach.

The SRA need not and indeed must not wait on a change in the regulatory system to demonstrate a change in regulatory culture. The Law Society and the profession will expect to see SRA acting under the current system in the manner in which it proposes to do under OFR. There is no obvious reason why this cannot be done with immediate effect particularly so far a prosecution policy is concerned, subject to staff training.

The Society recognises that bringing about an internal culture change is not a quick or easy process. Outside experts have suggested that it is a matter of years rather than months. We are currently not satisfied, on the basis of the information before us, that SRA can realistically expect to achieve the culture change sufficiently in time for implementation of OFR by October 2011. It is far more important to introduce OFR successfully, on the basis of proper preparation for implementation, than it is to meet an arbitrary deadline for doing so.

The resource implications for the proposed change constitute an area of major concern both in terms of the cost of change and ongoing financial commitment. We do not believe that the overall cost to the profession – including cost of compliance as well as SRA’s costs - should be permitted to rise as a result of the proposed changes. Accordingly, we remain concerned that the process of conducting a cost benefit analysis on the proposed changes followed rather than preceded the decision to implement substantive change.

We are also concerned about the SRA’s undue emphasis on ‘client experience’ as a thread running through the consultation. As previously indicated in our response to the SRA’s consultation entitled Agenda for Quality, while we believe that it is, of course, important for solicitors to meet their clients’ legitimate expectations, we do not feel that it is for the SRA as regulator to seek to secure customer satisfaction as such. Rather it is SRA’s responsibility to ensure an adequate level of service within the auspices of the regulatory regime.

## Questionnaire form

### 1. Do you have any comments on our goals and vision for outcomes-focused regulation (OFR)?

We believe that the regulation of the profession should be more risk-based and proportionate and less prescriptive. As such, we are particularly keen to see the SRA concentrate less on detailed rules and more on high risk activity. The approach set out in the paper appears, broadly, to move in this direction.

Given our position on risk-based regulation, the SRA's proposals to concentrate its resources on those firms that pose a serious risk are welcomed, as is a new approach to supervision that encourages and helps firms to comply. We believe that where appropriate, increased scrutiny of firms earlier in their life-cycle has the potential to prevent problems later on, which are often more costly to resolve and have a greater impact on clients. We are therefore gratified that the SRA will take a more risk and evidence-based approach to authorisation of firms and individuals.

We are, however, concerned about the SRA's evident focus on the quality of the client's experience. The aim of the regulator should be to ensure that the professionals it regulates provide a competent level of service in compliance with the regulatory regime in which they operate and do not abuse their position of trust. It is neither the role of the regulator to seek to ensure a level of consumer satisfaction nor to prescribe the nature of the customer 'experience'. This is and should remain the role of the market, subject to the intervention of the Legal Ombudsman where appropriate.

The Law Society also has concerns about the SRA's ability to implement the proposed changes in such a short timescale. While we recognise that the SRA has made progress in changing their organisational structure, we believe that the change in culture required to successfully implement OFR will still be very difficult to achieve in the time allowed. It is, however, essential that this cultural change is palpable before fully implementing OFR. To seek to regulate with a focus on outcomes within the SRA's current culture and approach to supervision and enforcement, is likely to result in 'regulatory ambush' and critically, a further loss of trust between the regulator and the profession.

The proposals regarding the structure of the Handbook indicate that the avowed move away from prescriptive regulation to one based on outcomes has not been fully realised. It appears from the information provided, that indicative behaviours are to be in effect, semi-mandatory, having 'evidential weight' in any assessment and determination of whether outcomes have or will be met. This would seem to us to be contrary to the essence of both outcomes- and principles-based regulation, where the result and the spirit in which it is achieved is key rather than the detail of the method through which it is reached. The Law Society appreciates the need for, and benefit of, providing 'bright line' guidance to the profession, but questions why indicative behaviours should be given this additional weight. The same level of benefit could be derived from indicative behaviours sitting as pure 'guidance'. Firms that choose to deviate from it should be judged according to the extent to

which they can demonstrate that they meet the principles and outcomes without an initial assumption of presenting an elevated risk. To operate OFR as the SRA currently proposes risks a position where firms will be very reluctant to deviate from what will be viewed as the 'safe path'.

Where the SRA determines on the basis of risk assessment that greater prescription is necessary, it should elevate an issue to the status of a rule or mandate some of the activity that is currently expressed as indicative behaviour. Where this is not the case, the SRA should allow firms the genuine freedom to be innovative in meeting the outcomes. In this way, the Law Society envisages that some elements of the Handbook might be largely prescriptive, others largely flexible and some a balance between the two, dependent on the relative levels of risk identified with that activity.

To do otherwise, in our view will have the effect that the new Code will be very similar to its predecessor in terms of actual and implicit prescription and detailed requirements. This would negate the point of implementing outcomes focused regulation and in those circumstances; we would question whether it is worth the cost and resources to do so.

We would also question the SRA's approach to guidance. Guidance should be merely that, something that firms may find helpful but which they are not bound to follow. We do not believe that the fact that a firm follows guidance, or not, should be relevant to any regulatory decision, as implied in the consultation document.

The amount of resource required for the proposed change of regulation is still very much open to question. We are also concerned about the cost of changing the system and the ongoing cost of some of the proposals. We do not believe that the cost of regulation to the profession should rise. We are therefore concerned that as of yet no cost benefit analysis is available and indeed that such analysis as is being undertaken follows rather than precedes the decision to make such substantive changes.

## **2. Are there particular things we should consider to ensure that consumer protection remains central to our regulatory approach?**

Client protection is a key role of a regulator and should be central to the approach of the SRA. However; this should not be confused with the quality of the client experience. Generally, regulators are put in place where there is a disparity in the power between the provider and the consumer. In the case of solicitors, this disparity is caused by clients' relative lack of knowledge about legal processes. The regulator's primary role is to ensure that clients receive clear information about costs; benefit from a competent standard of work and that solicitors do not abuse their position of trust. A client may receive all of the above and not be satisfied by their 'experience' – whereupon, they may choose to use another solicitor. The SRA should be careful not to expand their jurisdiction to encompass something that should properly be regulated by the market and the Legal Ombudsman as appropriate.

We also believe that the SRA should be far more positive about the profession and the excellent service it provides the majority of clients. While we accept that not all clients are satisfied with their solicitor, it is also worth noting that the vast majority of clients are. Recent research commissioned by

the SRA showed that 93% of clients said that they were happy with their conveyancing solicitor's performance. In research commissioned by the LSB, only 10% of those questioned who had received legal advice within the last five years were dissatisfied with the service they received. Given the often difficult and contentious nature of the work solicitors carry out, these figures show a high level of client satisfaction. As such we query both the necessity as well as the legitimacy of the SRA's proposed regulatory interest in the area of customer experience.

**3. How do you think we should work with consumers to help them to understand our role as a regulator for the wider benefit of consumers as distinct from the Legal Ombudsman's role in facilitating individual redress where appropriate?**

Given the SRA's role as regulator, it will be important to manage client's expectations about the actions the SRA can take on their behalf. The SRA should make clear in any literature aimed at clients and on their website that complaints about poor service will be dealt with by the Legal Ombudsman. The SRA should also make clear that its role is to ensure that clients receive a competent level of service and not to consider the quality of the client experience.

**4. Do you have any comments on the key implications for firms set out above?**

Some firms will be understandably nervous about a new Code of Conduct being introduced. However, the SRA's assurances that those firms who are currently compliant will broadly remain compliant under the new Code are helpful. There are, however, some major changes in the regulatory system which will affect firms.

The SRA's new supervisory approach will be very different and as such the SRA should provide guidance about what firms can expect from the SRA, in particular when receiving a visit. The SRA proposes to focus on key issues rather than broad ranging reviews and as such, we would normally expect firms to be informed of the key matters the SRA plans to address. As noted above, it will be important that there is a culture change in the SRA before OFR is fully implemented otherwise firms will remain worried that the new system will be used to 'catch them out'.

The SRA will concentrate to a greater extent on the systems and processes firms have in place for managing their business. However, a proportion of firms do not have the necessary systems in place, such as those around compliance management, and will need support, guidance and time to put such systems in place. It will be important for the SRA to play its part in providing the help needed and also to recognise that firms will need to be given time to comply.

The annual report supplied by firms will be new to all firms and will provide data for the SRA to assess the regulatory risk posed by a firm. However, we have concerns over the data that was collected for the last renewals process. As yet, nothing has been said about whether that data has been analysed or if it was useful. The SRA proposes only to collect data where necessary and states that it will be mindful of the burden on firms. We hope this will be the case and trust that an analysis of the data collected recently and information

on its utility will be published shortly. We believe that the SRA should always be transparent about the purpose of data collection and ensure that firms are told well in advance about the data they will need to provide and in what format. The SRA should also be mindful that certain data, will most readily be available at set times of the year and plan its requests accordingly.

As noted in the consultation paper, there are risks for a regulator in collecting too much information. It can be very tempting to ask for large amounts of data when it can easily be uploaded from a website to a database. However, this can lead to a regulator becoming overwhelmed and important information being missed, as well as representing a burden on firms. For this reason, the SRA should be clear about the purpose of collecting each piece of data and the resource implications. The SRA should regularly review whether the collection remains justifiable. The SRA will also need to ensure that it has systems in place to ensure sensitive data provided by firms is kept confidential.

Given that the SRA believes the new system will be more efficient and perhaps save costs it would be helpful to know what will be cut to create these efficiency savings. The Law Society is particularly concerned about the SRA becoming overwhelmed with information and being unable to carry out its day to day regulatory functions. While it is possible that efficiency savings will be made once the new system is bedded in it is unlikely to be the case in the early stages and there might even be a need for additional resource. We would urge the SRA to consider this risk and how to mitigate it.

The change in emphasis from a prescriptive rules-based approach to more risk based approach will mean that firms will need to put in place systems to manage their compliance and to collect and provide data to the SRA. We would urge that this will be considered in the SRA's cost benefit analysis. We believe that providing data to the SRA will represent a particular burden on firms and the impact of this should be carefully considered.

The changes taking place in the SRA will clearly have a cost associated with them and this cost will be passed on to the profession. The SRA should consider the potential impact this will have on firms at a time when they will be facing greater competition and an uncertain economic climate.

**5. Do you have any comments on how the SRA and firms can work together to build the necessary degree of trust and confidence for the move to OFR?**

The successful implementation of OFR will require the cultivation of trust and respect between the regulator and the profession. Building the necessary level of trust and respect between the profession and the SRA will require work and commitment on both sides.

It is refreshing that, in recent roadshows, the SRA has acknowledged that its approach has not always been appropriate or proportionate. This has resulted in significant distrust of the organisation and it will be essential that the SRA leads the way by demonstrating to the profession that it is implementing its proposed ethos now. In the run-up to OFR, every incidence of firms' interaction with the SRA being conducted according to the existing rather than the new cultural norms will bring into question whether the new regulatory system can in fact be achieved.

**6. Do you have any comments on the central role of the risk centre in our move to OFR?**

The structure of the SRA is a matter for the regulator itself. However, regardless of the structure, it will be important to ensure that implementation of the new regulatory regime is consistent across the organisation. Having a centralised risk analysis unit may aid consistency but more important will be the demonstrable support and engagement of all senior managers with the new approach. The staffing of the risk centre will also be crucial to its success, as to be effective, it will need to be staffed by people who have experience of data analysis and risk profiling.

**7. Do you have any other suggestions for the activities the risk centre will undertake?**

See comment above.

**8. Will firms understand our need to receive information from them in order to undertake high quality risk assessment?**

Yes ☐

No ☐

In order for firms to understand the need to collect data it will be important that the SRA is able to explain why it needs that data and is able to demonstrate that it has taken into account the cost benefit of collecting that data before it makes the request. In the future, it would be helpful for the SRA to provide feedback about how data has been used and how the data provided has improved regulation and / or improved the cost efficiency of regulation.

On a more practical level, the SRA should also ensure that firms are informed of what data it requires and the format needed, well in advance of any data collection exercise. If firms are not informed well in advance about what is required, they may not be able to provide the data the SRA requires or the data may not be of the quality the SRA requires. Ad-hoc data requests should only be made under exceptional circumstances, once the SRA has explored all alternatives.

We would urge that where possible the SRA should not duplicate the collection of information. For instance, if a firm has Lexcel or ISO accreditation this will provide the SRA with information about the systems and processes the firm has in place. Therefore the SRA should use this data to inform its risk analysis rather than requiring firms to supply the data. We would also hope that the SRA will take into account accreditations that a firm holds when assessing their risk profile.

**9. Do you have any comments on our proposed approach to authorisation?**

We support the proposals for more rigorous checks and an evidence-based process for authorisation. However, the process should be proportionate to the risks posed by an individual or a firm. It would not be economic or sensible for smaller firms to put in place the type of risk management systems

that larger firms might need to put in place. When authorising firms, the SRA should be mindful of what is practical and reasonable for different sizes and types of firms.

The SRA's proposals to consider the firm's proposed structure, governance, systems of compliance and business model before authorising a firm are welcomed. We note that many of the risks perceived by the SRA relate to external influence and arrangements to obtain business (presumably referral fee arrangements). While we accept there are risks in these areas we believe that major risks also come from poorly thought-out and researched business plans, high levels of debt and inexperienced managers. The SRA should balance the understandable concerns it has over referral fees against other risks to the firm.

We do have concerns about one of the stated objectives of the authorisation process, namely the objective to ensure firms and individuals only supply legal services when they deliver good outcomes for clients. We are unclear as to what is meant by 'good outcomes' for clients. Many clients of a personal injury specialist would define a good outcome as winning a case and being paid compensation, yet it is not possible for a solicitor to win every case. We believe that the SRA should focus on the competent provision of legal services and not on client satisfaction.

We note with interest the SRA's comments regarding licensing traditional firms by activity. Any such change to the licensing system will need considerable consideration and discussion, which is unlikely to occur before ABS are licensed in 2011. Our contention is that ABS and non-ABS should enjoy a level playing field where possible. We would therefore assume that ABS with solicitor managers, like traditional solicitors firms, would be licensed to carry out all reserved activities unless there is a good reason why they should not be. It would seem wrong that a solicitor could qualify to practice in all reserved areas only to be prevented from doing so because they work for or manage an ABS.

The SRA has the power to apply conditions to firms' and ABSs' authorisation. Conditions are a powerful regulatory tool and can be used to help monitor a firm or an ABS. However, the Law Society has raised concerns in the past about the publication of conditions where they are intended to raise standards e.g. by requiring attendance at training courses, rather than to limit the practise of a firm or individual.

#### **10. Do you have any comments on our proposed approach to supervision?**

As noted previously, we welcome the move away from the current focus on detail to a more outcomes-based approach to supervision. We accept that in order to be effective, the SRA needs to focus on firms' risk management and quality assurance systems. However, we believe that the SRA should be assessing such systems on the basis of what is suitable and proportionate for the firm to put in place. This will vary with the size of firm, the type of work carried out and the qualifications and experience of those carrying out the work. The SRA should not have a 'one-size fits all' approach to assessment of these systems.

In the consultation paper, the SRA has identified the risk posed by the firm, the size of the firm and their risk management as three key factors on which it



will base its supervision approach. It would be helpful if the SRA could provide more information on how the size of a firm might change the supervision approach that the SRA will take. For instance, are smaller firms seen as posing a greater risk to the regulatory objectives and therefore likely to receive more intense supervision?

The consultation paper also states that the SRA will take into account the firm's

- positive engagement with the SRA,
- compliance history and
- ability and willingness to put things right

when tailoring its approach to the supervision of a firm. We are unclear what the SRA means by 'positive engagement' or how it intends to measure this indicator. We are also unsure how the SRA will consider compliance history given that non-compliance under the current, prescriptive regime may be deemed very serious while under the new approach it may not be deemed particularly serious or even constitute non-compliance.

We agree that a firm's willingness to put things right is an important factor for the SRA to consider. However, firms should not be penalised if they enter into a constructive dialogue with the regulator about why they believe they are compliant rather than immediately accepting the regulator's position. Regulators also make mistakes and thus firms must be able to challenge claims of non-compliance without fear that they will be penalised for legitimately advancing their view. This is particularly important in OFR, where it is the outcome rather than the method of getting there that should be the focus of the regulator. Firms should feel encouraged to be innovative in serving their clients, to try different methods and processes to meet the outcomes and to enter into a dialogue with the regulator about how they meet those outcomes. Firms should not be penalised for minor mistakes or they will not experiment with different approaches and OFR will effectively mirror the basis of the current regulatory system.

The SRA proposes to put in place permanent relationship management for large and/or complex firms. There is minimal information regarding what large or complex might mean and how firms will be selected to be permanently relationship managed.

The Law Society recognises that larger firms can present very different risks from smaller firms. For instance, the process for supervising work may be very different in a large firm compared to a small firm where partners and staff work together on a day-to-day basis. Thus different expertise will be required to effectively supervise them. When considering this issue, we have identified two areas of expertise required – expertise in the systems and processes used by large firms and expertise in the transactional work carried out by some (but not all) large firms. We believe that it will be important for the SRA to gain this expertise and to use it effectively and efficiently. We do not, however, believe that this expertise should be isolated within a small group to the sole benefit of 'large and complex firms'. Instead, we consider that it should be a flexible resource, established in such a way that staff with the relevant expertise work across the organisation, applying their skills where

needed. This may mean that staff, with expertise in transactional and international work not only work with large / complex firms but may also be involved in supervising or giving guidance to smaller firms carrying out international transactions on a case by case basis. Staff with expertise on the systems and processes used by larger firms might work closely with colleagues who habitually supervise smaller conveyancing firms, in order to effectively supervise a large firm that undertakes significant amounts of conveyancing. This may mean that many large / complex firms do not have a team that permanently manages them. However, it will mean that they are regulated by people who have the necessary expertise and that expertise is used efficiently across the SRA.

The SRA has stated that it also expects to put in place permanent relationship management for ABS. While this may be appropriate for some larger ABS on a similar basis to larger firms, it would be wholly inappropriate and wasteful for the significant numbers of ABS which are likely to be smaller firms.

The SRA will also put in place temporary relationship management for firms whom it believes may pose a serious risk to its objectives. We believe that temporary relationship management may be appropriate in certain circumstances, for instance, where a firm is in difficulties and intense supervision may help to ensure that clients do not suffer as a result. However, we are concerned that, if used in the manner suggested, it may become very resource intensive for the SRA and will also lead to the SRA becoming involved in the day-to-day management of client matters. We are also concerned about the implications for firms, as temporary relationship management would be time consuming for them and place them under a great deal of pressure. For these reasons, we believe that the SRA should only use temporary relationship management where necessary, should be transparent about how it makes the decision to do so and is careful not to become involved in the handling of client matters.

We agree that the SRA should carry out visits to firms when it has identified a risk that makes it appropriate to do so. We also recognise that the SRA will need to carry out visits to other firms to monitor the results of its risk analysis. However, we have serious concerns about the proposals to visit firms once every five years. Any proposals for routine visits at a five yearly interval should be based on evidence that this approach is cost effective. However, we are very doubtful that any such approach will be cost effective given the considerable resources such a programme of visits would need.

We are disappointed by the SRA's refusal to provide 'safe harbour'. However, we still believe, as Lord Hunt recommended, that advice and guidance given by the SRA should be usable by firms as a defence against regulatory action. The new regime is intended to provide firms with significant flexibility and the ability to use their own judgement. However, that judgement can always be second-guessed by the SRA and we are concerned that firms will be reluctant to enter into entrepreneurial arrangements which may involve significant investment without some comfort that they are acting within the existing rules.

The SRA currently provides advice on ethics for firms and we recognise that its advice is only as good as the information that it is given. If, however, a firm has sought advice from the SRA in good faith, then the firm should be able to rely on that advice and avoid any disciplinary sanctions afterwards.

Clearly, if the SRA changes its mind, it will be entitled to do that, but firms should have time to adjust their structures and be notified of this change. We doubt that firms will require “safe harbour” advice to the extent envisaged by the SRA and we believe that firms and the SRA should have confidence in the advice given by those providing ethical advice. The contrary position and that currently endorsed by the SRA serves only to dilute the profession’s confidence in the regulator and brings into question the value of honest and open communication. This will be particularly important if firms are to feel confident about using the flexibility provided by the new regulatory system.

**11. What might be the particular issues for smaller firms and how might we address them?**

We believe that the new regulatory system may pose particular issues for smaller firms. Anecdotal evidence suggests that smaller firms might be less likely to have the required management systems in place and we believe that they will need guidance and support to implement them.

Smaller firms often have limited IT systems and thus may not have the information for the annual report, required by the SRA, readily available or be able to obtain that data easily. For this reason the SRA should consult widely on whether the data it requires is obtainable from firms and provide firms with information on the data it plans to collect early on. The SRA may also need to consider in what format it will accept data and whether firms will be able to provide data in the format required.

Adapting to a new Code of Conduct and regulatory approach will take time for everyone and the learning process will represent a cost to firms. However, this will be particularly true for smaller firms who have limited resources. The SRA will need to bear this in mind when assessing firms. Provision of good quality guidance by the SRA, that firms can rely on, will help smaller firms to adapt more quickly and feel more confident about the regulatory changes. This will also help smaller firms take advantage of the new system. This will be particularly important as larger firms are more likely to have the resources to take advantage of the flexibility provided by the new system and to change their processes to be more efficient and/or client friendly. Larger firms may also feel more confident about doing so, as they are likely to have greater expertise in regulatory compliance and the funds to seek counsel’s advice. This will put larger firms at a distinct competitive advantage.

**12. Are there other regulatory tools we could consider?**

We believe there is a much greater role for the use of guidance as a regulatory tool and in particular guidance that can be relied on by firms. We strongly urge the SRA to reconsider its decision not to provide advice upon which firms can rely if a regulatory issue arises. We also believe that other forms of guidance, such as regulatory alerts, newsletters and targeted letters / e-mails to different groups within the profession, could be used more widely and to better effect. We have been particularly concerned that, in the past, there have been series of prosecutions of firms or individuals over the same non-compliance issues but no guidance or alert has been issued to the profession to prevent further firms from committing the same mistake. We would like to see the SRA being much more proactive in its approach to issuing guidance and educating the profession.

We believe that remedial plans (or agreed compliance plans) may be helpful to firms who are in difficulties, provided that firms understand what they must do and the timescales set are realistic. However, we are unclear how the SRA will monitor and enforce these types of plans and further information about this would be welcomed.

The SRA has suggested that it may use unannounced visits as one of its regulatory tools. Unannounced visits can be a useful regulatory tool in circumstances where a regulator fears that giving notice might mean that evidence of non-compliance would be destroyed or hidden. However, these occasions are likely to be very rare. Unannounced or very short notice visits are often unproductive for the regulator, as key people are frequently absent or unavailable and the documents required by the regulator are not collated or are sometimes off-site. For the firm, they are very disruptive to business, as normal work routines are interrupted by the visit. For these reasons unannounced or short notice visits should be used sparingly and firms should normally be given reasonable notice of a planned visit.

We are concerned about the SRA's proposal to use mystery shopping as a regulatory tool. Mystery shopping is resource intensive for the regulator and costly to those in the profession who receive a visit. It is also likely to erode trust between the profession and the SRA, with solicitors not only feeling that this is another means to 'catch them out', but also engendering a sense of being deceived by their regulator. We are also unsure how mystery shoppers will assess 'good standards' or what is meant by this term. If mystery shoppers are not requiring real work to be carried out it is difficult to see how they can assess the competence of the work a client might receive. If they are merely considering the client experience then we would argue that this is outside the regulator's remit and therefore inappropriate.

The Law Society has been concerned about the number and cost of interventions for some time and therefore we welcome the proposals for orderly wind-down of firms who are unable to resolve their difficulties. We are keen to see interventions being avoided wherever possible. We are currently in a dialogue with the SRA about alternatives to interventions.

**13. Is there a role for representative bodies in supporting their members' compliance with the principles and outcomes in the Handbook?**

The Law Society has an important role in producing advice and guidance for the profession and welcomes the SRA's recognition of this aspect of our role. The Law Society would be keen to discuss further with the SRA the nature of guidance that the Law Society might produce. However, the provision of guidance by the Law Society should not detract from the importance of clear and consistent advice from the SRA on which the profession can rely.

**14. Do you agree with our approach to formal investigations?**

Yes ☐

No ☐

**15. If not, please explain why.**

We note that, as part of the new approach to formal investigation, there will be a structural separation between those making decisions on enforcement and those undertaking investigations. This separation has the potential to produce a fairer system, as decisions about enforcement will be made from an objective viewpoint by those uninvolved with the investigation. However, to ensure consistency, all decision making should be separated from investigations and a system of quality assurance, including peer review, should be put in place to ensure consistent and competent decision making. The results of any audit of decision making should be published.

We note that formal investigation will only occur where the SRA has decided that a serious breach of the principles or outcomes may have occurred. The Law Society considers that, given the serious consequences for a solicitor of an investigation, the criteria for making such a decision e.g. the type of evidence needed and what amounts to a serious breach, should be published. Given the effect on a solicitor, we also believe that there would need to be strong evidence of a serious breach before such an investigation is instigated. We also believe that there should be more guidance to firms about what to expect when they become the subject of an investigation and the powers that the SRA have with regard to such an investigation.

**16. Do you have any comments or feedback on our draft enforcement strategy?**

*General Approach*

The SRA has stated that it wishes to encourage firms to comply with the regulatory requirements. However, the emphasis within the enforcement policy often seems to be on deterrence rather than encouragement and we are concerned that deterrence has proven ineffective in the past. The anxious reaction from the profession to the changes in the Code of Conduct and increased flexibility provided by OFR indicates that solicitors are already very concerned about the consequences of non-compliance. This concern, however, has not appeared to have translated, under the current Code, into a level of compliance that the SRA wishes to see. This would seem to indicate that deterrence is not a very successful means of getting solicitors to be compliant with regulation. It would therefore seem more sensible to concentrate on the reason why solicitors are not complying rather than continuing to focus on deterrence.

The SRA will be relying on self reporting to help it to regulate more effectively. To encourage solicitors to report problems to the SRA, it will be important for it to be clear what action the SRA is likely to take and for solicitors to be confident that the response will be proportionate. The proposed enforcement policy leaves a great deal of flexibility for the SRA. For instance, even where the SRA agrees a compliance plan with a firm, it may also take further enforcement action. In many cases this will only be done where it is in the 'public interest', but this concept is undefined. We would strongly urge the SRA to define this concept. Similarly, the enforcement policy has limited information on how the SRA will manage different levels of non-compliance; for instance, how the SRA will approach a minor breach of an outcome compared to several minor breaches or a major breach.

### *Decision making process*

We are pleased that the SRA has recognised the importance of solving some non-compliance issues in a more informal manner. However, we do have some concerns about the process for deciding when informal or formal action will be taken. The SRA states that it might not take formal action where firms who are non-compliant

- demonstrate a understanding and acceptance of principles / outcomes
- take remedial action
- are open and cooperative with the SRA and accept guidance, supervision and monitoring

The SRA will need to be careful that this approach does not lead to firms being coerced into accepting caseworker judgements which they believe are wrong, in order to avoid the cost of a formal investigation and the risk of publicised enforcement action. All organisations make mistakes and it would be an unhealthy situation if mistakes made by the SRA went unchallenged.

We do not understand why non-compliance impacting on a high-profile matter should be relevant to the SRA's decision as to the course of action it will take. This factor appears to have more to do with the SRA's need to be seen to take action in high profile cases, and thus to protect its reputation, than taking an appropriate and proportionate approach to enforcement action.

The SRA provides limited information about how much weight it will give each factor, the criteria it will use to assess each factor or the type of evidence it will consider. This information should be included within the enforcement policy. There is also a variation in the language used within the policy with misconduct, non-compliance and failure to comply with regulatory duties all used to describe firms not adhering to the Code of Conduct. It would be helpful to have some consistency of definitions or if distinct, an indication of the meaning of these terms and guidance as to their relative seriousness.

We believe that there are other factors that the SRA should take into account when deciding whether to take action against a firm, such as the clarity of the rule and whether guidance was sought by the firm either from the SRA or from other expert sources.

### *Regulatory Settlement Agreements*

In general, the Law Society has supported the SRA's use of regulatory settlement agreements (RSA) in place of other more draconian enforcement measures. However, we are concerned about the SRA's overly rigid policy on publicising these agreements. This leads to a situation where some solicitors would rather risk the adjudication process and hope to get a reprimand (without any publicity) instead of making an early settlement. We would urge the SRA to reconsider its approach on publicity given the effect that it can have on a firm's business and reputation. The process for agreeing an RSA is time consuming, bureaucratic and can ultimately fail at the last hurdle - authorised person sign-off - leaving the firm and the regulator back where they started, having wasted a great deal of time and effort. The process

should be streamlined and either those with final authority should be involved early in the process or those negotiating the settlements should be given clear guidelines on what will be acceptable to include in an RSA to ensure that they are not rejected at the final stage in the process. While we welcome the use of RSA where formal action might otherwise have been taken, RSAs should not be used as an alternative to informal enforcement action such as letters and advice. As, even if there is no publicity surrounding the RSA, firms will need to declare such an arrangement when tendering for work and as such are put at a disadvantage.

#### *Enforcement priorities*

We believe that further clarification is needed about case selection based on enforcement priorities. In particular, we would urge that the method for selecting enforcement priorities and the priorities themselves are made public. Any variation in enforcement against similar types of misconduct is likely to cause resentment and distrust within the profession and leave the SRA open to accusations of being unfair. It is therefore important that the SRA is clear and transparent about how it sets priorities and makes decisions on enforcement action.

We are concerned at the suggestion that even where a case is not an enforcement priority the SRA may take enforcement action merely to provide a credible deterrent. This implies that even where a firm has been open, cooperative and has taken remedial action it still might find itself subject to enforcement action as an example to others. This would seem not only to be unfair and contrary to the open and honest approach that the regulator seeks to cultivate, but may lead to further distrust of the SRA.

#### *Other issues*

We note that the enforcement policy refers to a matrix of criteria used to decide whether an investigation is required. It would be helpful to see this matrix.

**17. Do you have any comments on our proposed approach to making new Handbook provisions?**

The Law Society would expect the SRA to consult on any changes to the handbook. This should include changes to guidance and the indicative behaviours as changes to these can have an impact on the profession, particularly given the evidential weight currently given to indicative behaviours. While we understand the need to review the handbook regularly, we believe it should only be changed where absolutely necessary, to minimise cost and confusion. Unless there are exceptional circumstances, we believe that updates in the handbook should coincide with the Government's common commencement dates (6 April and 1 October).

**18. Do you have any comments on our proposed approach to consumer education? Are there particular initiatives we should consider?**

The Law Society supports the SRA's proposal to increase consumer understanding of the legal services available to them, to enable them to make informed choices and enhance their experience of the legal market. Educated consumers have a role to play in ensuring that solicitors maintain consistently high standards.

We have no comment on the types of initiatives that the SRA should consider with regards to consumer education.

**19. Do you have any comments on the SRA's current approach to formal education and training for the profession? Are there additional approaches we could take to improving pre- and post-qualification training?**

The Law Society is in favour of strengthening the current standards of the profession, both pre- and post-qualification. Our response to the SRA's Agenda for Quality consultation, in September 2009, highlighted numerous concerns about the SRA's current approach to formal education and training for the profession. We support the SRA's attempts to strengthen the standards of entry, through the trial of work-based learning, the introduction of an outcomes-based regime and the improvement of the Qualified Lawyer Transfer Regulations. However we would like to see this work continue, to ensure more robust and better aligned entry standards. It is also vital that the SRA turn its attention to post-qualification standards, in particular by reviewing the effectiveness of the CPD scheme and by introducing better management and supervision training.

Taking a more detailed look at the current pre- and post-qualification training, we reiterate a number of the comments made in our September 2009 consultation response:

- We recognise that the SRA is currently working on a variety of projects to improve the standards for entry to the profession, and we support these attempts. However we continue to have concerns as to whether some aspects of the entry requirements are sufficiently robust to assure the quality of those seeking to enter the profession. We are particularly concerned with the standards and quality assurance of the Qualifying Law Degree (QLD). While the Law Society believes that it is for academia to decide on the content of the degree that institutions offer, it is for the regulator to decide whether a degree constitutes a QLD. It is essential that the SRA ensures that the Joint Academic Stage Board is a robust and effective body through which the QLD can be reviewed. Currently, given the lack of resources available to the Board, the Law Society does not have confidence that this is the case. With the imminent introduction of outcomes focussed regulation, it is now even more vital to ensure that the QLD is fit for purpose. Ethics should be included as a compulsory element of the QLD so that students begin their journey to qualification with a strong grounding in the sense of professionalism and ethical behaviour expected of the profession, beyond a mere ability to understand and comply with regulation.
- The SRA has considerable confidence in the work of the Quality Assurance Agency (QAA), but it does not engage with the QAA in relation to standards and quality assurance. We are concerned that there are perceived to be significant differences in the quality of degrees awarded by different institutions. The teaching and the standard of marking (and, indeed, the standards of the students admitted) are perceived to vary markedly. Common standards across the board and improved objective information about the courses would enable a better informed view of the performance and capabilities of graduating students, including whether they are sufficiently competent to pass the LPC.



- We are pleased that the SRA is currently piloting the work-based learning scheme, which marks a welcome step away from the current system which, in some circumstances, simply encourages a “time served” approach. However, our concerns remain about the lack of formal training for supervisors of trainees. We also continue to have concerns about the quality assurance of the Legal Practice Course.
- The Law Society does not believe that the current regulation of CPD is sufficient to ensure that the scheme is effective and meets its aims. Solicitors should be encouraged to ensure that their CPD training is tailored to the needs of their practice. The regulator needs to ensure that the scheme is one that the profession can be proud of and that the public has confidence in. The SRA has indicated that proposals for a new CPD scheme will be released for consultation in October, and we welcome this review.
- The Law Society believes that good supervision is the key to ensuring quality. Supervisors are in a position to assess the quality of the work of their supervisees better than anyone else. We are concerned that the current requirements for supervision are not detailed or stringent enough. There are no limits placed on the number of people that one person can supervise and no training is required of supervisors. An experience requirement alone is inadequate. The SRA should use the current review of the Code of Conduct and accompanying guidance as an opportunity to introduce measures to ensure good supervision practice throughout the profession.

The SRA has indicated that its October consultation on the new Handbook will contain a large education and training element, including re-drafted Training Regulations and guidance. The Law Society hopes that proposals in this consultation will address many of the concerns outlined above. We also urge that the SRA will continue to strengthen its quality assurance mechanisms, particularly in relation to the QLD and the LPC, to ensure that the profession and the public can have a greater confidence in the standard of those seeking entry to the profession.

**20. Are there other ways we can engage with our stakeholders on our move to OFR?**

The SRA should begin to implement its plan to be more proportionate in its supervision and enforcement activities immediately. We would also urge the SRA to review its decisions to refer cases to the Solicitors Disciplinary Tribunal in light of its new enforcement approach.

**21. Do you have any comments on any aspect of our approach and its implications for equality issues? For example how might our approach impact on black and minority ethnic solicitors, women solicitors, disabled solicitors, and older and younger solicitors?**

As noted above (Q12), the change in regulation may raise particular issues for smaller firms. As a greater proportion of BME and older solicitors work within smaller firms these groups are more likely to be affected by these issues. It is unclear whether the changes will have other implications for equality issues and we believe that only a full impact assessment can identify potential issues. We look forward to seeing the SRA’s full assessment in October.

## Questions on Annex B

- 22. Do you have any comments about the risks arising from the current financial management of firms?**

In general we agree with the risks identified in the paper. We would add one further external factor, the cost of professional indemnity insurance. Internal factors also include poor understanding of the accounts rules and of financial management, normally due to lack of training. Lack of understanding of the accounts rules may be a particular problem where a solicitor has trained abroad and is unfamiliar with the complex accounts rules in place in this jurisdiction.

- 23. Do you have any comments regarding the SRA's responsibilities for addressing the financial stability of firms and its proposed desired outcomes?**

We agree that the SRA has no direct responsibility for a firm's inability to make its business viable, the SRA do however have a responsibility for ensuring that clients and the profession are not adversely affected by a firm's failure. We believe that, where the SRA needs to intervene in a failing practice, there has been a regulatory failure on the part of the SRA. We are encouraged that the SRA is keen to ensure that firms facing difficulties which cannot be resolved, are wound down in an orderly manner rather than intervened in. We agree with the outcomes.

- 24. To what extent do you consider the proposed response outlined in this section meets the objectives of outcomes-focused regulation?**

We note that the SRA has placed emphasis on using data from firms to allow it to monitor firms and thus ensure that they are meeting the outcomes. We believe that there is also a greater role for education and training to help firms achieve better financial management, thus lessening the need for regulatory oversight.

We agree that the initial authorisation is a key point within a firm's lifecycle and believe that, in particular, the experience of the staff running the business is crucial in ensuring good financial management.

As authorisation is a one-off process, there will need to be other processes for monitoring firms. The SRA proposes a monitoring system which will rely heavily on self-reporting throughout a firm's lifecycle. As noted above, the SRA will need to gain the profession's trust in order to encourage them to report issues. The SRA will also need to provide clear guidance on when firms will need to report and to put in place a system for handling such reports, if self reporting is to be successful.

- 25. Do you have any suggestions regarding what information may be requested of firms and how frequently it may be requested?**

As noted above, it will be important to give firms notice of the information that the SRA will require. It will also be important to consult on what information the SRA will collect to ensure that it will be feasible to collect such data.

There will be understandable nervousness about providing commercially sensitive information. For this reason the SRA should publish how it intends to keep data confidential and if relevant when it will disclose data. It will be important to consider how the Freedom of Information provisions will affect any guarantees of confidentiality.