Annex E – Response to consultation "Outcomes-focused regulation – transforming the SRA's regulation of legal services"

Enforcement Strategy Section

1. Introduction

As part of the SRA's reform of its regulatory approach for the benefit of consumers, a consultation process was instigated on 30th April 2010 with responses from interested parties to be received by 27th July 2010.

This paper concentrates entirely upon the responses received in connection with the section "Formal Investigations, Legal and Enforcement".

The questions posed in the consultation with respect to Enforcement were as follows:

> Q15. Do you agree with our approach to formal investigations?
>
> Q16. If not, please explain why.
>
> Q17. Do you have any comments or feedback on our draft enforcement strategy?

A compilation of the detailed responses in respect of questions 15 and 16 is attached to this paper as Appendix 1 and those to question 17 are in Appendix 2.

The total number of consultation responses received was 62.

With regards to responses from solicitors/solicitor firms, the total number of solicitors/assistant solicitors this represents is 9,747. The solicitors ranged from being sole practitioners to multi-national practices with 1,804 solicitors/assistant solicitors.

As to solicitor groups, these included The Law Society, 9 local law societies, the Sole Practitioners Group, Association of Women Practitioners and the Bristol Risk Managers Group.

Amongst the 14 "Other" responses were those from the Bar Standards Board, Association of British Insurers and the ICAEW (Institute of Chartered Accountants).

2. Question 15 – Do you agree with our approach to formal investigations?

The consultation paper required a yes/no response to the question, however, in a number of instances no such response was given or it was not possible from any narrative to ascertain whether the contributor was expressing a positive or negative opinion.

3. Question 16 – If not [agree with approach] why not?

For the purposes of this internal paper the quotes are attributed where appropriate.

The Sole Practitioner Group raise the following concern:

“The Group can foresee difficulties arising when there is a transition from a positive and constructive approach to helping with problems, to one of preparing to act against an individual as a result of problems. The role of the SRA must be clearly identified to the individual concerned so that there is no misunderstanding no question that the SRA is using the “friendly cooperative“ approach to obtain evidence against the solicitor for subsequent proceedings.”

The Association of Women Solicitors comment:

“Although we have answered yes to your approach to formal investigations, we would welcome further information as to the criteria to be used before a formal investigation is instigated for example gross misconduct, negligence or a long history of client complaints. The fact that a firm receives complaints is not significant enough to trigger any kind of supervision or intervention but rather should be based upon whether any of the alleged actions by solicitors or their practices can be upheld as a breach of regulation, compliance or client care. It can be an issue for Women Solicitors and BME Solicitors that they are given awkward clients. There must be an intermediary step that is less formal to ensure that no solicitor is targeted unnecessarily.”

The comments of The Law Society were as follows:

“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 a objective viewpoint by those involved 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 investigations will only occur when 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 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 could 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."

The Bristol Risk Managers Group broadly agrees with the approach to formal investigations but that there seems to be *"…tension between the desire to improve and educate on the one hand and the need to enforce on the other". Furthermore, they say that "We find it a little difficult to distinguish between formal investigations and the enforcement strategy generally."*

Other comments made refer to concerns over the costs of the proposal, a requirement for further information on the criterion for instigation of formal investigations and that any action taken should be proportionate. All contributions are summarised in Appendix 1.

4. Question 17 - Do you have any comments or feedback on our draft enforcement strategy?

Appendix A of the consultation document is the "SRA Enforcement Strategy". The Strategy is divided into the following sections:

- General
- Constructive engagement
- Relationship management
- Supervision
- Advice and firm-specific guidance
- Agreed compliance plans
- Enforcement action
- Factors to be taken into account
- Regulatory settlement agreements
- Case selection
- Who will be investigated?
- Informants, witnesses and others with a legitimate interest in a case

Where possible, the consultation responses will be divided into the sections noted in paragraph 4.1 above.

General

Whilst acknowledging that "OFR appears sound and positive", Horwich Farelly Solicitors, a firm with 84 solicitors/assistant solicitors caution:

"If the SRA genuinely recognises that in the past it has been heavy handed then that will be a step in the right direction. However, genuinely achieving cultural change within the organisation should not be underestimated.

Enforcement must be proportionate and take into account the pressures on the profession, particularly financial ones. Clients cannot expect a Rolls Royce service where the fees involved are equivalent to a Morris Minor. Take the issue of personal injury where a service is provided under a conditional fee agreement and no payment and certainly no interim payment is ever requested or expected. The profession have been seen to be prepared to take financial risks on behalf of their clients yet all too often that is ignored if a complaint is received."

The response of The Law Society to the "General Approach" was as follows:

"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 should 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."

A cautionary note is sounded by the Association of British Insurers whose general comments include:

"The ABI notes that under the Legal Services Act 2007, individual complaints will be referred to the Legal Ombudsman. It will be for the SRA to determine which complaints require regulatory intervention. We are firmly of the opinion that where a firm represents a serious or persistent risk, the SRA should seek to remove it from practice immediately and we are concerned that an approach which requires a thematic review of recurring risks will invariably delay necessary enforcement action. Without early intervention and a reduction in the time between intensive investigation, formal investigation and enforcement it is unlikely the new measures will reduce the opportunities for fraudulent behaviour and act as a credible deterrent."

The Legal Services Consumer Panel make the following positive comment:

"Effective enforcement will be critical to the success of OFR. The panel supports the focus on education of well-intentioned firms to achieve compliance, while at the same time providing a credible deterrence. Our response to the January consultation emphasised the need for sanctions to bite on individuals as well as firms – the Panel is pleased to note this part of the strategy.

The proposal to publicise enforcement action on priority issues to improve standards is welcome. In addition to seeking publicity on some issues, details of all concluded enforcement action should continue to be published. This is an essential part of creating a credible deterrence, maintaining public confidence in regulation and providing a predictable environment in which legitimate firms can know what is acceptable behaviour.

The proposed factors to be taken into account in deciding on enforcement action cover the right areas. The panel is particularly pleased to see the emphasis on the impact on clients (as well as the number of clients) and whether the behaviour could have affected a vulnerable person or child."

Other concerns voiced were that the SRA "…would draft the regulations, impose the penalties and prosecute SDT matters" as well as it being essential for there to be a consistency of approach.

Enforcement Action

The Tunbridge Wells, Tonbridge & District Law Society express their opinion that any enforcement team should "…include a firm supervisor as we understand the supervisor would have the relevant knowledge to direct enforcement appropriately".

Osborne Clarke Solicitors (412 solicitor/assistant solicitors) comment that care needs to be taken to "distinguish clearly between enforcement and "supervision". A scale which referred to, for example, Level One Intervention, Level Two Intervention (with appropriate definitions) might more clearly differentiate your enforcement activity from other forms of engagement with regulated firms."

Regulatory Settlement Agreements

The only direct contribution on the subject of RSA's was from The Law Society which was as follows:

> *"In general the Law Society has been supportive of 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, RSA's 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."*

Case Selection

The chief contributor to this particular section, under their heading "Decision Making Process", was again The Law Society. The comments made were as follows:

"We are pleased that the SRA has recognised the importance of solving some non-compliance issues in a more formal manner. However, we do have some concerns abut 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 an 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."

The view expressed by the Association of British Insurers was as follows:

> *"The ABI is concerned that a selective approach to enforcement will mean the some cases will be subject to enforcement and others not, even when similar in nature. It will be necessary to establish clear criteria to determine when SRA intervention and/or enforcement action is applied and to ensure the strategy is fair and transparent."*

Who will be investigated?

Horwich Farrelly Solicitors express the concern that "…it is important that firms do not fear a regulator trying to catch them out for minor breaches" and that there is a "…regulatory ambush because the enforcement and regulatory sides of the SRA do not always appear to be joined up".

Informants, witnesses and others with a legitimate interest in a case

The Cambridgeshire & District Law Society submit that the "…provisions of para. 25 are of concern; there should be no publication during the course of initial proceedings, but should it go to formal disciplinary proceedings there should be publication in full".

Conversely, the Association of British Insurers state, "to achieve and protect the reputation of the profession, it is necessary all enforcement action is made available to any interested party through an up to date public website".