Report on the responses to the SRA consultation issued on 31 October 2012

Introduction

1. This report follows the SRA's consultation on co-operation agreements, and includes the SRA's responses to the issues raised by respondents. The consultation closed on 23 January 2013.

2. The consultation contained 6 specific questions, and invited the respondents to comment on a range of issues. These key comments are summarised below.

Responses received

3. There were 14 responses to the consultation, the majority of which came from the Law Society, divisions of the Law Society and local law societies (including the City of London Law Society). The most detailed responses received were from:

   - the Law Society;
   - the City of London Law Society; and
   - the Junior Lawyers Division of the Law Society.

4. The views of the Legal Services Consumer Panel were specifically sought and the Panel have provided a response.

5. A full list of the respondents appears at the end of this report.

Overview of responses to individual questions

Responses to Question 1

"Do you feel that the SRA should develop a policy on reaching agreements with co-operating witnesses?"

6. Two respondents were not in favour of developing such a policy at all, including the Law Society.

7. The Law Society felt that the existing regulatory arrangements were sufficient and that there was a lack of evidence to support the adoption of a co-operation agreements policy. The Law Society commented that the policy did not add much to the existing SRA enforcement strategy and that similar schemes under the FSA and the OFT operated in a different market. The Law Society also felt that the requirement to act with integrity should act as an adequate incentive for solicitors to report regulatory breaches.

8. However, the majority of respondents, including a number of local law societies and the Junior Lawyers Division of the Law Society, were supportive of the SRA adopting such a policy. Some respondents indicated that they were supportive provided that certain changes to the draft policy or arrangements were made. The City of London Law Society (CLLS) for example were broadly supportive provided (among other things) that there is greater clarity on

reporting obligations and those of the COLP and COFA in particular. The CLLS were concerned that some individuals may report issues directly to the SRA at too early a stage and without the firm being able to take steps to address the issues.

9. Some respondents did question whether it was ethical to offer leniency to a person involved in wrongdoing. Some respondents also expressed concern about the reliability of the evidence provided by a witness who has received leniency as a result of his or her co-operation. The Bar Standards Board made the point that in addition to the ethical considerations there could also be a practical impact upon the protection afforded to consumers if no action is taken in respect of misconduct.

10. However, the Legal Services Consumer Panel's sentiment that *"Overall, domestic and overseas experience suggests that the benefits of co-operation regimes outweigh the costs"* was indicative of the conclusions commonly reached by respondents.

SRA response:

11. We are encouraged that the majority of respondents were in favour of the proposals and in particular that the benefits of such a policy have been recognised by stakeholders representing consumers of legal services and junior lawyers.

12. It is perhaps unsurprising that some stakeholders felt that there is not a clear need for the policy given that it was recognised in the consultation paper that the policy would be an extension of existing principles and may be used infrequently. However, the majority of respondents recognised the benefits of setting out a more formal position for those cases where it would be used.

13. We appreciate that the FSA and OFT operate in a different market. The successful use of leniency schemes in other regulatory regimes was only one reason for our preliminary view that a co-operation agreements policy could be beneficial. The overall support for this view is encouraging.

14. We have noted the concerns that providing an incentive to report issues first to the SRA could result in instances where individuals bypass their firm's own procedures for dealing with risk. While we do not consider this likely in practice amendments have been proposed to the draft policy to highlight that individuals may have an obligation to report certain matters internally as well as to the SRA. We have also proposed an amendment to the policy to clarify that early reports of problems made via a firm's COLP or COFA could still constitute mitigation.

15. We have proposed some amendments to the draft policy to broaden the relevant circumstances to be considered when entering into a co-operation agreement in respect of ongoing risks posed to consumers and the public interest by a witness.

Responses to Question 2

"Do you agree that there could be significant benefits in implementing a co-operation agreements policy? Do you feel that there are any objectives which have not been included in the policy which should be?"

16. There were a number of substantive responses to this question, which in broad terms were positive.

17. A small number of respondents questioned whether the policy would be effective because it does not provide 'up front' guarantees to potential witnesses who enter into a co-operation agreement.

18. One respondent was concerned that the proposed policy could result in a number of inappropriate or immaterial issues being reported to the SRA resulting in a waste of investigating resource and reduction in SRA efficiency.

19. In response to this question one of the local law societies questioned the ratification process of co-operation agreements, and whether there needs to countersignature by a senior SRA staff to avoid scope for subjectivity, collusion and error to creep into the system.

20. No suggestions were made for new objectives for the policy which were not already covered within the original draft.

SRA response:

21. We are encouraged by the responses received. We remain of the view that there are significant incentives provided in the policy for witnesses to enter into a co-operation agreement with the SRA in appropriate cases. Significant problems could arise if the SRA purported to guarantee particular outcomes in certain circumstances or routinely committed to a certain outcome in individual cases before it was in receipt of the full facts. Publicising the possibility of leniency (and of no action being taken in particular) should increase the SRA's ability to take action in certain cases without the risk of inappropriate outcomes being arrived at on the individual facts of a case.

22. We do not anticipate that the policy will result in a significant increase in the matters which are reported to us (at present all breaches of the regulatory requirements should be reported to the SRA at some stage). We expect the reports made by witnesses who go on to enter into co-operation agreements to generally be more serious in nature (as stated in the policy). We can review the wording of any final policy once adopted if in practice difficulties arise.

23. We anticipate that a reasonably senior member of staff such as a Head of business function or a Director will enter into the agreement for the SRA in each case (though this may be reviewed over time).

Responses to Question 3

"Do you agree with our views as to the main risks and challenges posed by such an approach? Are there other issues which you feel should be considered?"

24. We received a number of responses to this question in which there was broad consensus that the main risks and challenges had been considered by the SRA.

25. Some respondents did suggest that there were additional risks and challenges:

- the CLLS raised concern about the lack of guidance on what information cannot by law, or need not, be reported to the SRA. The CLLS commented that no account had been taken of the matters identified in the SRA's previously published guidance to Rule 20.06 of the old Solicitors Code of Conduct 2007 (paragraphs 33 – 39 of the old guidance to Rule 20). The CLLS expressed concern in their response about individuals inadvertently breaking the law by disclosing information which they should not;

- whether publication of the agreements may impact upon the willingness of witnesses to come forward or would put witnesses at risk of harm; and

- whether action taken by the SRA involving serious cases may prejudice work being undertaken by other regulators and enforcement agencies. A linked concern was raised as to whether all witnesses would understand that reaching an agreement with the SRA would not prevent other action being taken (such as criminal proceedings) by another body.

SRA response:

26. A warning is given in the whistleblowing statement on the website that certain information may not be able to be provided to the SRA or at least not without certain steps being taken. We have however noted the desire among stakeholders for further guidance on obligations to report matters to the SRA generally. This will be considered separately as it raises more general issues than can be addressed in the co-operation agreements policy. The relevant responses have been shared with the SRA policy team responsible for reporting obligations.

27. In terms of the publication of co-operation agreements, the draft policy does state that "*This policy is about more formal disclosure including formal evidence being given by a potential witness.*" Co-operation agreements are therefore not anticipated to be normally used in scenarios where the identity of a witness is to remain confidential. This would not however prevent an individual from providing information to the SRA on an anonymous or confidential basis. However, such scenarios would not involve the more formal co-operation in a wider investigation which the policy is concerned with.

28. In terms of whether action taken by the SRA involving serious cases may prejudice work being undertaken by other regulators and enforcement agencies, the risks associated with parallel investigations and proceedings are not limited to cases where a co-operation agreement may be used. The SRA has significant experience of working closely with enforcement agencies and other regulators with success in such scenarios. We have good existing relationships with relevant bodies, including memorandums of understanding.

29. We consider that persons regulated by the SRA would generally appreciate that an agreement reached with the SRA is separate to any action which could be taken by another regulator or enforcement agency. However, an amendment is proposed to the policy to clarify this for the avoidance of doubt.

30. Overall, we are confident that the safeguards proposed in the policy are sufficiently robust.

Responses to Question 4

"Do you feel that the steps proposed to minimise the risks posed by such an approach are sufficient and appropriate? Are there any other safeguards which you feel should be included, such as excluding very serious conduct from the scope of the policy?"

31. Some of the issues raised in responses to this question have been considered already above due to the overlap between question 4 and question 3.

32. A number of respondents did feel that certain a witness who had been involved in certain serious misconduct should be prohibited from receiving leniency under the policy. For example: dishonesty, failure to act in good faith and a failure to provide full and frank disclosure. A few respondents however took a contrasting view.

SRA response:

33. There will be cases which are not appropriate for leniency in respect of a co-operating witness. However, it could be difficult to define certain acts or omissions which would always or nearly always make this the case.

34. Instead, the draft policy lists relevant factors which will be considered case by case in determining the appropriate regulatory outcome in respect of a co-operating witness. Whether an individual whose involvement in misconduct has been serious continues to practice is already included in the draft policy as a relevant factor for example. This allows a risk based approach in each case and avoids the difficulties of attempting to develop a definition of the most concerning types of conduct which could safely be applied in each case. On balance, we consider that this is the better approach.

35. However, some amendments are proposed to the draft policy to focus more clearly on the risks which the SRA is concerned about in such a scenario and broaden the circumstances in which an agreement may not be appropriate.

36. Overall the majority of respondents felt that the safeguards proposed were sufficient. Some respondents felt that the risks were actually overstated.

37. **Responses to Question 5**

"Do you agree with the content of the draft policy and the proposed process for dealing with such matters? Do you feel that this could be improved in any particular way?"

38. Broadly speaking the responses to this question were positive.

39. One respondent raised concerns abut the consistency of the language used in the consultation paper, the policy and the SRA Handbook. For example, the policy refers at times to 'misconduct' and at others to 'wrongdoing'. The term 'misconduct' is also used in parts of the SRA Handbok. Concerns were also raised about the consistency of the language used in the different provisions of the SRA Handbook which deal with SRA reporting.

40. One of the respondents commented that the format and precise terms of the co-operation agreement were unclear.

41. The Junior Lawyers Division of the Law Society commented that trainee solicitors may become aware of fraudulent transactions or breaches and should have confidence that their training contracts would be preserved if they reported the matter.

42. One of the local law societies observed that there will be circumstances where the party guilty of misconduct is not in a position to reinstate a person who has suffered a loss as a result in full. The policy indicates that leniency will not be appropriate where a co-operating witness has retained benefits arising from the misconduct and the respondent raised a concern that this could be a barrier to securing the co-operation of the witness.

SRA response:

43. Some amendments have been proposed to the language used within the policy. Concerns about the consistency of the language used in the SRA Handbook generally in respect of reporting requirements will be considered separately.

44. In terms of the format of the co-operation agreement the policy states that this will generally involve a witness entering into a regulatory settlement agreement. Read our policy on regulatory settlement agreements.

45. We recognise the concerns raised by the Junior Lawyers Division about the risk of reports to the SRA by a trainee solicitor jeopardising that trainee's ability to qualify as a solicitor (though these appear to be separate to the issues consulted upon). While it would be very unfortunate for an individual's ability to continue their training contract to be put at risk for factors beyond their control it is important that an individual meets the required standard before qualifying. There may be options available to a trainee who finds themselves in such a position and in some cases an application could be made to an adjudicator for consideration of their particular circumstances. Guidance can be sought from the SRA where such issues arise.

46. We recognise that there may be certain circumstances where a potential witness is simply unable, perhaps through no fault of his or her own, to reinstate in full the financial gain he/she has made as a result of their misconduct. The policy does not prohibit leniency in such a scenario – only that leniency would be extremely unlikely if benefits have been retained. We consider that this is the correct approach and that there is sufficient discretion retained within the policy to deal with exceptional cases on their facts.

47. **Responses to Question 6**

"Do you envisage any particular section of the public or a group of stakeholders being placed at a disadvantage by the policy or the implementation of the policy? If so, do you feel that there are any steps or adjustments which can reasonably be taken to minimise any impact?"

48. There were a number of responses to this question, which in broad terms indicated that no particular sections of the public would be at a disadvantage by the policy.

49. One respondent questioned whether the policy might be used more frequently in respect of smaller firms and if so impact upon BME lawyers disproportionately (as BME lawyers are known to be disproportionately represented in smaller firms).

SRA response:

50. It is difficult to know for sure whether co-operation agreements would be used more frequently in respect of witnesses in smaller firms. If that were to be the case, entering into a co-operation agreement with a witness would not in any event appear to have a negative impact. The co-operation agreement policy's application is intended to apply consistently to all regulated communities ranging from solicitors working in-house to small and large international firms.

51. We will keep the policy under review.

List of respondents

- The Law Society
- The City of London Law Society
- Kent Law Society
- The Junior Lawyers Division of the Law Society
- Staffordshire Junior Lawyers Division
- Bar Standards Board
- Legal Services Consumer Panel
- Lawyers with Disabilities Division

There were 6 respondents who have not made clear that their responses may be attributed to them and so have been treated as anonymous.

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