

## SRA response

### *"Duty to have regard to growth", Department for Business, Innovation and Skills consultation*

Published on 24 April 2013

#### *The Solicitors Regulation Authority*

- 1.

The Solicitors Regulation Authority (SRA) is the independent regulatory body of the Law Society of England and Wales. We protect the public by regulating law firms and individuals who provide legal services. These include some 125,000 solicitors practising in nearly 11,000 firms.

- 2.

We welcome the opportunity to respond to the Department for Business, Innovation and Skills (BIS) consultation paper "Non-economic Regulators: Duty to Have Regard to Growth".

#### *The Legal Services Act 2007*

- 3.

The Legal Services Act 2007 (LSA) sets out eight regulatory objectives. Approved regulators, including the SRA, have a duty to act in a way which is compatible with them and which is most appropriate for the purpose of meeting those objectives.

- 4.

These regulatory objectives are:

- a. protecting and promoting the public interest;
- b. supporting the constitutional principle of the rule of law;
- c. improving access to justice;
- d. protecting and promoting the interests of consumers;
- e. promoting competition in the provision of services ;
- f. encouraging an independent, strong, diverse and effective legal profession;

- g. increasing public understanding of the citizen's legal rights and duties;
- h. promoting and maintaining adherence to the professional principles
- 5.

The professional principles are:

- a. that authorised persons should act with independence and integrity,
- b. that authorised persons should maintain proper standards of work,
- c. that authorised persons should act in the best interests of their clients,
- d. that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice, and
- e. that the affairs of clients should be kept confidential.
- 6.

The regulatory objectives set out in the Legal Services Act 2007 are ranked equally.

- 7.

Approved regulators such as the SRA must also have regard to iii

- a. the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed, and
- b. any other principle appearing to them to represent the best regulatory practice.
- 8.

The same regulatory objectives and principles also apply to the Legal Services Board which oversees the approved regulators who are the front line regulators of reserved legal activities.

## *Outcomes-focused regulation*

- 9.

In October 2011 the SRA adopted an outcomes focused approach to regulation (OFR) and launched the SRA Handbook 2011 which is based on this approach. Wherever possible, we have dispensed with strict rules and replaced them with outcomes which businesses are expected to obtain for

their clients. The businesses can choose how to organise themselves to achieve these outcomes.

- 10.

The introduction of OFR was designed to reduce the burden of regulation for businesses. In February 2013 we published the results of a survey of 1000 solicitors, looking at the impact of OFR on their firms. This included looking at the impact on their costs. The survey was intended to establish a baseline against which future change can be measured.

- 11.

Overall, a significant proportion of firms stated that compliance with OFR costs too much time and money. 44% of respondents stated that compliance with OFR takes up too much time and 34% said its costs too much money.

- 12.

85% of respondents "strongly agreed" or "agreed" with the following statement – "Even if you were not required to do so by the SRA, your firm would continue what it currently does to comply simply in order to run your firm well and look after your clients interests". Only 5%"disagreed" or "strongly disagreed" with the statement. This indicates that although many firms view compliance costs as high, the vast majority also accept that what they do to comply is directly related to the good management of their business and the need to look after their clients interests.

- 13.

Our commitment to research of this kind demonstrates that we already have regard to the economic position of our regulated community.

### *Other SRA initiatives to reduce unnecessary regulation*

- 14.

The SRA is committed to reducing the burden of regulation on the businesses it regulated by removing unnecessary regulation. In 2012 we abolished the minimum salary for trainee solicitors as evidence showed that this acted as a disincentive for firms to recruit trainees. This had led to a shortage of trainee places.

- 15.

In December 2012 we launched our Red Tape Initiative. Our aim is to remove, curtail or simplify regulations and processes which are not demonstrably in the public interest, impeding both those we regulate and our ability to focus on the issues that really matter. Our Code of Conduct and Handbook should contain no more than what is necessary - and what is unnecessary is taken away.

- 16.

The first phase of the initiative came into force on 1 April 2013. The changes included:

- allowing a solicitor employed by a law centre or charity to charge for advice
- allowing a solicitor employed by a local authority to charge a local charity or voluntary organisation for advice
- permitting firms to have Compliance Officers who are not managers or employees of the firm provided the individual nominated has been approved as a Compliance Officer) for a related authorised body and is a manager or employee of that related authorised body.
- removing the requirement for Registered Foreign Lawyers and Registered European Lawyers to go through an approval process to be an owner or manager of a firm;
- the time limits on academic qualifications and student enrolment, have been removed as well as the need to gain our approval for trainee secondments.
- The half-equivalence requirements for considering reductions in the term of the training contract, and the need for periodic re-authorisation of training establishments, have also been removed

## *The proposed duty to have regard to growth*

### *Is a new duty needed?*

- 17.

The Regulatory Objectives and principles prescribed by the LSA are designed to achieve a carefully balanced approach which could be disturbed by the introduction of an additional duty to have regard to growth in separate legislation.

- 18.

In our view, legal regulation should not come within the scope of the proposed new duty as it is unnecessary. Several of the Regulatory Objectives would encourage economic growth, these include:

- improving access to justice;
  - promoting competition in the provision of services; and
  - encouraging an independent, strong, diverse and effective legal profession;
- 19.

Furthermore the LSA clearly imposes a duty to have regard to any principle representing best regulatory practice. This enables the SRA to have regard to the promotion of growth or economic progress in its operations and decision making. As discussed above, our research into the impact of OFR and our Red Tape Initiative are two of the ways in which we have had regard to economic progress.

- 20.

BIS state (at paragraph 2.3 of the Consultation) that the aim of the proposed duty is compliant growth. However, the introduction of a requirement to consider growth might be used as basis for challenge of any decision to refuse or restrict authorisation or approval of a business or individual. This could lead to increased cost in staff time if regulators are required to provide evidence in all their operations and policies of compliance with the new duty (as suggested in paragraph 2.8 of the Consultation paper). Increases in appeals and applications for judicial review will incur direct costs.

- 21.

This increased regulatory burden on the regulators will add to the costs of regulation which will ultimately have to be paid by the regulated communication. Thus, though well intentioned, the proposed new duty may paradoxically have an adverse impact on economic wellbeing.

### *The effect on other regulatory duties*

- 22.

The regulatory objectives set out above have been carefully debated by Parliament and are now well established in the field of legal regulation. If a duty to promote growth is introduced, it should be subordinate to rather than complementary to the LSA regulatory objectives (as suggested at paragraph 2.9 of the BIS consultation paper). It should rather be at the level

of any other principle representing best regulatory practice as set out in paragraph 6(b) above.

### *The formulation and scope of any duty*

- 23.

We feel it is important that stakeholders should have an opportunity to comment on the precise formulation of the proposed duty and its scope. The precise formulation that the new duty will take is unclear. The title of the BIS consultation refers to a duty "to have regard to growth". Paragraph 2.1 talks of a "a clear objective to promote economic progress".

- 24.

One area where it is important to have clarity is over the extent to which the duty applies to individual decisions over individual businesses. In our view, any new duty imposed should apply only to the formulation of regulatory policy generally rather than operational decisions concerning specific businesses.

- 25.

Paragraph 3.12 of the Consultation document says that enforcement should "be done in a way that minimises the burden on the business". Does this mean the regulator must incur greater costs if a particular way of enforcing would suit the business more even if it is potentially more expensive and time consuming for the regulator. This of course could throw extra costs on compliant businesses.

- 26.

We are concerned that such duty might have an impact on the decision whether to impose and how to calculate penalties. A larger penalty is likely to impact on growth.

### *Answers to consultation questions*

*Question 1: Should primary legislation be used to introduce a duty for regulators to have regard to growth and the economic impact of their actions?*

*Question 2: Is there an alternative means by which these objectives, described in paragraphs 2.1 to 2.6 above, could be achieved?*



In our view, a duty to have regard to growth should not be imposed on regulators of legal services. This would disturb the careful balance of regulatory objectives set out in the Legal Services Act 2007.

Furthermore, it is unnecessary as the LSA imposes a duty on regulators to have regard to any relevant principle representing best regulatory practice.

***Question 3: Do you agree that the duty should be complementary to existing duties?***

We believe that, if a duty to have regard to growth is introduced, it should be subordinate to, rather than complementary to the duties imposed by the Legal Services Act 2007.

***Question 4: Should the duty be principles-based, for regulators themselves to interpret and apply to their operations, or should it also specify the manner in which economic growth should be supported?***

If such a duty is imposed, it would be more appropriate for it to be principles-based. This would make it more readily applicable to a wide range of regulations and circumstances.

***Question 5: do you think that guidance in how to implement the proposed growth duty would be useful? If yes, please provide examples of what it should cover.***

We consider that guidance would be useful. For example:

- guidance to make it clear that the new duty is subordinate to other duties to which regulators are subject;
- guidance on the extent to which the duty applies to individual decisions relating to specific businesses; and
- guidance on how the duty applies to decisions to impose penalties.

***Question 6: Do you agree that the measurement and monitoring mechanisms proposed above, allied to those of the revised Regulators' Compliance Code, would be adequate for this purpose? If not, please provide details.***

We agree that proposal that the publication of annual service standards coupled with a post-implementation review should provide adequate reporting mechanisms.

*Question 7: Do you agree that the duty should in principle apply to all non- economic regulators?*

No, we consider that the duty should not apply to those regulators that are subject to the Legal Services Act 2007. This includes:

- The Legal Services Board
- The Law Society/SRA
- The Bar Council/Bar Standards Board
- The Council for Licensed Conveyancers
- The Master of the Faculties
- The Chartered Institute of Legal Executives/Illex Professional Standards
- The Cost Lawyers Standards Board
- The Intellectual Property Regulation Board

As explained above, we consider that the Legal Services Act 2007 makes sufficient provision for economic considerations to be taken into account by regulators. The Act provides for a finely balanced set of objectives and we do not consider that it would be appropriate to introduce another duty the priority of which is not clear.

*Question 8: Should the Pensions Regulator be included in the scope of the growth duty?*

We have no comment to make.

*Question 9: Do you feel that a growth duty would reduce costs to business and remove or address barriers to growth?*

*Question 10: How would you envisage a regulator's actions changing as a result of a growth duty? Please consider this in light of evidence presented above, and/or with reference to other situations where regulator actions impacted a company or industry's ability to grow. Where possible, provide a monetary indication of likely impact of a successfully operating growth duty on a company or industry.*

In the field of legal regulation, we consider that a growth duty would make little difference to business. This is because the Regulatory Objectives in the LSA, already make provision for growth to be promoted. The objectives

set out below taken together with the SRA's move to outcomes-focused regulation provide a strong framework for supporting growth.

- improving access to justice;
- promoting competition in the provision of services; and
- encouraging an independent, strong, diverse and effective legal profession;

As, indicated above, we consider that the LSA already makes ample provision for legal regulators to take economic growth into account. Accordingly, we envisage that the main change to our actions of the proposed new duty would be to introduce procedures to document that growth or economic progress has been taken into account in particular decisions. For example, this might be a new element introduced in impact assessments attached to Board and Committee papers. This will add to the costs of regulation.

*Question 11: Is there any evidence that this will add significant burdens to regulators and why?*

We feel the Consultation Paper significantly understates the impact on regulators of having another duty to take account, state they have taken into account and argue with those who are trying to prevent regulation. Extra staff time will be needed to consider the new duty in relation to individual policies and decisions. There is an increased risk of legal challenge from businesses resisting enforcement or the refusal of or conditions on authorisation.

- i Section 1 Legal Services Act 2007
- ii Section 28 Legal Services Act 2007
- iii Section 28 Legal Services Act 2007