

## Consultations

### *Outcomes-focused regulation - transforming the SRA's regulation of legal services*

#### *Annex D - Discussion paper on the equality implications of outcomes-focused regulation*

30 April 2010

### *Introduction*

The SRA is transforming its approach to regulation, moving to a new outcome-focused approach which will deliver more effective, proportionate and targeted regulation that improves delivery of our regulatory objectives. This new approach will have far-reaching implications for all the firms and individuals we currently regulate, for consumers of legal services, and the Alternative Business Structures (ABSs) we plan to regulate from 6 October 2011.

We are committed to demonstrating that we are a fair and proportionate regulator. We also want to ensure that we are, and are seen as an inclusive and accessible organisation. We have made significant progress through the implementation of our equality and diversity strategy in achieving our vision for equality and diversity. We want to continue to improve on our performance in this area and do not underestimate the challenge a new regulatory approach may present. We are seeking to embed equality and diversity in the transformation to outcomes-focused regulation at the earliest opportunity.

We will be carrying out a full assessment of the impact that our proposed new approach to regulation will have on equality. This discussion document is based on our early thinking about the potential equality issues that we will need to consider as we work through the full equality impact assessment for all of the affected work areas.

We have been carrying out a programme of impact assessments in relation to many areas of our regulatory work over the past few years and much of the data that we have gathered will be useful for us in assessing the equality implications that may emerge out of the outcomes-focused regulation approach.

We will be carefully considering the feedback provided to us in response to our early consultation document and engagement with our stakeholders. We will be working very closely with representative groups within the

profession, including equality groups, and with consumers and consumer groups to help us make a thorough assessment of impact and to identify actions we could take to minimise any adverse impact and promote equality.

We would encourage and welcome all feedback and views which we will use to inform the full equality impact assessment which we intend to complete and present with our second consultation in the Autumn when we will have much more detailed proposals about the transformation.

## *Overview of the aims and objectives of our proposals*

We are at an early stage in our thinking about how the outcome-focused approach will work in practice and have set out our vision in a consultation document to provide you with an opportunity to inform and contribute to our thinking.

Our approach includes:

- (i) ensuring that the requirements on firms are more focused on acting in a principled manner to deliver desired outcomes, rather than compliance with over detailed rules. We will do this by lifting the binding regulatory requirements ("rules") to the level of principles and stating the clear outcomes to be achieved where possible;
- (ii) a sophisticated desk-based research and analysis capacity to assess potential risks to the regulatory outcomes and support the delivery of targeted proactive regulatory action;
- (iii) an approach to authorisation that is risk and evidence based, making sure that legal services are delivered by principled and competent firms and individuals;
- (iv) an approach to supervision which encourages firms and individuals to be open and honest in their dealings with us that helps and encourages them to tackle the risks themselves wherever possible, allowing us to concentrate on those who can't, or won't put things right;
- (v) an approach to enforcement which creates a credible deterrent and is effective, fair and proportionate;
- (vi) the delivery of consistent regulatory protection across the profession to ensure that no entity or individual delivering legal services is at an unnecessary comparative disadvantage as a result of our regulation;
- (vii) concentrating our resources on dealing with those firms who pose a serious risk to our regulatory objectives, such as protecting and promoting the interests of consumers. This means we will make decisions not to

address matters we judge to be of low risk and impact, and will accept the risk that entails; and

(viii) delivering better value for money. Concentrating our resources on the greatest areas of risk will make us more cost-effective.

## *Who will be affected by the proposals?*

The key stakeholders who will be affected by our transformation to outcomes-focused regulation are

- the profession and other suppliers of legal services,
- consumers of legal services,
- the Legal Services Board,
- the Legal Ombudsman,
- SRA staff,
- the Law Society,
- other regulators.

## *The outcomes of our current approach to regulation*

We have been working hard to understand the impact that our regulatory activities have on different equality groups within the profession. In particular we have been concerned about the disproportionate outcomes for black and ethnic minority (BME) solicitors, highlighted in Lord Ouseley's independent review published in July 2008. Although we have made considerable progress across a number of areas since then, which is reflected in Lord Ouseley's interim review [<https://www.sra.org.uk/ouseley>] published in June 2009, we are continuing to monitor our regulatory activities and outcomes and have commissioned research to help us understand the reasons for this continuing disproportionality. The research findings will help inform our full equality impact assessment of outcomes-focused regulation policy and practice.

Our most recent monitoring report provides statistical data about key aspects of our regulatory activities for the calendar year 2008 and the profile of the profession broken down by ethnicity, gender and age.

Although this data relates to our current approach to regulation, the data is nevertheless a starting point for our equality impact assessment work on the proposed new approach.

## *The equality implications to be addressed as we move to outcomes-focused regulation*

Outcomes-focused regulation will significantly change the way the SRA regulates the profession. As explained in the consultation document, the transformation will involve changing almost all aspects of our regulatory work. The principles of outcomes-focused regulation are fair and non-discriminatory, but the practical changes we will need to make to our regulatory practices could have positive or negative effects for equality. As we develop our proposals, we shall need to identify these impacts, and ensure that any negative impact is minimised.

As the new approach will involve moving away from the application of prescriptive rules, some in the profession and other legal services providers may be uncomfortable with the uncertainty that comes with this. To help with this, we will be providing the profession with clear guidance about our expectations and describing the indicative behaviours which we will be looking for. We would hope that the move to broad principles and outcomes will be seen as an opportunity for the profession and other legal services providers as the new approach provides much more flexibility in terms of how a firm chooses to practise.

We have set out below some early thoughts about the equality implications that we will need to consider in relation to each of the key proposals described in the consultation document:

- A new Handbook of regulatory requirements
- Authorisation
- The Risk Centre
- Supervision
- Formal investigation, legal and enforcement
- Policy and Handbook
- Evidence-based decision making and research
- Governance, coordination and decision making
- People, culture and systems
- Transition.

This work will develop as we engage with the profession and consumers and gather further evidence.

## *New Handbook of regulatory requirements*

**Aims/Objective:** to ensure that all of our regulatory requirements are brought together into a single online Handbook, including the Code of Conduct, Accounts Rules, Licensing Rules, special bodies etc. A redrafted Code of Conduct is central to our implementation of outcomes-focused regulation, concentrating on key principles and outcomes which must be achieved and to remove and rationalise much of the detail contained in the current Code and other regulations.

In considering the impact for all equality groups we have recognised that there are some high-level generic themes such as:

- A less prescriptive approach can mean uncertainty  
Action: we will be working with the profession to promote clear understanding of our requirements and the approaches that can be used to meet them.

The potential positive impacts are:

- There will be greater flexibility in using different methods to achieve the required outcomes.
- Clear outcomes will help consumers to better understand what they can expect from legal services.

## *The Risk Centre*

**Aims/Objective:** to obtain, analyse and deploy information from a range of sources in order to understand the changing legal marketplace and to understand the risk to our objectives which may come from:

- the behaviour of firms we regulate,
- our own internal operations,
- broader economic and sector developments.

In considering the impact of how we approach risk assessment for all equality groups we have recognised that there are some high-level generic themes such as

- how we assess risk may target particular parts of the profession which could have an indirect impact on equality;  
Action: we will assess the risk criteria and mitigate any adverse impact by implementing a transparent risk-assessment process and quality assure our decisions;



- we need to be aware of the source of information that we act on and be cautious about subjective or potentially biased sources;  
Action: our assessment of the information received will take into account any concerns about its source and our staff will be provided with the necessary skills and confidence to make an assessment that is fair and objective.

We also recognise that there are positives outcomes for each of the equality groups in how we propose to assess risk such as

- getting a more informed picture of the risk posed will enable us to deploy the right level of supervision/action to that risk,
- being able to assess emerging risks will enable firms to put things right at an early stage and help to protect consumers and third parties,
- identifying recurring themes of risks affecting particular groups and considering preventative measures such as holding educational workshops/seminars.

## *Authorisation*

**Aims/Objectives:** to ensure that we allow only those firms and individuals to deliver legal services, who are capable and willing to act ethically and deliver good outcomes for clients. This will operate for new applications and for ongoing revisions or revalidations.

This work will involve all firms and individuals as well as the new arrangements for Alternative Business Structures.

In considering the impact of how we approach risk assessment for all equality groups we have recognised that there are some high-level generic themes such as:

- Ensuring that individuals seeking to practise have the appropriate education and training requirements and that we promote wider access to the profession to increase its diversity
- Ensuring that lawyers from overseas who are seeking to practise in England and Wales are properly prepared and assessed
- Ensuring that solicitors are able to provide legal services in a variety of ways to promote diversity in the profession and access to justice for consumers.

## *Our supervisory approach*

**Aims/Objective:** to develop risk-based oversight of the regulated community focusing on how a firm's own internal systems are working to

deliver the required outcomes.

Supervision from the SRA will be tailored to meet the risk posed, the firm's size, and the firm's approach to risk management. It will include a range of measures from permanent relationship management, for example with large commercial firms, to temporary measures such as visits to firms or groups of firms.

In considering the impact on all equality groups of our new approach to supervision, we have recognised that there are some high-level generic themes such as:

- The requirement for robust and effective self regulation may place an additional burden on smaller firms;  
Action: We will take a more collaborative approach to regulation and support a firm where appropriate to enable them to put the necessary improvements in place. We will encourage the Law Society and other professional groups to provide additional support. We hope the profession will cooperate and work with us on what will be a distinct change in the way we regulate.

We also recognise that there are positive outcomes for the profession and consumers groups in how we propose to approach supervision, such as:

- Introducing a more collaborative approach to ensuring that the right outcomes are achieved for the consumer
- A tailored approach to supervision may mean more support for firms that are currently disproportionality represented in regulatory outcomes
- An additional opportunity for more engagement and contact between the SRA and the profession
- An opportunity for firms to be proactive in taking steps to put things right
- Consumers may be reassured by the fact that we are making unannounced visits or using mystery shopping as a method of initial enquiry.

## *Formal investigations, legal and enforcement*

**Aims/Objective:** to ensure that serious breaches of the principles are detected, investigated and rigorously enforced, including through prosecution at the Solicitors Disciplinary Tribunal on the basis of sound legal advice.

In considering the impact of how we approach formal investigations and enforcement on all equality groups we have recognised that there are some high-level generic themes, such as:



- We will need to put in place systems and processes to demonstrate a fair and proportionate use of our investigatory and enforcement powers  
Action: We will take into account the work that we are already doing in relation to the disproportionality in regulatory outcomes;
- Uncertainty about when the SRA will take enforcement action against an individual or firm  
Action: We would hope that we will have to use less of our enforcement powers under an outcomes-focused regulation regime, as firms will have an opportunity to engage at an early stage with the SRA should a concern be raised;
- The risk of losing the confidence of consumers and others if the approach is seen as taking too much of a "light touch";  
Action: we will use our enforcement powers if a firm fails to meet its obligations and does not cooperate with the SRA to try and rectify any failings.

We also recognise that there are positives for equality groups in how we propose to conduct formal investigations and enforcement, such as:

- Robust and proportionate enforcement will raise consumer confidence in the SRA and legal services
- Agreed compliance plans and settlement agreements are an opportunity for solicitors and other providers to put things right and continue to practise
- Our approach to enforcement will be fair and proportionate taking into consideration factors such as size of firm, number of clients affected etc.—taking a flexible approach rather than a "one size fits all" approach
- Our enforcement strategy will ensure that our approach is transparent.

## *Policy and Handbook*

**Aims/Objective:** to provide advice internally and externally on the intention of and policy behind Handbook provisions.

Explaining the policy behind the Handbook will benefit both the profession and consumers by:

- Helping the profession and consumers to understand the required outcomes
- In developing the policy behind the handbook, we will be assessing and monitoring the equality impact of each policy area.

## *Evidence-based decision making and research*





**Aims/Objective:** to undertake analysis and research, using it to support and inform all of our regulatory activities so that we develop and maintain an accurate understanding of risk.

We will use the evidence gathered from research into the impact of outcomes-focused regulation to identify equality impact that we may not have considered. We see evidence-based research as being valuable in providing the evidence to help us target our resources and make decisions more effectively.

## *Governance, coordination and decision making*

**Aims/Objective:** to deliver good risk-based cost-effective regulation that directs regulatory attention to the areas of greatest need will require us to develop strong, flexible mechanisms for the management and coordination of our resources.

We have introduced and published clear criteria for decision making supported by a system of internal audit. We will build on this work in the context of our new approach to ensure that we are better and more consistent in our approach to decision making.

We will continue to monitor the outcomes of our decision making and build on our quality assurance system to ensure that our decision making stands up to internal and external scrutiny.

## *People, culture and systems*

**Aims/Objective:** to ensure that we develop attitudes and behaviours from our staff alongside the development of technical competencies so we are fit and ready to regulate in the new way.

We are undertaking a training needs analysis to address the skills requirements and will be implementing a new and improved IT system to enable us to work more efficiently and effectively.

We recognise that there are positives for all equality groups in how we prepare our staff and systems to work in an outcome-focused way, such as:

- Ensuring our staff have the right skills, competencies and attitudes to ensure fair and proportionate regulation of a diverse profession in accordance with the new approach
- A new IT system will help us improve how we hold, process and assess data
- We will be better able to monitor our regulatory activity and this data will be available for use in our ongoing equality impact assessment work.

## *Transition*

**Aims/Objective:** to ensure that there is a clear programme of transition for the implementation of outcomes-focused regulation.

We recognise that there are positives for all equality groups in how we propose to handle the transition to outcomes-focused regulation, such as:

- Improved information for the profession and consumers
- A variety of engagement activities with consumer groups, the profession and others to seek views on our proposals at an early stage so as to be able to influence our thinking and help us to fully assess equality impact
- There will be time for firms to understand the SRA's direction of travel from an early stage and think about changes they may need to make to be ready for outcomes-focused regulation
- There will be time to provide support and guidance for those most likely to be adversely affected by the new approach.

## *Conclusions*

It is clear that many aspects of our proposed move to outcomes-focused regulation are highly relevant to equality. We will be considering each aspect of the transformation in detail, relying on the initial equality impact assessment work that has been completed or is continuing across the organisation. We will be publishing the findings of our full equality impact assessment of outcomes-focused regulation with our next consultation in October.

The attached action plan sets out the work that we will be doing in the interim.

## *Action plan*

| Objective   | Action  | Target date |
|---|---|-------------|
| 1. Gather data and information that may be required to inform the full equality impact assessment | Gather information already available from our existing initial equality impact assessment work<br><br>Identify any further data required to complete the full impact assessment | July 2010   |

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|   | <p>Obtain feedback from the profession and representative groups, including equality groups through the consultation process and additional engagement</p> <p>Obtain feedback through consultation and engagement activities with consumers and consumer groups</p> |                |
| 2. Make an assessment of the equality impact of our move to outcomes-focused regulation | Analyse the available data, information and feedback on the equality impact of the new approach to regulation   | August 2010    |
| 3. Eliminate any potential adverse impact or unlawful discrimination                    | <p>Consider possible alternative options to the approaches if there is an adverse impact and/or if there is any unlawful discrimination</p> <p>Consider and put in place measures/provisions to address adverse impact (or justify adverse impact)</p>              | September 2010 |
| 4. Continuing engagement with profession and consumers                                  | <p>Inform and consult equality stakeholders on the assessment made and outcomes as a result of the equality impact assessment</p> <p>Ongoing dialogue on the developments of outcomes-focused regulation to inform the equality impact assessments</p>              | October 2010   |
| 5. Outline out monitoring and review arrangements on our                                | Publish this information in our full equality impact assessment   | October 2010   |

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| approach to<br>outcomes-focused<br>regulation and further<br>developments |  |  |
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