

SRA response

"Compliance and Enforcement - Statement of Policy", Legal Services Board consultation

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Introduction

The Solicitors Regulation Authority (SRA) is the independent regulatory arm of the Law Society [<http://www.lawsociety.org.uk/>] for England and Wales. We regulate individual solicitors, certain other lawyers and non lawyers with whom they practise, solicitors' firms and their staff.

We welcome this consultation by the Legal Services Board [<http://www.legalservicesboard.org.uk/>] (LSB). Please find below our detailed comments.

SRA comments

Q1. What are your views on the LSB's proposed compliance and enforcement strategy? If you think we should have other or additional aims, please say what you think they should be and explain why you think we should have them.

The aims and outcomes described in section two of the consultation paper are rightly focussed on improving the consumer experience by upholding confidence for those accessing the legal services market, and we believe that they set a suitable framework for the LSB's compliance and enforcement strategy.

In its Business Plan 2009/10, the LSB sets out its vision that by 2013, "... *legal services regulators in the UK will be seen as world leaders....in the full range of their activities*", and it is clear that the compliance and enforcement regime underpinning this vision will be central to making it a reality.

We believe that the basis of the LSB's compliance and enforcement policy should encourage an open approach by approved regulators in which shortfalls and failures are acknowledged and addressed collaboratively, and in which formal enforcement is the backstop. This is the relationship we are looking to encourage with the firms we regulate, with the support of the LSB.

The SRA is openly addressing long-standing weaknesses in its regime, and reporting on its progress towards full compliance with the Legal Services Act objectives. We welcome the reiteration at paragraph 2.7 of the



consultation paper that the compliance and enforcement framework will be underpinned by early and informal resolution of issues with approved regulators where appropriate. We believe that this early engagement should rightly lie at the heart of the LSB's compliance and enforcement approach.

Q2. What are your views on the matters that the LSB proposes to take into account in deciding whether (and if so what) action is appropriate? In particular, what are your views on how the LSB should judge whether an Approved Regulator's acts or omissions have been unreasonable?

We agree with the matters for consideration described in paragraph 3.9 of the consultation paper.

It would be useful if this section of the LSB's final version of its compliance and enforcement policy statement could describe how any disagreement between the LSB and the approved regulator on the conclusions could be resolved.

The final version of the LSB's compliance and enforcement statement could also usefully refer to the information gathering powers of the Office for Legal Complaints [<https://www.legalservicesboard.org.uk/research/reports>] (OLC), and how these will intertwine with those of the LSB. The information gathering mechanisms set out at paragraph 3.7 of the consultation paper could be expanded to refer to the powers under statute of the OLC in referring matters to approved regulators, and in some cases asking for a report on action taken by those regulators. We appreciate that these are properly powers available to the OLC, but as the Act assumes that if the OLC is disappointed with the action taken it would then refer the matter to the LSB, there appears to be a clear case for acknowledging this as one of the approaches by which the LSB may monitor and gather information.

Q3. What are your views on the informal resolution process and the timescales set out above? If you have alternative suggestions please say what they are and why you consider they are more appropriate.

We have no objection to the process and timeframes set out in the consultation paper for consideration of informal resolution, although we are surprised at the level of detail. The range of issues that could be dealt with under this process will be significant from individual complaints to matters of great significance, and as such we believe the stated timelines would need to be capable of accommodating that diversity.

Q4. What should the LSB publish about informal resolution of an issue? Will publication help to spread learning in the regulated community or do you consider that it may hamper informal resolution of an issue? Are



there alternatives that you consider would be more appropriate? Please explain your answer.

We expect that good practice will emerge from informal resolution of issues between the LSB and approved regulators. This best practice could usefully be shared with other approved regulators to the benefit of the wider regulatory framework. The extent to which publication will be beneficial will inevitably depend upon the nature of the issue, so we would favour a selective approach, agreed wherever possible between the LSB and the approved regulator.

There might be issues in which publication would hamper informal resolution, though we doubt that that would be likely.

We believe it would be beneficial to share the good practice and learning points arising from informal resolution at liaison meetings between the LSB and approved regulators, as opposed to formally publishing technical summaries of the issues, whether or not formal publication of the issue is to take place.

Q5. What are your views on how performance targets could be used?

Performance targets are an integral component of effective compliance and enforcement activity; they must be achievable and realistic, clearly defined, and proportionate to the facts of each case.

Most approved regulators will already have their own published performance targets – the SRA has some, and is developing them further. It would clearly be sensible to build upon existing targets and programmes wherever possible.

Q6. What are your views on how directions should be used?

We believe that the LSB should exercise caution in using directions. It is important for the LSB avoid using directions purely to impose action upon an approved regulator that arises from a difference in views between the LSB and those of the approved regulator in question, particularly where the approved regulator's view is within the bounds of what is reasonable and it has followed due process and consulted widely in order to form that view.

Q7. What are your views on using directions to require an Approved Regulator to spend money on a specific issue?

Directions on expenditure are preferable to imposing a fine on an approved regulator – directed expenditure is likely to lead to a desired benefit being achieved, as opposed to a fine where the money is diverted away from the regulatory objectives for which it was raised. However, we believe that



directions requiring expenditure must only be developed where there is certainty that budgets are available, or that sufficient time is available to allow a budget to be raised. Failure to do so could affect the ability of an approved regulator to continue regulating effectively and deliver the rest of its business plan for that year.

Q8. What are your views on how censure should be used?

We agree that the balance referred to in paragraph 3.30 of the consultation paper is important. In reality, the fact that censure is a possible sanction should ensure that approved regulators respond appropriately to the LSB at earlier stages.

Q9. What do you think the LSB's aims should be in imposing financial penalties?

As the consultation paper makes clear, the imposition of financial penalties will only occur in 'serious circumstances' consistent with section 37 of the Legal Services Act 2007 [<http://www.legislation.gov.uk/ukpga/2007/29/contents>] (the Act). We support the LSB's approach that such circumstances to arise only following considerable effort and engagement by both the approved regulator and the LSB to achieve an informal resolution to resolve matters at an earlier stage.

We note at paragraph 3.36 (page 18 of the consultation paper) the LSB's belief that "*...those who pay for the Approved Regulator through their practising fees should be able to influence the Approved Regulator's behaviour, including its approach to compliance*". We agree that the regulated community should be fully consulted about the regulator's approach to compliance, though there is a danger that this statement could be interpreted as permission for a representative-controlled approved regulator to attempt improperly to influence the regulator's discharge of its duties through control of resources. This is clearly not the intention.

Q10. What are your views on what the maximum amount of a financial penalty should be?

We have some concern about the use of substantial financial penalties as a compliance tool, particularly as such penalties fall in the first place on the regulated community. There is a clear danger here that such additional costs are then passed in turn on to consumers.

We agree that the LSB is right to have identified the comparators it refers to in paragraphs 3.37 and 3.38 of the consultation paper, in considering a maximum penalty amount. In reality, the imposition of fines of less than £1million has had a considerable impact on the Law Society and the solicitors' profession in the past. We believe there is ample evidence to suggest that lesser fines are effective in achieving enforcement aims,



particularly in the context of fining approved regulators as opposed to fining utility companies or commercial providers whose profits may be increased by, for example, finable activity such as anti-competitive behaviour. Given that the LSB could at a point in the future change the maximum penalty level if it became apparent it was set too low, we believe that the 'starting point' level from 2010 in 2010 should be a low but meaningful amount.

We are concerned equally that, if a substantially high financial penalty were levied upon an approved regulator, that regulator would be afforded 21 days to make representations against the penalty. At paragraph 3.43 of the consultation paper, a maximum penalty of £28 million is mentioned for the Law Society [<http://www.lawsociety.org.uk/>], and we are concerned that the window in which a representation could be lodged against such a considerable amount is simply too small.

Q11. Is the formula proposed the right one or is there another more appropriate measure?

We believe that the formula used by the LSB should be orientated around identifying the size and scope of individual approved regulators.

Q12. Can you identify any circumstances when the proposed formula may be inappropriate to use?

As per our comments under Q10 above, any circumstances where using the formula could result in a substantial fine being placed on an approved regulator must be avoided, as we are concerned that such fines would ultimately be passed on to consumers of legal services.

Q13. What are your views on whether the maximum should be linked to the total value of the services being regulated?

We do not think that this is a logical approach.

Q14. What are your views on the amounts suggested in the formula? What other amounts do you think might be appropriate, bearing in mind the need for a financial penalty to act as a credible deterrent? Please explain your answer.

As per our comments under Q10, we believe that for approved regulators the maximum penalty could be relatively low and still remain a credible deterrent.

Q15. What are your views on the process that the LSB proposes to use to arrive at an appropriate amount for a financial penalty?

Please see our comments under Q16 below.



Q16. What are your views on the examples of the factors that the LSB may take into account when deciding what level of penalty is appropriate? What other factors do you consider that the LSB should take into account? Please explain your answer.

Broadly we agree with the approach set out by the LSB on page 21 of the consultation paper, although we believe that some of the suggested factors will simply not be of relevance to approved regulators and would only be of relevance for fines imposed by regulators on commercial enterprises. For example, we would be surprised if the LSB would ever reasonably reach the position of contemplating financial penalties for a situation that was "... the result of a genuine misunderstanding".

We note, however, a paragraph 3.46 that the LSB's suggested process toward penalty setting will be flexible and responsive to individual circumstances "... on a case by case basis ...", and we endorse this approach.

Q17. What are your views on the LSB's aims for using intervention directions? Are there other circumstances when you consider that the exercise of this power might be appropriate?

The consultation paper sets out (in paragraph 3.55) that the use of intervention directions is "... an extreme measure which is most likely to be used in serious circumstances". We agree that the aims set out in paragraph 3.55 achieve this.

Q18. What are your views on the LSB's aims for cancelling the designation of an Approved Regulator? Are there other circumstances when you consider that the exercise of this power might be appropriate?

The cancellation of the designation of an approved regulator only becomes an option when, as the consultation paper points out, the LSB is satisfied a matter being investigated cannot be addressed using other powers, and all other attempts at doing so have failed. The LSB's focus at this stage must be on assuring continuity and protecting consumer interests.

Q19. Do you think the draft statutory instrument is appropriate? If not, please say why. If you think that it should be changed, it would be helpful if you could suggest drafting changes and explain the reasons for them.

We have identified the changes we consider appropriate in our responses to the other questions.

Q20. What are your views on each of the initial impact assessments? If you have any evidence to support your



view, in particular on the possible costs involved, please provide that information.

We have no comments on the initial impact assessments.

Q21. Do you agree with the approach taken to oral representations?

If, despite our suggestions, the LSB's maximum financial penalty limit remains significantly high in line with the proposals set out in the consultation paper, we believe that the LSB should permit oral representations.

Q22. Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the process.

We note the LSB's assertion at paragraph 8 on page 49 of the consultation paper that it will consider a Representing Person's circumstances in agreeing to accept oral representations. The final version of the rules could make it more explicit that, where an oral representation request is deemed appropriate, the Representing Person's individual personal circumstances are accommodated during the hearing itself. This could be achieved by including a reference such as "*the Board will ask the Representing Person if any reasonable adjustments can be made for them.*"

Q23. Do you agree with the Board's approach for making nominations for the purposes of Section 41(2) (a)?

The approach set out seems reasonable and is wide enough to support the LSB in identifying an appropriate nominee.

Q24. If you do not agree with the Board's approach, what alternative approach would you suggest?

We have no comments.

Q25. Do you agree with the Board's approach for making nominations for the purposes of Section 42(3)?

The approach set out seems reasonable to us, and wide enough to support the LSB in identifying a suitable nominee.

Q26. If you do not agree with the Board's approach, what alternative approach would you suggest?

We have no comments.

Q27. Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the



Board's approach to its requirements for the content of Applications?

Broadly we agree with the suggested approach; however please also see our response to Q28.

Q28. If you do not agree with the Board's approach to its requirements for the content of Applications, what alternative approaches would you suggest and why?

The guidance for the content of applications made under part 2 of schedule 8 of the Act could usefully make clearer the expectations of the LSB in receiving such an application. We note on page 58 of the consultation paper that the LSB may ask for additional information from the applicant as reasonably required, but further that the LSB may refuse or suspend consideration of an application where information is lacking. A more clearly-defined content specification could support both the applicant and the LSB.

As an example, the LSB could advise applicants that the content of their part 2 application should include evidence capable of demonstrating that all reasonable action has been taken to ensure lessons had been learned, and suitable mechanisms had been put in place to mitigate against a repeat incident of similar or more serious matters arising in the future.

Q29. Do you agree with the approach taken to oral representations?

We have no comments on oral representations; however please see our comments at Q30.

Q30. Bearing in mind the Regulatory Objectives, the Better Regulation Principles and the need to operate efficiently in relation to the Freedom of Information Act, please could you suggest improvements to the process.

We note at paragraph 29 on page 60 of the consultation paper that the LSB confirms it will consider a Representing Person's circumstances in agreeing to accept oral representations. As per our comments under question 22 , this consideration could be further detailed to focus on the individual's circumstances. Where an oral representation request is deemed appropriate, the rules could then include a reference along the lines of "*the Board will ask the Representing Person if any reasonable adjustments can be made for them*".

Q31. Bearing in mind the Regulatory Objectives and the Better Regulation Principles, do you agree with the Board's approach to its requirements for the content of Applications?

Broadly we agree with the suggested approach, however please also see our response to question 32.

Q32. If you do not agree with the Board's approach to its requirements for the content of Applications, what alternative approaches would you suggest and why?

The requirements for the content of applications made under section 45(3) of the Act should require the applicant to set out any alternative courses of action besides cancellation of designation that had been explored and considered, in order for the LSB and its consideration process to be well-informed. The transfer of regulatory services to another approved regulator would be a complex and lengthy process with potential arising for disruption of service and some confusion for consumers. We believe it is therefore important for the LSB to be informed and assured that all such matters had been considered by the applicant and alternative ways forward explored before enacting section 45(3).

Q33. What do you think the appropriate level of, and method of calculation of the Prescribed Fee should be?

The prescribed application fee must reflect suitable cost recovery for the LSB in considering and determining the application.

Q34. Do you agree with the Board's approach for making nominations for the purposes of Section 48(3)?

We have no comments.

Q35. If you do not agree with the Board's approach, what alternative approach would you suggest?

We have no comments.