The City of London Law Society

4 College Hill
London EC4R 2RB
Tel: 020 7329 2173
Fax: 020 7329 2190
www.citysolicitors.org.uk

Response

Legal Services Act: New forms of Practice and Regulation

Consultation Paper 9: Draft SRA Practising Regulations [2009]

The City of London Law Society (CLLS) represents over 13,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response is in relation to the questions and numbering as they appear in Consultation Paper 9.

1. **Do you think regulation 3 adequately replaces the current statutory provisions (section 12 of the Solicitors Act) under which the SRA can refuse applications for practising certificates and REL registration, or impose a condition when granting an application, in specified situations? If not, please give details. (See paragraph 4 and regulation 3).**

   We agree that regulation 3 replaces the current statutory provisions in a broadly adequate manner. However, we have some comments:

   (i) Although we recognise that the wording tracks back to the original provisions in the 1974 Solicitors Act, we suggest that it might be appropriate to reconsider the provisions of 3.1(n). This regulation is difficult to apply in practice without further guidance; for example, is 3.1(n)(ii) meant to apply to sums in respect of which that applicant is insured and what is the position if at the time of application the responsibility of a third party to contribute is itself subject to dispute? Moreover we are not convinced that it is proportionate for the SRA to have to be provided with information relating to all civil matters and, certainly, that the information to be supplied in all cases should include detailed proof of payment.

   By way of example, this section could apply to divorce judgements that require a lump sum initial payment and subsequent payments over time. Would it really be necessary and proportionate for the SRA to have to be provided with proof both of the initial payment and, presumably, of each subsequent alimony (or other payment) when a practising certificate is renewed? From a practical perspective, with in

the region of 40% of marriages now ending in divorce, is the SRA receiving this information in appropriate detail at the moment (in accordance with the ostensibly still relevant section 12 of the Solicitors Act 1974)? If not, we would suggest that these provisions may already have become practically unworkable and might well be revisited in the context of the new regulations.

(ii) Given that the regulations apply to individuals who may not be British nationals how should regulation 3.1(o) and 3.1(p) be construed? Should these sections be read as only applying to charges or convictions in the UK, or should they be read also as applying to a charge or conviction in relation to an activity which occurred overseas but which, had it occurred in the UK, would have been indictable? Given that regulation 3.1(m) refers to other jurisdictions explicitly, we presume that these sections should only be read as applying to activities in the UK but this could be clarified.

(iii) Whilst again we recognise that the provisions track the earlier legislation, the drafting of regulation 3.3(b)(i) seem to us to be unreasonably broad. How will the SRA be in a position to form a fully informed opinion as to whether or not an applicant has legitimate grounds for appeal in relation to a civil or criminal matter to which the SRA is not a party? At the very least we believe that the relevant provisions should oblige the SRA to be reasonable in coming to its opinion.

2. **Do you agree with the criteria for authorisation as a recognised sole practitioner as drafted? If not, please give details. (See paragraph 5 and regulation 4.)**

Again we agree with the criteria in the draft regulations.

We would suggest that regulation 4.2(b) should be amended to provide that 'the application is one to which regulation 3 applies' and not that the applicant is "subject to regulation 3".

In regulation 4.2(c), should the reference be to regulation 6 rather than 5 (so that it would read "registration in accordance with regulation 6")?

3. **Do you think we have adequately covered the circumstances in which we may impose a condition on a practising certificate? If not, please give details. (See paragraphs 7.1 and 7.2 and regulation 6.)**

We think that the SRA has given itself adequate scope to impose a condition on a practising certificate but this is largely due to the all encompassing nature of the second regulation 6.1(e).

In fact, given that this regulation (which should be correctly labelled 6.1(f)) gives the SRA the power to impose a condition in any case where it feels it is in the public's interest, some of the other parts of regulation 6.1 are redundant. In particular, we are not convinced that 6.1(d) is necessary. If a matter does not fall within one of the other heads (e.g. the interests of clients, third parties or the public) we cannot see why the efficiency of a practice is a matter for regulation by the SRA, essentially in the context of a highly

competitive market for legal services where inefficiency will naturally be penalised by market forces.

Generally, we would be interested to understand the SRA's reasoning as to why, given the all embracing scope of this last regulation, it is necessary to spell out specific circumstances in regulations 6.1(a) to (e).

4. **Can you think of any situations in which a practising certificate, registration or authorisation ought to expire automatically but which we have not included in regulation 9? (See paragraph 9.2 and regulation 9.)**

No.

5. **Can you think of any other situations in which the power to revoke a practising certificate, registration or authorisation ought to arise but which we have not included in regulation 9? (See paragraph 9.3 and regulation 9.)**

No.

6. **Do you agree that in addition to information currently available to public, the following should be public information?**

- **an individual's date of admission or first registration?**
- **any conditions to which the practising certificate or registration is subject?**
- **if not, please give details. (See paragraph 10.2 and regulations 10, 11 and 12.)**

We agree that an individual's date of first admission or first registration should be public information (and in this regard see our answer to question 7 below).

We agree that, generally speaking, any conditions to which a practising certificate or registration is subject should also be made public. However we do have some reservations regarding the potential for a disproportionate effect on the practice of a lawyer of publishing conditions that are technical in nature. (In that regard we would again refer to the open ended nature of the SRA's rights under the second of the regulations 6.1(e), which make it very difficult to appraise the issues fully).

Whilst we concur that a prohibition on an individual carrying out a particular activity (e.g. conveyancing) based on a previous record of negligence ought to be drawn to the attention of consumers, some conditions (e.g. those related to 'efficiency in practice'), seem to us likely to be far more technical in nature. We would like to see a provision obliging the SRA to reach a decision balancing the interests of the individual lawyer concerned and those of the public at large when deciding whether or not to publish a condition.

For the purposes of regulation 10.3(a) (and related provisions), we are not sure why it is necessary to make reference in the regulations to "exceptional circumstances". If the action that the SRA will take upon receipt of a request to withhold an address is to apply a public interest test, what is gained by making reference to "exceptional circumstances" other than to introduce an

element of confusion as to what test is to be applied to the likely prejudice of the lawyer concerned?

7. **Do you agree that an individual's date of birth should not be public information? If not, please give details. (See paragraph 10.2 and regulations 10, 11 and 12.)**

We agree. A person's date of birth is personal data the publication of which should not be required unless there is an overwhelming reason.

Given that information will be provided as to an individual's date of admission, there is no need to use date of birth as a proxy for how experienced the individual is likely to be and making it available may encourage age discrimination.

8. **Do you think we have struck the right balance between transparency and the protection of individuals in reserving a discretion, in exceptional circumstances, to allow a practising address to be kept private? If not, please give details. (See paragraph 10.6 and regulations 10, 11 and 12.)**

We are not sure that the right balance has been struck. To our mind the use of the expression "in exceptional circumstances" in the regulations is likely to predispose the SRA to refuse to exercise its discretion. We would prefer the regulations to set out an alternative test; being that if an application is made the information should be withheld unless the SRA forms the impression that to do so would not be in the public interest.

The example the SRA provides (threat of violence) seems to us in fact to be a very legitimate reason why this may be necessary.

9. **Do you think we have struck the right balance between transparency and the protection of individuals in reserving a discretion to issue a practising certificate which does not recite the full details, or does not refer to, an imposed condition? If not, please give details. (See paragraph 10.6 and regulations 10, 11 and 12.)**

We do not think that there has been sufficient discussion of this issue in the consultation paper.

Without additional information (such as how conditions are usually phrased on practising certificates and by what means and in what manner they are or could be abbreviated) we cannot form a view as to whether the balance is appropriate or not.

10. **Do you think it would be appropriate to include in the regulations provision for the SRA to review its own decisions? If not, please give details. (See paragraph 12.)**

Yes, it is clearly appropriate that the SAR should be able to review its own decisions. It would be a very unsatisfactory circumstance if the SRA believed that it had erred in terms of its internal processes in withholding or granting a practising certificate but was unable to take any steps to remedy this (short of advising the individual concerned to appeal to the High Court).

However in relation to this topic the 'devil is in the detail'. As the SRA points out in paragraph 12.3, it is vital that such procedures as are developed are explicit and fair given the potentially dramatic consequences for those involved.

11. **If the SRA is to have the right to review its decisions, how long should the SRA have after the original decision before the review procedure must be started? (See paragraph 12.)**

We do not think that we can answer this question without further information as to how the SRA would approach its review procedure. This seems to us to be precisely the sort of detailed consultation point that cannot be considered satisfactorily until the way that similar reconsideration powers or functions will work has been clarified.

Further, we think that the eventual provision dealing with timing should be crafted by reference to a time period starting at the point when the SRA became aware of the facts that gave rise to the requirement for reconsideration, rather than by reference to a date when the original decision was made. It would be unfair for the SRA to become aware of having made an error only for it to find that it was unable to rectify or otherwise deal with the situation because the matter was outside the time limit for review.

12. **Do you think it is appropriate to include the requirements for solicitors, RELs and RFLs together in the same set of regulations? If not, please give details.**

No, we think that the regulations are unwieldy and at points almost unintelligible. Aside from the possible benefit of having one statutory instrument rather than three, we can see no other benefits in combining the requirements at all. An example of how difficult the combined regulations are to read in a consistent manner and how poorly they lend themselves to combination is the very different way in which they deal with the conditions which may initially be imposed on a solicitor or a REL (regulation 6) and an RFL (by the mere addition of the words "(subject to such conditions as the SRA may think fit)" in regulation 2.4(a)).

It needs to be kept in mind that it will rarely be necessary to look at the regime for solicitors, RELs and RFLs all at the same time. Most commonly an individual solicitor will wish to understand the regime as it applies to him or her but will not be concerned with how it could hypothetically apply to somebody who was qualified in Delaware but wanted to practise in London. Even if a person was required to consult the regulations in the context of more than one regulated group, we would argue that it would still be more time efficient and straightforward to look at three shorter, distinct regulations than the present unwieldy draft.

In the context of a period during which the legal profession in the UK has been (and will continue to be) subject to an enormous amount of regulatory change, we feel strongly that it should be an SRA objective to produce regulation which is as clear and straight forward as possible. In our mind that would best be achieved by splitting the regulations out.

13. **Do you believe any aspect of the draft SRA Practising Regulations will have a particular impact (adverse or otherwise) on any group or category of persons? If so please give details.**

We are not aware of any such group or category.

14. **Have you any other comments on the draft SRA Practising Regulations?**

We have some additional comments which are set out below by reference to the relevant regulation:

1.1 We can foresee the circumstance in which an individual may believe that he or she has submitted all of the documentation required and that an application is being considered when the SRA is not satisfied with what has been submitted or believes that the application is not complete. This is particularly likely given the breadth of the SRA's power in regulation 1.1(e). Accordingly, we think it appropriate that the SRA should be subject to an explicit obligation to stipulate to an applicant when an application is not yet under consideration due to deficiencies.

1.4 Given how complicated the application and the SRA's deliberations may be, we think it only reasonable that the SRA should be obliged to provide full details regarding its reasoning in relation to any application which is the subject of regulation 1.4(a) to (c). Not only is this reasonable from the perspective of the applicant but it may be that the applicant has misunderstood an element of the process and that the provision of detailed reasoning will actually serve to resolve issues.

2.3(a) This regulation includes a 'fit and proper' test regarding the suitability of the person concerned to practice in the UK. It would be helpful if the SRA would explain (and provide in the regulations or guidance) how this test will be applied. The new regime for legal services envisages such a test being applied in different circumstances (for example in relation to non-lawyer managers and so forth) and it would be helpful for there to be consistency across the various rules in the application of this test.

2.3(c) Presumably here a reference to "the relevant Law Society" is a reference to the Law Societies of Scotland and Northern Ireland but the drafting could be clarified.

6.1 Why is there a difference between the SRA being required to consider whether an individual is "unsuitable" for the purposes of regulation 6.1(a) and being required to consider whether an individual is "potentially unsuitable" for the purposes of regulation 6.1(c)? It seems to us that there is a significantly broader number of circumstances in which somebody could be considered to be "potentially unsuitable" and we are concerned that regulation 6.1(c) gives the SRA an unreasonably broad power to impose a condition.

7.2 How is 'may' to be read for the purposes of this regulation? Is the regulation to be read so that the individual has the ability to make such an appeal or is it to be read so that the individual 'may only' make such an appeal during the period?

If the latter, we do not see why it is reasonable to restrict a right of appeal in this fashion and, if it is so restricted, then we cannot easily see how the timing for the internal SRA appeals in regulations 7.5 and 7.6 can apply. Twenty eight days is a very short period of time during which an individual may not have gathered together the relevant materials or have reached a decision as to how to proceed (particularly since not appealing may involve material issues for the person concerned such as a change of career). If a time period is to be used it should be longer, we would suggest 90 days.

15(c) "Approved regulator" should be defined in regulation 17 to link the concept back to the approval regime created by the Legal Services Act 2007.