Solicitors Regulation Authority

SRA response

"Amending the Regulators' Compliance Code", Department for Business, Innovation and Skills consultation

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Executive summary

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 are pleased to have the opportunity to respond to the Department for Business, Innovation and Skills (BIS) consultation paper "Amending the Regulators' Compliance Code".

3.

The principles underpinning the Compliance Code are welcomed. They are consistent with the SRA's outcomes-focused approach to regulation. However, we are concerned by the level of prescription suggested in the new Code and that the new proposed Code may stray beyond the remit of Sections 21 and 22 of the Legislative and Regulatory Reform Act 2006 (LRRA). Specifically we are concerned that:

- the Code as drafted is not principles based;
- the significant amount of work which the Code envisages being completed by regulators to pro-actively evidence desired behaviours and comply with quite prescriptive requirements will in our view increase the cost of regulation not reduce it;
- the significantly increased prescription on details such as publishing a review date for policies on a website could result in unhelpful costly disputes over non-substantive issues. This could again result in an increase in the cost of regulation.

4.

Essentially, the new Code appears to mix detailed requirements which concern good practice with core duties which need to be fulfilled to perform a regulatory role effectively and proportionately. In our view this is wrong and risks having the unintended consequence of increasing regulatory burden (cost) despite the good intentions behind the proposals. Good practice should be included in guidance rather than the Code to avoid unhelpful dispute over the requirements.

5.

Also some areas, such as appeal rights, are complex and similarly would be better dealt with through guidance rather than in broad statements in a statutory Code.

6.

Finally, some regulators (including the SRA) are already subject to significant requirements and oversight by another body. The Legal Services Act 2007 (LSA) sets out the ‘regulatory objectives' and good compliance principles for approved regulators and an oversight regulator the Legal Services Board (LSB). The proposed changes are not necessary for approved regulators and would increase cost by requiring regulators to demonstrate adherence to a further set of requirements. More information on the requirements which the SRA is already subject to is set out in an annex to this response.

7.

It is important to note that by virtue of Section 22(4) LRRA the duties to have regard to the code "are subject to any requirement affecting the exercise of the regulatory function". This includes the SRA's duty to promote the regulatory objectives set out in the LSA.

8.

While we do not feel that it is appropriate therefore for a revised compliance code of this nature to be applied to the SRA we hope that our more detailed comments below are helpful.

Replies to Consultation Questions

Question 1:

Do you agree that the Regulators' Compliance Code and the voluntary Enforcement Concordat should be replaced with a new simplified code?

Question 2:

Do you agree with the name of Regulators' Code? If not, please suggest alternative titles for the Code

9.

We consider that the current Regulators' Compliance Code strikes a better balance between high level principles and detail. It works well and does not need fundamental revision. The Code is consistent with our duties under the LSA.

10.

We would support an updated Code that is outcomes-focused, truly principles based and very alive to the risk of imposing additional cost by being too directive. We do not support the replacement of the current Regulators' Compliance Code with the draft Regulators' Code which represents a significant change in approach and goes well beyond simplifying the current code. In particular, the introduction of very detailed requirements will introduce a disproportionate level of extra costs.

11.

We agree with the name of Regulators' Code.

Question 3:

Are the draft requirements of the Regulators Code appropriate? Please provide any supporting evidence in your response.

Question 4:

Are there additional requirements you consider important that are not captured by the draft code? Please state these and your reasons.

General comments

12.

The current Regulators' Compliance Code makes it clear at paragraph 2.4 that the duty to have regard to the Code is a general one and does not apply directly to the exercise of specific regulatory functions by regulators in individual cases. This is an extremely important statement of the legal position under the LRRA which should be included in any revised Code. A failure to do so may lead to unnecessary, inappropriate and costly legal challenges based upon the Code which are not in the interests of the public (who will ultimately bear the cost), good regulation or indeed those they are regulated.

13.

The most serious concern is that the draft Code will certainly increase regulatory cost, which is passed on to business in fees and has a negative effect on growth. Even if the cost is not passed on (in circumstances where it may be impracticable or undesirable to increase regulatory fees), it would result in the diversion of resource better applied to direct regulatory work. Much of what the Code requires is already provided by modern regulators but requiring a long list of factors to be taken into account in decisions will simply increase the bureaucracy around developing policy as well as providing (often unmeritorious) scope for challenge. While the SRA's experience (regulating lawyers) may be different from other sectors, challenges to policy are usually driven by those alleged to be in serious breach of public protection provisions.

14.

As drafted, the new Code is highly prescriptive which we consider is wrong in principle and likely to lead to considerable extra expense for regulators in practice. Such compliance costs would inevitably have to be passed on to our regulated community and therefore would increase the cost of the regulation for businesses. The 5 high level principles in the draft Code are appropriate. In our view, as the consultation paper accepts, these should be left for regulators to interpret flexibly in the context of their sector. We agree that some explanation of the high level principles is desirable but not in such detail and not without appropriate qualification.

15.

Highly prescriptive requirements such as those in paragraphs 3.2 to 3.8 will clearly increase cost, since they include very specific tasks.

16.

The approach suggested by both current and draft Codes seems to envisage regulators making a record of their compliance with the Code and then working either to achieve compliance or document why they feel justified in doing something differently. Given the very detailed requirements of the draft Code, this would in the future be likely to be an onerous task.

17.

The commitment made in paragraph 3.11 of the Consultation for regulators to be challenged by "businesses, regulated bodies and citizens" needs to be dealt with carefully to avoid misleading regulated businesses and others into making unnecessary and costly challenges to legitimate enforcement action in the public interest. It is not in the interests of business or the public for cost to be expended on unnecessary challenge. Provided challenge is clearly related to service standards and regulators are held to account for

overall delivery, legitimate challenge is welcome (but could also become costly if not properly managed).

18.

The current Regulators' Compliance Code makes it clear at paragraph 2.4 that the duty to have regard to the Code is a general one and does not apply directly to the exercise of specific regulatory functions by regulators in individual cases. This is an extremely important statement of the legal position under the LRRA which should be included in any revised Code. A failure to do so may lead to confusion, unnecessary disputes, increased cost and delay. The failure to include this statement is exacerbated by the fact that the Consultation at paragraph 3.8 talks of the requirements of the code being "delivered by regulators in their day to day activities" and in paragraph 3.15 it refers to regulators having regard to the Code "when delivering their enforcement responsibilities".

19.

Similarly the first paragraph of the draft Code is applied to regulators developing "operational procedures".

20.

The Code therefore appears to go beyond the scope of Section 22 of the LRRA.

Detailed comments

21.

We have concerns about the way in which the following requirements are expressed

> 2.4 this should be qualified as dialogue is not always appropriate. For example the SRA, and no doubt other regulators, sometimes have to take urgent action in order to protect the public. Most regulators clearly set out an appropriate approach in their Enforcement principles. This is an example of the Code being too detailed.
>
> 2.5 - – we support the provision of fair and transparent appeal procedures. The draft provision fails to take into account complexities around this issue such as that some regulators (such as the SRA) have internal appeal processes (which cannot, by definition, be "independent") which are often complemented by an external appeal to a statutory tribunal or the courts. The overall process is compliant with Article 6 of the ECHR but the regulator itself does not (and arguably cannot) provide a truly "independent, impartial" process in the legal sense. Regulators also make in-process

decisions which should not be subject to appeal (such as to exercise investigatory powers). A better wording would be: "Final decisions of regulators should be the subject of fair and transparent appeal processes where appropriate." The final qualification is important because, for example, some decisions can affect large numbers of people and it would not be in the consumer or public interest for one person to be able to appeal and delay the outcome. The SRA has to decide on how to distribute the client accounts of law firms it has closed and many clients may be awaiting their money. The availability of appeal to one of those clients could delay distribution to all.2.8 – While we agree that it is good practice to carry out customer satisfaction surveys, paragraph 2.8 is unrealistic in requiring the inclusion of questions suggested by Government. It is unlikely to be possible to construct a set of questions relevant to the diverse range of regulators subject to the Code.

Paragraph 3.2 is overly prescriptive in that phrases such as "every stage" overstate good practice. The work of a modern risk-based and outcomes focused regulator will be fully informed by risk as part of its core values and principles; that should be a statement of general principle or outcome rather than a prescriptive provision which may simply lead to costly challenge as to whether risk is considered at "every stage".

An example of an overly prescriptive requirement is the requirement in paragraph 3.6 to enable "earned recognition". The concept of earned recognition is important and potentially beneficial but it would be wrong to force regulators to deploy it across all of their work since such schemes need to be designed carefully and proportionately.

3.7 regulators must be able to decide at what level to consult with its supervised population on risk assessment and risk ratings. This approach may put regulators at risk of challenge about the level at which they share such information which it has based on sound operational reasons. It is assumed that it is not being suggested that risk indicators of individual businesses should be published - as this could harm the business concerned. It is important to understand that these are indicators of potential risk and not outcomes.

3.8 - this may impair flexibility which will hamper regulators from regulating effectively. While it is entirely appropriate for businesses to be aware of how an inspection will be conducted and what compliance levels are expected, if detailed information on how checks of compliance are published non-compliant businesses may be able to make adjustments to mask non-compliance. This provision should therefore be qualified.

Unlike the existing RCC, principle 4 makes no reference to legal requirements. The SRA appreciates the desirability of sharing information with other regulators where appropriate and permissible and has entered into agreements accordingly however it recognises the limitations imposed upon it by law. This should be reflected in the Code.

5.3 must be subject to a qualification as it would be inappropriate to impose an obligation to consult on all guidance when there are circumstances when it is clearly inappropriate as recognised by the Cabinet Office Guidance on consultation. Equally while it may be desirable to co-publish guidance with businesses in some sectors and some circumstances this should be subject to a qualification that such a requirement would only apply in appropriate circumstances.

5.5 – Similarly, while business should of course be able to rely upon advice from regulators (paragraph 5.5) it is important not to inadvertently impose a "safe harbour" approach in the context of public protection. Safe harbour policies need to be carefully designed because it is not in the public interest, for example, for a business to be beyond enforcement because of an exchange with a regulator in circumstances where the impact of the business's behaviour is against the public interest. The SRA also has experience of "advice" being sought on a carefully limited basis with a view to its being relied on to derail legitimate enforcement action. General public law principles of "legitimate expectation" work well in this context including balancing the ability of business to rely on what has been said by regulators with the impact on others.

Question 5:
Do you agree with the principles-based approach of the code together with the requirement for each regulator to publish detailed, specific service standards?

Question 6:
What should be included in the regulators' service standards to meet the requirements of the code and ensure that these standards enable businesses and other regulated bodies to hold regulators to account?

Question 7:
How should regulators' compliance with the requirements of the code and their published service standards be monitored?

Question 8:
How can the code be made more accessible to business and regulated bodies and how can they be encouraged to engage with regulators in developing policy and challenging poor practice?

22.

A statement of key principles for regulators is potentially helpful provided it is not over-prescriptive. It is not clear that the draft is in line with the reference in the consultation paper to "Government's commitment to reducing unnecessary direction from the centre" (para 3.16). Although the effective provision that the Code is subject to other provisions such as those the SRA is required to deliver under the Legal Services Act 2007 is helpful, detailed additional or slightly different provision in a Code is liable to confuse or mislead the regulated community.

23..

Although the consultation paper suggests that the Code is principles-based, it is not. Indeed, the SRA and other modern regulators have moved beyond principles-based to outcomes-focused regulation.

24.

The SRA's regulatory performance is subject to review by the Legal Services Board. In addition to this we have an internal complaints handling system with a three stage system including oversight by the Independent Complaint Resolution Service. We believe these specialist mechanisms are better suited to securing appropriate standards of service by the SRA than a prescriptive Code which applies across the board to a very diverse range of regulators.

Question 9:

How should the scope of the Regulators' Code be defined?

Question 10:

Should the scope of the Regulators' Code be amended? Please provide reasons and any supporting evidence for your answer.

25.

There is currently an anomaly in the application of the code to approved regulators of legal services, in that the code applies to some but not all of the approved regulators. This creates potential confusion and unfairness between different professions governed by different regulators. As the LSA provides for approved regulators to be held to account by the LSB, we believe this situation could best be resolved by removing all approved regulators from the scope of the code.

26.

The code currently applies to the LSB, the Law Society (of which the SRA forms part), the Bar Council, the Faculty Office of the Archbishop of Canterbury and the Council for Licensed Conveyancers. However it does not apply to:

a. The Chartered Institute of Legal Executives/ILEX Professional Services

b. The Chartered Institute of Patent Attorneys

c. The Institute of Trade Mark Attorneys

d. Association of Costs Lawyers

Question 11:

Do you agree with this approach to providing guidance on the code?

27.

We agree that the proposed approach to providing guidance on the code is sensible and practical. However we would be concerned, given our comments on the draft Code itself, if the guidance was too detailed or prescriptive. It is essential that it allows regulators flexibility in the ways in which they apply the Code. We support the aims to improve business awareness and assume that the proposed introductory guide would be generic and not detailed or prescriptive in such a way as to contradict or impact on information published by regulators themselves.

Annex – current SRA arrangements

The Legal Services Act 2007

28.

The Legal Services Act 2007 (LSA) sets out eight regulatory objectives [i] [#section1] . Approved regulators of legal services, 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 [ii] [#section28] .

29.

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

30.

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.

31.

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

32.

Approved regulators such as the SRA must also have regard to iii [#section28a]

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.

33.

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. Thus there is a carefully balanced combination of duties for regulators of legal services to observe.

i Section 1 Legal Services Act 2007
[http://www.legislation.gov.uk/ukpga/2007/29/section/1]

ii Section 28 Legal Services Act 2007
[http://www.legislation.gov.uk/ukpga/2007/29/section/28]

iii Section 28 Legal Services Act 2007
[http://www.legislation.gov.uk/ukpga/2007/29/section/28]

The SRA's approach

34.

The SRA is committed to setting itself challenging targets and being open about its performance. We have adopted a Visions and Values statement as part of our overall strategy which includes:

"We constantly seek to improve the effectiveness of our regulation and the efficiency with which we achieve our objectives:

we deliver against our plans and budgets;

we are open, honest and transparent about our performance;

we keep our activities and use of resources under review to ensure the optimum utilisation of resource to deliver our objectives;

our people are proactive in seeking opportunities to improve both the effectiveness and efficiency of the organisation and the delivery of our objectives."

35.

The SRA's regulatory performance is subject to review by the Legal Services Board. In addition to this we have an internal complaints handling system with a three stage system including oversight by the Independent Complaint Resolution Service. We believe these specialist mechanisms are better suited to securing appropriate standards of service by the SRA than a prescriptive Code which applies across the board to a very diverse range of regulators.