

E-Briefing – Detailed Version
(Covering the period from 16 April to 14 May 2009)

1. Professional Representation

1.1 Professional Rules and Regulation Committee (PR&RC)

The PR&RC prepared a submission in response to the SRA's consultation on decision making criteria (see <http://www.sra.org.uk/sra/consultations/2385.article> for the consultation and [click here](#) to read the response.)

The SRA consultation was the first in a series inviting comments on criteria applied to its decisions. The consultation invited comments directly on the application of criteria specific to the following decision types listed below, which are already used by the SRA:

- Give notice that intervention powers have arisen
- Issue a letter of advice
- Make an order to examine files
- Restore an individual's name to the roll
- Remove an individual's name from the roll
- Keep an individual's name on the roll
- Waive the requirement to deliver an accountant's report
- Issue a certificate of good standing/attestation
- Refer conduct to Solicitors Disciplinary Tribunal
- Order preventing non-lawyers from being employed or remunerated
- Issue a settlement of regulatory and disciplinary case
- Give discretion to the SRA when issuing a solicitor's next practising certificate

The CLLS's submission in response to the consultation stated that the criteria were clear and easily understood, and that publication of the criteria applied to decisions would assist in making the process more transparent. However, it was noted that not all of the 12 criteria published contained a complete list of the criteria that would be applied to the relevant decisions. The submission also agreed that it would be helpful for the SRA to refer to the specific published decision making criteria when making decisions, in that it would show that specific decisions had been arrived at with due consideration of the relevant decision-making criteria. It was thought that where the criteria applied are complete and clearly articulated, it should not be necessary for the criteria or the SRA website to give examples of how the criteria might be applied in practice. It was also thought that the application of the criteria would not have an adverse impact on any of the groups referred to in the consultation questionnaire form (older or younger solicitors, men or women, solicitors with a disability, solicitors from any particular ethnic background).

The PR&RC also provided a supplementary response to the SRA's consultation on work type codes ([click here](#) for the response). The PR&RC response approved of the fact that some of the concerns which it had raised

earlier had been taken on board by the SRA and that the SRA had recognised that the initial list of work type codes was too long. It also suggested the addition of a few more work type codes (i.e banking/international capital markets, competition/anti-trust, and pensions), and also sought clarification on the application of some of the proposed codes.

The PR&RC also responded to the SRA's Consultation Paper on the "Use of enhanced investigatory powers" (See <http://www.sra.org.uk/sra/consultations/2406.article>) for the consultation paper and [click here](#) for the response).

The SRA consultation stemmed from the powers granted under the Legal Services Act 2007 to the SRA to require solicitors and others to explain their conduct and to produce documents. The consultation was on how the SRA proposes to use the new powers (and not about the powers themselves, which have been provided by statute). The Legal Services Act 2007 has extended and modernised the existing powers so as to give additional rights to the SRA to pursue its investigations and also to extend these powers to third parties and to regulated persons. The policy statement attached to the paper covered three powers, namely:

- The power to require a regulated person to provide information – section 44B
- The power to require a regulated person to attend to provide an explanation – section 44BA
- The power to require any person to provide information – this can only be done if the SRA obtains a court order – section 44BB

The SRA's draft policy statement regarding the use of enhanced investigatory powers set out the practice and processes which govern the SRA's use of the investigatory powers, namely Section 44B – "Provision of information and documents by solicitors etc", Section 44BA – "Power to require explanation of document or information" and Section 44BB – "Provision of information and documents by other persons" (as above).

The CLLS response made a number of detailed comments in regards to the proposals, and stated generally that:

Like all powers, the [enhanced investigatory powers] need to be exercised with caution, respecting the rights of the affected person. With that in mind:

- 1. The draft policy statement is insufficiently clear/helpful on rights of review or appeal. "Penal" Court documents/Orders explain what the recipient is required to do and what they should do if they disagree with the Order. At a policy level, a similar open approach should be taken by the SRA.
- 2. In relation to paragraph 5, it is unclear why it is said that a power is likely to be used frequently on the basis that it is proportionate because it does not involve major cost or inconvenience. Cost and inconvenience are together only one measure of proportionality. The SRA's approach should include consideration of other factors, for example, whether the requirement affects the confidentiality of any party, the seriousness of the alleged infringement and the steps taken by the practitioner to assist the SRA. In any case, it may not be for the SRA to judge cost or inconvenience. Compliance may be very costly in larger or more complex matters or very inconvenient to a busy sole practitioner.
- 3. In relation to paragraph 12 (c), the general exclusion of the advance provision of questions is unhelpful and inappropriate to an investigation of which the interviewee is unaware, unless it is thought that the provision of questions will lead to the investigation being obstructed or evidence being destroyed. It would be more helpful

to allow interviewees to prepare for interviews by having questions in advance or at least a summary of the topics on which questions will be asked.

2. Specialist Committees & Working Groups

2.1 Company Law/Financial Law Committees

Guidance on the execution of documents at a virtual signing or closing has been prepared by a joint working party of The Law Society Company Law Committee and The City of London Law Society Company Law and Financial Law Committees (the JWP) ([Read the guidance.](#)) The purpose of the Guidance is to record a (non-exhaustive) range of options available to parties when executing documents at 'virtual' signings or closings (i.e. where some or all of the signatories are not physically present at the same meeting). **This Guidance is not intended to imply that virtual signings and closings cannot, or should not, be conducted in other ways.** The Guidance is simply intended to facilitate virtual signings and closings, in the light of the *R (on the application of Mercury Tax Group and another) v HMRC* [2008] EWHC 2721 (*Mercury*) case. This Guidance is relevant for virtual signings and closings of documents governed by English law.

The Guidance looks at the relevant statutory and other legal requirements for deeds, real estate contracts, guarantees and simple contracts, sets out three possible options for "virtual" signings and closings, and examines the situation of where a contracting party cannot attend the signing/closing meeting in person.

2.2 Litigation Committee

The Litigation Committee responded to the Ministry of Justice's consultation paper 04/2009 on controlling costs in defamation proceedings (see <http://www.justice.gov.uk/consultations/docs/controlling-costs-in-defamation-proceedings-consultation-paper-web.pdf> for the consultation paper and [click here](#) for the response). The consultation paper stated in its Executive Summary that:

1. The high levels of legal costs incurred in defamation and some other publication related proceedings have been the subject of criticism and debate in the courts and Parliament where, in particular, it was considered by the Constitutional Affairs Select Committee's inquiry into Compensation Culture in 2006.

And

4. This paper seeks views on measures to control costs better in this area, taking account of the proposals submitted by media organisations and other interested parties in response to earlier consultations. These measures are:

- A. Limiting recoverable hourly rates;
- B. Mandatory costs capping or consideration of costs capping;
- C. Linking recoverability of ATE Insurance premiums to notification to the other party and introducing a period of non-recoverability post notification; and
- D. Requiring the proportionality of total costs to be considered on cost assessments conducted by the court.

The Committee's response pointed out that costs are already controlled:

The reasonableness of costs incurred in all civil proceedings is assessed by the courts under the provisions of the Civil Procedure Rules and administered by specialist costs judges. Furthermore, where costs are granted on a standard basis, any doubt about reasonableness of work done will be resolved in favour of the paying party. The courts can cap costs under the new rules agreed by the Civil Procedure Rule Committee, introduced on 6 April 2009.

The submission also stated that “[a] cap on costs would require claimants to cover the shortfall, the prospect of which might deter the less wealthy from seeking to assert their legal rights in the first place, and could reduce lawyers’ willingness to act” and that “Capping costs in defamation proceedings would grant defendants special privileges at the expense of claimants”. The submission also stated that “the ability of those damaged to sue and recover their legal costs is operating as the only brake on a powerful media”.

2.3 Regulatory Law Committee

The Regulatory Law Committee responded to the FSA’s Discussion Paper 09/1 “Temporary short selling measures” (see http://www.fsa.gov.uk/Pages/Library/Policy/DP/2009/09_01.shtml for the discussion paper and [click here](#) for the response).

As the Discussion Paper states:

When we introduced the [temporary short selling measures in relation to stocks in UK financial sector companies], we said we would conduct a comprehensive review of short selling – and this Discussion Paper (DP) sets out our analysis and conclusions. The review has sought to cover all the key issues in this area, as we saw them, including the issue of short selling in stocks of companies undertaking rights issues; we introduced disclosure requirements regarding short positions in companies undertaking rights issues on 20 June 2008.

The Committee’s response dealt with a number of the issues raised in the Discussion Paper, and in the main focussed on the issues which had legal as well as market implications. It stated that:

- It appeared to be of critical importance that the FSA should maintain its close involvement in, and coordination with, regulatory initiatives relating to short selling, both at European level and internationally.
- A consistent set of short selling measures across European and other significant global markets is a priority, and that achieving this should be a key objective of the FSA. The paper therefore welcomed and supported the FSA’s endorsement of the desirability of seeking an international consensus on the short selling regime and at a minimum, a more harmonised approach within the EEA. Furthermore, In view of the work being carried out by both IOSCO and CESR, in which the FSA has been closely involved, the paper strongly encouraged the FSA to defer any final decisions on the issues under discussion pending the outcome of that work, in order to ensure a fully coordinated European regulatory response, and to minimise disruption and cost to market participants.
- Considering that the temporary regime is due to expire at the end of June, it would be helpful if the FSA was able to provide as early an indication as possible as to what action it intends to take at that point.

The document also responded to the specific questions mentioned in the discussion paper, namely:

- Prohibition on short selling – questions 1 to 6
- Powers to intervene in cases of emergency – question 7
- Additional constraints on short selling – questions 8 to 10
- A permanent disclosure regime on a proper statutory footing
- The benefits of transparency around short selling – question 11

- Scope of disclosure obligations – questions 12 and 13
- The types of disclosure option – questions 14 to 16
- Thresholds and bands – questions 17, 18, 20 and 21
- Market maker exemption – question 19
- Further measures in respect of CDS

3. Other Matters

Law Commission Consultation

The Law Commission recently produced a summary of the responses it received to the consultation paper regarding consumer remedies for faulty goods. The summary can be accessed at http://www.lawcom.gov.uk/consumer_remedies.htm.

Law Society Survey on the Regulation of Solicitors

The Law Society has stated that it will shortly be undertaking a survey of the profession's views on the regulation of solicitors.

It is understood that the main objectives of this research are to gather information on the views of senior decision makers within firms on how the profession is regulated and to provide the Society with information on the effect of regulation on firms. The survey and its results will also apparently help the Society to identify the issues and themes to which it should devote its resources. So that the Society might track the development of views about regulation over time, it is further understood that the Society will be repeating the survey say every two years.

It is further understood that:

- The Society will shortly appoint an independent market research company to conduct a series of telephone interviews and that, when returning the information to the Society, the research company will anonymise the data; and
- The focus will be on solicitors in private practice only.

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