



GUISE response to Lord Hunt's Call for Evidence in the Legal Regulation Review

1 Introduction

- 1.1 The firm specialises in the management of heavy business disputes and regulatory investigations of all kinds.
- 1.2 Approximately 40% of the firm's turnover is derived from our regulatory practice.
- 1.3 The Partners are members of the Solicitors' Assistance Scheme (www.solicitorsassistancescheme.org.uk) (SAS) a panel of solicitors specialising in supporting solicitors facing a range of different challenges in their personal and professional lives including investigation by the SRA and/or the Legal Complaints Service (LCS). Panel members each provide one hour of advice pro bono either by telephone or in face to face meetings. In the firm's financial year to 30 April 2008 some 74 interactions took place at our firm under the aegis of the Scheme representing a pro bono commitment to the profession equivalent to approximately £25,000 of otherwise chargeable time¹. In the financial period to 30 April 2009 the number of interactions was 88, the equivalent of almost £30,000 of otherwise chargeable time.
- 1.4 Tony Guise is one of only 6 members of the Duty Solicitor Scheme at the Solicitors Disciplinary Tribunal (SDT). He is a founding member of the Editorial Board of the Law Society's new publication, The Compliance Bulletin, which addresses current issues in solicitors regulatory law.
- 1.5 The partners are frequently published or quoted on regulatory issues in journals such as the Law Society's Gazette, Solicitors Journal, New Law Journal and the newsletters of a number of regional Law Societies. Partners frequently speak on compliance related topics to practitioners in private practice, in house and in local government throughout the country.
- 1.6 Ms Rinker specialises in issues arising from professional indemnity coverage issues under the Minimum Terms.
- 1.7 Mr Guise writes a monthly column dedicated to regulatory issues for the Solicitors Journal.

¹ This does not equate to precisely 1 hour per interaction as some calls take considerably longer than 1 hour to resolve. Nevertheless the Practice does not charge.

1.8 We frequently appear as advocates before the SDT, our daily work involves the management of regulatory investigations prior to referral to an Adjudicator or the Tribunal. Our clients range from sole practitioners to the largest regional practices.

2 Our submission

2.1 We draw attention to concerns we have found occurring in the way in which solicitors re regulated by the SRA and address issues that may arise as the profession further expands with the introduction of Alternative Business Structures (ABSs).

2.2 These concerns arise, we believe, from the shift from a prescriptive to a principles based regulatory environment to which Lord Hunt draws attention in paragraph 2.11 of his Call for Evidence of January 2009.

2.3 Whilst he is right to draw attention to the fact that the regulated community must adjust to this new approach it is also the case, in our view, that the regulator must adjust. Part of the problem arises from the background and training in that many of the case workers employed by the SRA originate from a Trading Standards or similar background with no training, in our experience, on the Better Regulation Executive's 5 principles of effective regulation. In this we note and agree with Lord Hunt's proposed recommendations in paragraph 38 of his Initial Response to Evidence of May 2009 (the Initial Response).

2.4 The case workers' background makes for excellent investigative skills but that same background (being from a prescriptive environment) appears to inhibit a sense of proportion in their recommendations. In this submission we provide examples of such practice in order to achieve a more enlightened approach consistent with the principles of regulation Lord Hunt has set out in paragraph 2.11 of his Call for Evidence. The object being to establish a new approach to regulation which should benefit regulator and regulated alike.

3 In house and local government practitioners

3.1 The Code of Conduct is a breath of fresh air in the regulatory field. Its concise and clear manner of presenting rules and guidance is a very welcome change from the confusing presentation of the Guide which preceded it. The use of a glossary is helpful. However there is one respect in which it fails to convey its meaning clearly and we address that in this part of our submissions.

3.2 This firm acts for local government lawyers and in house lawyers. We represent the Commerce and Industry Group and liaise with the Solicitors in Local Government Association (SLG) and the Association of Council Secretaries and Solicitors (ACSeS) on compliance matters of concern to their members.

3.3 In our practice we have experienced only 2 issues of concern to this sector:

- a) The level of the practising certificate fee charged to in house/local government lawyers; and,
- b) Investigations which have at their core the allegation that the lawyer in question is practising uncertificated carrying with it the prospect of regulatory sanction and criminal prosecution under section 21 of the Solicitors Act, 1974 (the 1974 Act).

3.4 The case for a differentiated practising certificate fee

Although there are those who contend that the practising certificate fee should be charged uniformly irrespective of sector (see, for example, Geoff Wild's article in the Solicitors Journal 07.04.09 and our reply in Solicitors Journal 05.05.09) most local government and in house lawyers and their representative bodies seek either:

- a) the extension of the exemptions from the obligation to hold a practising certificate contained in section 88 of the 1974 Act (extends to the Treasury Solicitor and Principal Solicitors in the major Departments of State) and under and section 223 Local Government Act, 1972 (to the Clerks to local authorities)²;
- or,
- b) a differentiated fee.

3.5 Those arguing for a differentiated fee seek a practising certificate fee which recognises the minimal regulatory burden that in house and local government lawyers present to the SRA.

3.6 The firm has led a negotiating team from the C&I Group to address this concern and at a meeting with the Chief Executive of the SRA and others on 11 December 2008 were promised a consultation early in 2009 on this issue. That has yet to materialize and there are those calling for a boycott of the fee in October 2009 unless the sections 88/223 exemption is extended. This would be a most unseemly development and one which, in our view, should be avoided by a consultation which tackles head on the concerns of the in house and local government community.

3.7 A differentiated fee or the extension of the existing exemptions would of course meet 2 of the BRE's principles - a transparent and proportionate regulatory environment.

3.8 The requirement to hold a practising certificate and "the regulatory net"

A more pernicious aspect of the principles based Solicitors Code of Conduct which came into force on 1 July 2007 (the 2007 Code) is the extension of the requirement to hold a practising certificate from those undertaking reserved legal activities to those undertaking business services such as are undertaken by solicitors. This approach can be seen in Rule 20.01 of the 2007 Code and has

² There are numerous other exemptions but these are of some antiquity and are not referenced here.

been the subject of lengthy negotiations between the C&I Group team and the SRA. It provides:

3.9 In the 2007 Code rule 20.01 represented an extension of the obligation to hold a practising certificate which was not authorised under the 1974 Act or the Legal Services Act, 2007 (the LSA). The rule provided:

“20.01(2)

You will be practising as a solicitor if you are involved in legal practice and:
(a) your involvement in the firm or the work depends on you being a solicitor;
(b) you are held out explicitly or implicitly as a practising solicitor;
(c) you are employed explicitly or implicitly as a solicitor; or
(d) you are deemed by section 1A of the Solicitors Act, 1974 to be acting as a solicitor.

20.01(3)

In (2) above “legal practice” includes not only the practice of law but also the provision of business services such as are provided by solicitors.

Guidance to Rule 20

6. *There is a presumption that you are practising as a solicitor if you are held out (explicitly or implicitly) as a solicitor whilst providing lawyer-like services. The same presumption arises if you are described as a lawyer in such a context, if you have no other legal qualification to justify that description. It is possible in some circumstances to rebut the presumption by ensuring that some such words as “non-practising” are used whenever you are held out as a solicitor or lawyer. However, you cannot rebut the presumption if you rely on being a solicitor in the context of legal practice – for example in order:*

(b) to be employed as a solicitor or lawyer

In house solicitors

13. *If you are an in-house solicitor, you must hold a practising certificate if:*
(a) you are held out as, or employed as, as solicitor or lawyer.”

3.10 The decision of the Judicial Committee of the House of Lords in Law Society v Swain [1983] 1 AC 598 (HL(E)) held that the rules regulating the profession were secondary legislation. Consequently this has raised the prospect of a judicial review of the 2007 Code as being ultra vires primary legislation. This would be another unwelcome development derived from a prescriptive approach on the part of the regulator in a time when the Code should be approaching matters on a principles basis.

3.11 The Solicitors Code of Conduct which came into force on 31 March 2009 (the 2009 Revision) was required to effect rule changes to facilitate the establishment of LDPs. Although described by the SRA as “general updating” the revisions in fact made significant changes in a number of other respects

amongst which were the rules affecting in house and local government lawyers. As a result of the negotiations between the C&I Group and the SRA the new rule (20.02) provides:

“If you are practising as a solicitor you must whether practising in a firm or in-house:

(a) have in force a practising certificate issued by the Solicitors Regulation Authority; or

(b) be exempt under section 88 of the Solicitors Act 1974 from holding a practising certificate.

(2) You will be practising as a solicitor if you are involved in legal practice and:

(a) your involvement in the firm or the work depends on your being a solicitor;

(b) you are held out explicitly or implicitly as a practising solicitor;

(c) you are employed explicitly or implicitly as a solicitor; or

(d) you are deemed by section 1A of the Solicitors Act 1974 to be acting as a solicitor.

(3) In (2) above "legal practice" includes not only the practice of law but also the provision of other services such as are provided by solicitors.”

3.12 “Other services” remains undefined and a serious issue for in house and local government lawyers who may be practising in activities which are wholly unreserved (such as advising on employment contracts) and therefore have no need for a practising certificate yet this piece of secondary legislation would appear to require them to hold a certificate. This is particularly onerous for local government lawyers whose employer, the local authority, may lack the funds to pay for the certificate leaving their employee solicitor exposed to regulatory and criminal sanctions.³

3.13 The guidance notes to the 2009 Revision at note 55 assist to clarify the position in accordance with primary legislation but the guidance is of course only guidance and it is not mandatory. Rule 20.02 takes priority. In our discussions with the SRA the officers who drafted this revision were unable to explain what

³ Lord Hunt will recall the amendment sponsored by the SRA to introduce this concept into the Legal Services Bill in the House of Lords via Lord Kingsland. The Government rejected the amendment and the position was most clearly expressed by the Honourable Bridget Prentice, MP during exchanges in the House of Commons HC LSB Committee on 14.06.07:

“The Government’s approach in the Bill is exactly the same as that set out in the Solicitors Act, 1974.”

- the 2007 Code meant by “business services” and unable to explain what “other services” involved. This is particularly unsatisfactory and oppressive. It is wholly inappropriate in a modern principles based Code to have undefined, prescriptive terms especially where they do not form any part of primary legislation.
- 3.14 An example of a case in which in house solicitors have been subject to regulatory investigation in such circumstances under the 2007 Code is SRA reference REG/38421-2008/JK.
- 3.15 It is too early to say what the SRA’s approach will be under the 2009 Revision. However the undefined nature of “other services” occasions cause for continuing concern. The issue is a large one and receives a fuller treatment in our advice prepared for the C&I Group a copy of which we enclose in Appendix 1. This takes into account the 2009 Revision.
- 3.16 The regulatory treatment of this issue typifies the SRA’s heavy handed, unjustified and disproportionate approach to regulation at present.
- 3.17 This is probably an appropriate place at which to address the issues raised by Lord Hunt in paragraph 10 of the Initial Response. Should the requirement to hold a practising certificate be extended to will writers, certain commercial work, certain types of legal helpline and all probate work? This question is really asking whether the range of reserved legal activities defined in the Legal Services Act, 2007 should be extend to embrace those matters to which Lord Hunt has drawn attention.
- 3.18 Each category deserves its own debate. We are unclear by what is meant by certain types of legal helpline and certain commercial work and therefore reserve comment pending clarification.
- 3.19 However the writing of wills and probate work can give rise to much anguish unless it is done properly and professionally. Those categories of work should probably become reserved. It should be noted that we do not oppose the widening of the regulatory net where a case can be made for it. Our desire is that any enlargement of the reserved legal activities should be done transparently rather than by stealth in a way which lacks transparency as in the case of rule 20.02.
- 3.20 The criteria for the regulatory net has been a story of attempts by the Law Society (in its various historical manifestations) seeking to extend and assert the solicitors’ monopoly over certain types of work. The Courts have over many years drawn the line quite clearly in favour of the current reserved legal activities and only those closely allied to the existing categories should be admitted. Hence our call for will writing and probate activities to join the list given the list already includes the obtaining of grants of probate/letters of administration.
- 3.21 The proposal of “certain commercial work” and “certain types of legal helpline” to become reserved legal activities is quite a different matter. Those

categories have no obvious, or any, nexus with the existing list. We are strongly of the opinion that any widening of the legal net should be the subject of extensive specific consultation.

3.22 Legal Professional Privilege

Legal professional privilege is another source of concern to the in house and local government community. In response to enquiries by Vince Cable, MP the Chief Executive of the SRA wrote a letter dated 19.01.09 (copy attached at appendix 2) asserting that under English and Welsh law only those in house or local government lawyers would be entitled to the benefit of legal professional privilege if they held a practising certificate. The sentence in question says this:

“We believe it is in the public interest that in-house lawyers (solicitors or barristers) employed in commerce, industry, the voluntary sector and the public service should be full members of their respective legal professions, subject to all the same professional obligations and entitled to the same public trust as their colleagues in private practice, and that their clients are entitled to the same benefit of legal professional privilege.”

3.23 This is a mis-statement of the law (see Three Rivers District Council and others v Governor and Company of the Bank of England [2004] UKHL 48, per Lord Scott of Foscote at para 46 et seq.). The SRA’s letter does not make that clear, unfortunately. The closest this can come to accuracy is if the statement were limited (which it is not) to cases involving European competition law under the decision in Akzo Nobel (although that is subject to appeal due to be heard later this year).

3.24 It is this kind of aggressive, one-sided approach which does not assist to persuade the regulated community that the SRA adopt the BRE’s five principles of effective regulation.

4 **Private practice**

4.1 In paragraph 24 of the Initial Response Lord Hunt indicates he would encourage the SRA to develop further the Practice Standards Unit and to have created a compliance toolkit. We strongly support such a move. Time and time again our private practice clients complain about visits from the SRA in which mistakes are identified but there is a refusal by the SRA to provide advice about how to put things right. This is greeted with disbelief by many of our solicitor clients all of whom wish to conduct their practices honestly and with proper regard for the professional rules.

4.2 Such a tool kit could be exceptionally helpful in many different situations. This would be particularly helpful in for those:

- managing referrals from claims management companies; and,

- undertaking investment business and having to cope with the complex provisions of rule 10 (commissions) as well as the COB Rules and the SCOPE rules.

4.3 In the latter example we would refer the Review to the case of Eaton Smith⁴ solicitors whose firm is of excellent pedigree and committed to client care and excellence in service delivery. This firm came before the SDT in September 2008. We passed details of their case to Paul Marsh on 1 December 2008 for transmission to the Review.

4.4 The Tribunal said:

“This case would emphasise to the profession the need for solicitors to be extremely careful in dealing with the receipt of commission and similar matters. The Tribunal made no criticism of the Applicant for the presentation of her case but also felt some surprise that the case had come before the Tribunal. This was not a firm which should be held up to the profession as a bad example. What the Tribunal had read and heard today about the firm had impressed the Tribunal in relation to the high quality of work carried out particularly in the care and handling of the affairs of the very vulnerable client, SR.”

4.5 This is a matter which should have been dealt with internally. The outcome which we recommended should have been expected was, almost entirely, the outcome that resulted in the SDT, namely reprimands, with some allegations withdrawn and others dismissed. The one sanction which was administered to Ms Pendlebury which could not have been given internally, at that time, was a £500 fine⁵.

4.6 The SRA’s Costs were reduced by approximately one half.

4.7 The case concerned the operation of the rules relating to the receipt of commission, the COB and SCOPE rules. They are a complex mixture and one where advice given during interview with the SRA’S Investment Business Unit would probably have avoided the need for 3 years of investigation and Tribunal proceedings, £6,000 of SRA costs awarded in the Tribunal, £90,000 of own costs and a firm whose development was effectively put on hold for 3 years.

4.8 At the end of the hearing the views expressed by the Tribunal echoed our own views but not those of the SRA who took an aggressive and unhelpful approach to matters which had occasioned no loss or prejudice to any client. It is the last point which may assist the SRA to gauge a proportionate response. The questions case workers should be asking are:

- Are there technical breaches which could be put right with training?

⁴ SDT case number 9853-2007, David Blakeborough et al

⁵ Under the regime shortly to be introduced by the SRA fines and rebukes will be options for internal sanctions and it is to be hoped more cases will then proceed internally reducing the (considerable) back log of work in the SDT and producing a more proportionate result.

- Has any client suffered loss?
- What is the attitude of clients to the breaches?

4.9 This one example; we are aware of many more cases where such questions, if asked rhetorically - as it were - by case workers, could have led to the great saving of costs on all sides and enable the SRA to concentrate on cases where the public interest has been prejudiced.

5 The SDT

5.1 Resources

The Tribunal has recently received further investment from the Law Society which has enabled its administration offices to move to the fifth floor of Gate House thereby enabling a third hearing room to be developed where the office once stood. The opportunity was also taken to install air conditioning and provide, for the first time, client conference rooms. The most recent Annual Report is for the period ending 30 April 2008 and provides an insight to these changes and also the increasing workload of the Tribunal, see appendix 3.

5.2 Much has improved at the Tribunal but more can be done about providing greater resources in the form of staff to enable the processing of cases.

5.3 The process of investigating a solicitor for alleged professional misconduct is a protracted one. Its principal stages are: investigation, adjudication which can lead to referral to the SDT, the instruction of a Panel Solicitor, the preparation of an application and supporting evidence by that Panel Solicitor which is then submitted to the Tribunal for a single member to determine whether there is a prima facie case or not. If a prima facie case is found the Tribunal posts the application and supporting evidence to the respondent solicitor. Eventually the matter comes before the Tribunal. However, those stages can sometimes take, and usually do take, years to reach a conclusion. There follows a significant delay which almost always arises between the hearing date and the handing down of Findings. This gap can often be months before Findings are published. Whilst the outcome and sanction are made known on the day of the hearing detailed reasons take a considerable time to arrive.

5.4 This is problematic because:

- The solicitor is left without knowing in detail the reason for his punishment having already waited at least 2 or 3 years before reaching this point;
- Any appeal that needs to be lodged cannot be initiated without those reasons; and,
- A solicitor's employment or continued partnership can be determined by the Findings which can lead to a prolonged period of suspension or issues of the exclusion of a partner arising.

5.5 Reporting of decisions

We note the views expressed in paragraph 27 of the Initial Response and agree with them. Tribunal decisions are the only authoritative way of the profession learning about the interpretation of the professional code of conduct. This is all the more important following the change of the rules in 2007 to a more principles based approach. A good example is the recent case of Tilbury which deals with referral fees (specifically exit fees) and which is not widely known⁶. The decision has serious implications for all solicitors undertaking personal injury work referred by claims management companies.

5.6 Decisions are reported on the internet but the database is not searchable and makes working with it very difficult. A full set of reports is not available and at present the reported decisions start at January 2005. However, the catalogue is revised periodically to remove older decisions.

5.7 An invaluable service would be the publication of a series of law reports of the Tribunal's decisions. The Law Society has already made taken some steps in the right direction by launching, earlier this year, The Compliance Bulletin⁷. This is a publication which reviews developments in solicitors regulation and draws attention to recent decisions of importance but it is not a complete solution as space is limited.

6 Representing solicitors in regulatory investigations

6.1 Schemes such as the Solicitors' Assistance Scheme (SAS) and Law Care provide an invaluable service but whether they can level a playing field dominated by a well resourced regulator is doubtful.

6.2 SAS panel members provide an hour's free advice either by telephone or in person advising about regulatory, partnership, money laundering and other compliance related issues. Until the recent shake up of the Law Society's functions following Sir David Clementi's report the Scheme was substantially financed by the Law Society.

6.3 Recently the SAS has suffered a swingeing cut in this support with only very limited meeting expenses now being provided by the Law Society. The Scheme is supported by its Committee providing a helpline and support network for solicitors facing professional crisis.

6.4 The SAS' resources are limited and after a free hour's advice further support has to be paid for at commercial rates unless funding can be found from an Insurer which support is not always available.

⁶ Despite our best efforts, see Solicitors Journal 153/21 02.06.09 p 15 – appendix 4.

⁷ As mentioned above, one of our partners is a member of the Editorial Board. We gather the publication already has 450 subscribers.

6.5 There are insurance schemes which solicitors can purchase to protect themselves from the cost of a regulatory investigation or SDT appearance. Before the Event legal expenses insurance policies are available from well known BTE providers. Sometimes such products are a benefit of membership of organisations such as the British Legal Association, but not the Law Society of England and Wales. The drawback with these products is that they usually require there to be reasonable grounds for defence before an indemnity is made available. In most regulatory investigations there will be a breach of one kind or another and therefore almost no cases in which reasonable grounds for defence may be found to qualify a solicitor for the benefits of cover.

6.6 It would be good to see the Society negotiating with insurers to provide BTE cover which overcame this drawback.

6.7 A regulatory defence scheme

It is surprising the SAS is not better supported by the Society and even more surprising that no regulatory defence scheme has yet been put in place⁸. These are the kind of services we believe most solicitors would expect their representative body to provide. Medical practitioners have no problem with this recognising, as they do, that in times of professional difficulty a representative body exists to support its members with relevant services.

6.8 The Law Society requires Insurers providing the Primary Layer of professional indemnity insurance to abide by the Minimum Terms and Conditions. Those terms cannot be avoided by Insurers when meeting claims and provide for defence costs, including the cost of defending any investigation, inquiry or disciplinary proceeding to be met irrespective of excess. However, such cover only arises if a claim has been made or notified. In many cases a notifiable claim does not arise because there is no allegation of professional negligence. For example, in the case of a breach of the Solicitors Accounts Rules, 1998.

Hence the pressing need for a regulatory defence scheme for solicitors.

7 The future of regulation – LDPs and ABSs

7.1 We agree with Lord Hunt's remarks on paragraphs 44 et seq. of the Initial Response. This is a serious innovation which we consider could become the salvation of High Street practitioners in the MDP format. However, time must be taken to enable possible regulators, such as the SRA, to assess whether they are willing to regulate ABSs and, if so, how. A consultation paper was issued by the SRA recently on regulating ABSs and whilst that is a start it is equally clear from the paper that much thinking remains to be done.

⁸ We gather the possibility is being considered by the Law Society.

7.2 We are concerned that calls by such as those of the Honourable John Mann, MP for robust regulation⁹ may affect the LSB's approach. Excessive zeal in regulating such novel concepts may lead to the benefits of such innovation being stymied at the outset. We prefer Lord Hunt's remarks during the House of Lords Committee stage of the passage of the Legal Services Bill¹⁰: what is required is "a light touch which is proportionate". We urge Lord Hunt to build on his approach in the Initial Response and reiterate this approach in his Report.

8 Concluding remarks

8.1 The Review is moving in the right direction.

8.2 As we see it the big challenge is tackling the SRA's enforcement philosophy. The annual audit (which Lord Hunt proposed) of the Authority's performance against the 5 Principles may assist.

8.3 If we can assist further on any of the points raised we would be delighted to do so. Our contact details are below.

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⁹ Legal Services Bill, House of Commons Third Reading, 04.06.07 "robust regulation is required to protect the good name of solicitors...". A similar call has been made by David Edmonds, Chair of the LSB, in evidence to the Justice Select Committee on 25.02.09 when he made it clear that light touch regulation did not work with the Banks and was not going to be tried for lawyers.

¹⁰ 22.01.07 HL Committee stage