

Delicate condition

When outcomes focused regulation is adopted next year, the SRA's power to impose conditions on practising certificates is likely to increase – bringing both comfort and concern, says **Susanna Heley**

The use of conditions on practising certificates as a regulatory tool to manage risk seems likely to increase when outcomes focused regulation is finally adopted in 2011. The system is currently far from perfect, but it is, at least, tried and tested and subject to fairly robust judicial oversight. Indeed, the Master of the Rolls has occasionally been highly critical of the SRA's approach to the imposition of conditions.

The power to impose conditions on practising certificates has traditionally been the SRA's primary option to control the practice of individuals. The SRA has only ever been able to prevent solicitors from, for example, being partners or sole practitioners through the imposition of practising certificate conditions. With the advent of firm authorisation and the new firm requirements to be brought in next October, all of that is about to change.

Since the issue of the final consultation on the new solicitors' handbook on 21 October, risk-based regulation has been very much in the news. The focus of many tends to be on the detail of the changes and it seems clear that the proposed rules on conflicts will cause some conflicts of their own. But what do the new handbook proposals tell us about the SRA's approach to controlling how people practise in future?

Fresh ideas

Although the detail of outcomes focused regulation is yet to be finalised, there are already interesting mutterings coming from several quarters. The Legal Services Consumer Panel has published a survey suggesting that solicitors should undergo some form of mandatory re-accreditation every five years. The question of whether solicitors should be licensed to practice as specialists in separately accredited areas is also being mooted.

With the endorsement of the Legal Services Consumer Panel, these ideas give some indication of the way the Legal Services Board is likely to approach authorisation to practise in future. Compared to our existing CPD scheme, which relies on



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solicitors to maintain up-to-date knowledge, these suggestions have some attraction for regulators, particularly with the potential for consumer confusion as to which services will be regulated when alternative business structures are permitted next year. It is difficult to fault the logic that admission to the roll is not, in itself, a guarantee of eternal competence.

These suggestions are only ideas at present. There are no firm proposals, or even resolutions to put forward firm proposals, but the conclusion that there will eventually be increased restrictions on practising seems unavoidable. For now though, the new handbook brings with it firm authorisation (and the power for the SRA to impose conditions on such authorisation) and the ‘suitability test’ for

non-lawyer managers, for some external owners of ABSs and for COLPs (compliance officers for legal practice) and COFAs (compliance officers for financial administration). These are acronyms we should all get used to; from 6 October next year, every firm will need a COLP and a COFA – unless the SRA has a radical rethink in its approach between now and then which seems unlikely.

New powers

Considering the new handbook, there are numerous additional powers for the SRA, many of which are regulatory (or protective) powers, although, of course, the SRA will have substantial new disciplinary (or punitive) powers as well. While I remain deeply uncomfortable about the SRA's new disciplinary powers, in particular the ability for the SRA to impose unlimited fines on ABSs and the muddled proposals for appeal arrangements, it seems that all roads ultimately lead back to practising certificates in terms of the regulatory powers.

The SRA will have power to disqualify individuals from acting as a COLP or a COFA which will, in turn, trigger regulation 3, meaning that the SRA will then have the power to consider whether to impose conditions on those individuals' practising certificates. Similarly, those disqualified from acting as a manager of a firm will also be subject to regulation 3. These categories are in addition to the current ‘triggers’ for regulation 3. In practice, the changes mean that the substance of the SRA's regulatory jurisdiction for solicitors will remain practising certificate conditions.

Although there is arguably some comfort for solicitors in knowing that there is established precedent for dealing with practising certificate conditions, it is concerning that the SRA has got it very wrong in a number of cases in the past. And, of course, we cannot yet know how well the suitability test will be applied in practice. Fingers crossed.

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