



Regulators are now required to work together, but this raises concerns regarding the impact on client confidentiality and legal professional privilege, says **Susanna Heley**

## What effect will sharing information have on the profession?

This month the SRA signed a long-awaited memorandum of understanding intended to provide a framework for legal services regulators and selected external regulators to cooperate and share information in the overall interests of better regulation. Extending to the Financial Services Authority and the Ministry of Justice in its capacity as claims management regulator, the MoU sets out basic principles to assist regulators in working together.

It is undeniably necessary for legal services regulators to coordinate efforts to regulate where there is some cross over in jurisdiction. In the world of multidisciplinary alternative business structures, there are likely to be significant overlaps in regulatory jurisdiction; however, traditional firms may also have to deal with multiple regulators where non-solicitor fee earners are accused of personal misconduct.

The MoU requires regulators to share information – insofar as it is lawful for them to do so – during both the investigation and prosecution of regulatory offences. Where this information sharing may cause some concern is in its impact on client confidentiality and legal professional privilege. The SRA is entitled to override both confidentiality and privilege considerations in seeking cooperation from a regulated entity. The same powers do not necessarily extend to other regulators, so there is potentially a risk that confidential client information – or even privileged documents – can end up in the hands of a regulator which has no obligation to ensure that confidentiality and privilege are maintained. What recourse would a client have if that information was passed on to a regulator investigating the client's affairs (as opposed to the conduct of the regulated entity or individual)?

It is tempting to dismiss these concerns as largely theoretical; however, the SRA has recently attempted to obtain blanket

information from firms on SDLT avoidance schemes sold to clients. These enquiries have resulted from HMRC's concerns about the unlawful sale of SDLT avoidance schemes and the role of solicitors in the sale of such schemes. The reports I have heard of such enquiries could raise concerns that the SRA may be exceeding its remit in making those enquiries. While the SRA clearly has to fulfil its role as regulator of the solicitors'

regulators will work together in practice but it is a fair assumption that this may lead to longer and more complex investigations since multiple regulators and codes of conduct could be involved.

On the plus side, the findings of one regulator ought to be admissible in disciplinary proceedings brought by another regulator. Regulators will have to accord proper respect to findings made

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profession with proper regard for the evidence presented to it, one has to wonder what steps are being taken to ensure that the enquiries are aimed solely at the conduct of solicitors and not at the conduct of our clients.

The SRA is one of the few regulators/prosecuting authorities with the power to override legal professional privilege. Those powers have not been granted lightly and must not be used for the benefit of other investigating authorities which do not have such powers. The SRA can, of course, only share its information where it is lawful for it to do so. This raises any number of rather vexed questions as to whether privilege belonging to the client can be lost if information is passed through a regulator with statutory powers to override it.

### Longer and more complex

An additional facet of the MoU is that it gives primary jurisdiction for an investigation to the entity regulator. If the investigation deals with individuals subject to the individual jurisdiction of another regulator, the entity regulator should consider involving that other regulator at an early stage. It is yet to be seen how well

following investigations of other regulators. This should mean that the risk of duplicate investigations is reduced. One must, however, wonder what the long-term cost consequences of these arrangements will be. It seems that the entity regulators will be committed to picking up the tab for most investigations as non-entity regulators will fulfil a largely supporting role.

It is difficult to say what the MoU means for the profession as a whole. While it is appropriate that the regulators have a properly defined and published approach to jurisdiction, some of the issues have rather been glossed over and will only crystallise in the fullness of time. I will be waiting to see how the regulators deal with the MoU's requirement that its parties should have substantially the same rules relating to the treatment of client monies... I think that may be an article for another day.



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