COMPLIANCE TOP TEN TOPICS FOR 2024

What does 2024 have in store for us on the compliance front? Jayne Willetts Solicitor Advocate & Bronwen Still Solicitor Consultant both of Jayne Willetts & Co Solicitors Ltd share ten of the most significant compliance issues for the coming year. Firms need to be aware of all these hot topics to ensure that their policies, systems, and procedures adequately deal with the current requirements and the planned changes.

1. Economic Crime & Corporate Transparency Act

The Economic Crime & Corporate Transparency Act received the Royal Assent on 27 October 2023. Space does not permit a detailed examination of this wide-ranging Act but its key features include:

• Significant changes to the role of Companies House by reforming how companies report information.

• A new "failure to prevent fraud" offence whereby an organisation will be liable where a specified fraud offence is committed by an employee or agent for the benefit of the organisation and the organisation did not have reasonable fraud prevention procedures in place.

• Reforms to prevent the abuse of limited partnerships; and

• Measures to address strategic lawsuits against public participation (SLAPPS).

Obviously, the SRA will not itself investigate and prosecute the criminal offences covered by this new Act as that is a job for the police. However, the SRA is granted the power to issue unlimited fines for economic crime offences. Section 207 provides that this power is granted to the SRA to use for breaches of the rules or professional conduct in relation to the "prevention of detection of economic crime" or "an act or omission which has the effect of inhibiting the prevention or detection of economic crime". One can anticipate cases where the threshold for criminal prosecution will not be met but the SRA will investigate the allegations dismissed by the police and possibly forge ahead with its new powers. Expert advice firms will be essential for firms who find themselves in this situation as the SRA will be unaccustomed to investigating these types of cases and the stakes are so very high.

2. The onward march of the SRA

We have written before in this column about the expansion of the SRA and its powers. In July 2022 its fining powers were increased for traditional law firms and the individuals who work in them from £2000 to £25,000. As we see from the previous paragraph, the SRA now has unlimited fining powers for economic crime as a result of the Economic Crime & Transparency Act.

There are signs however that the SRA's push for additional fining powers in relation to economic crime might be the thin end of the wedge. The SRA's "mission creep" is apparent from a recent letter from the SRA Board's Chair, Anna Bradley to the Justice Secretary, Alex Chalk MP, (responding to the issues arising from the Daily Mail sting on immigration solicitors), which raised the wider issue of the SRA's fining powers. Whilst the letter acknowledged that the Bill would provide the SRA with unlimited fining powers in relation to economic crimes, Ms Bradley requested that these unlimited fining powers be given to the SRA in all cases of serious misconduct.

Coupled with this, Ms Bradley suggested that, although individual solicitors should face the SDT in cases of serious wrongdoing, there should be nothing to preclude the SRA from also fining both the legal professional and their firm in parallel with SDT proceedings. Attached is a link https://www.lawgazette.co.uk/news/mail-sting-sra-asks-government-for-unlimited-fining-power/5116835.article

We have also recently seen the proposals for CILEX members to be regulated by the SRA described as a "tidying-up" exercise by the SRA Chief Executive, Paul Philip. Added to this the SRA is keen to be appointed as the sole AML supervisor for legal services.

Whilst one can appreciate ambition in any organisation, it usually goes in hand in hand with high standards of service to the stakeholders that it regulates. Sadly, that is not the case with the SRA. Inordinate delays in dealing with investigations are the norm not the exception and are not helped by expanding the Code of Conduct to ever more delicate and subjective areas of internal law firm management. The final dent in the relationship between the profession and the SRA is the Axiom Ince debacle, with the SRA failing to explain what was known and when and how this catastrophe was allowed to unfold. Confidence in the SRA is at an all-time low – which regrettably sadly damages all who work in legal services.
One can predict that the SRA has its sights set on becoming the sole regulator for legal services – a type of Financial Services Authority for the law – the Legal Services Authority would no doubt be the name of the organisation. However, the SRA would do well to restore its reputation with its stakeholders before it takes another step on its onward march forward..

3. AML & financial sanctions compliance

The heavy burden of AML compliance and compliance with the financial sanctions' legislation continues. Whilst AML compliance is only required by those firms within the scope of the Money Laundering Regulations, all firms are subject to the financial sanctions' regime.
On the AML front, the SRA recent inspections revealed 30% of firms fully compliant; 51% partially compliant and 19% non-compliant resulting in corrective or enforcement action.

As expected, conveyancing is the highest risk area.

Criticism was levelled by the SRA at firms displaying a "tick box mentality" as well as the use of "off the shelf" AML policies not tailored to firms. What the SRA fails to appreciate is that for firms without inhouse compliance teams the purchase of policies from external advisers is often the only option. However, these policies still need to be developed into bespoke policy.

Firms should watch out for common AML breaches such as :

• lacking or inadequate AML policies and procedures

• non-compliance with firm-wide risk assessments

• failure to carry out robust client and/or matter risk assessments.

• inadequate identification and verification of clients

• failure to check the source of funds.

• poor staff training

• little-to-no ongoing monitoring of transactions

• not reviewing or updating AML policies on a yearly basis
On the financial sanctions front, the SRA is increasing its focus to ensure that all solicitors are aware of their obligations and has issued guidance setting out risks and red flags and outlining what a good control framework looks like.

Over the next year, firms should look out for the SRA undertaking sanctions inspections and desk-based reviews to check how well firms are managing their risk and complying with the Office of Financial Sanctions Implementation licences.

4. Climate change guidance & effect on professional indemnity

This may well be a subject that many firms had thought would affect them only in terms of their winter heating bills. However, the Law Society has recently issued guidance on the subject and how this may impact practice in different ways - https://www.lawsociety.org.uk/topics/climate-change/impact-of-climate-change-on-solicitors

For most practitioners, particularly those that advise companies on legal and regulatory compliance, the most likely impact is on competence and the need to keep abreast of legislation concerning such subjects as emissions, discharges, off-setting and carbon credits. As well as a general legal duty to exercise reasonable care and skill, the Code of Conduct requires that solicitors are competent and that they keep their knowledge and skills up to date. Failure to advise clients of relevant legislative obligations could result in both negligence claims, with an associated impact on indemnity insurance premiums, and SRA interest for failure to demonstrate the required level of competence. (More on the general subject of competence appears below). The Law Society guidance points out that climate change issues may well be tangential to the main aspect of the client's retainer but solicitors need, nonetheless, to be aware of them and the possible need to instruct experts as agents where they do not have sufficient expertise. At present, very few solicitors will be competent to advise on "green" issues so firms need to pay careful attention to their terms of business documentation as to exclude such advice from the retainer.

The other subject which the guidance warns firms to be aware of is that of "greenwashing", or making claims about green credentials where they are not supported by any, or sufficient, evidence. It might make good marketing material but must be accurate and not misleading. If your practice says it operates sustainable green policies, there needs to be clear evidence of this, otherwise this may lead to breaches of the Competition and Markets Authority's guidance on environmental claims (the Green Claims Code) This warns: "Broader, more general, or absolute claims are much more likely to be inaccurate and to mislead. Terms like 'green', 'sustainable' or 'eco-friendly,' especially if used without explanation, are likely to be seen as suggesting that a product, service, process, brand, or business as a whole has a positive environmental impact, or at least no adverse impact. Unless a business can prove that, it risks

falling short of its legal obligations."

Again, there could also be a regulatory impact if claims are demonstrably false and a finding of this nature could lead to a failure to act with integrity (Principle 5).

5. First tier complaints handling – improvement needed!

The Legal Services Board reported during the year on research that it had commissioned using consumers and other stakeholders to gauge satisfaction with first tier complaints handling by firms https://legalservicesboard.org.uk/wp-content/uploads/2023/07/Improving-service-complaints-in-legal-services Evidence provided by the Legal Ombudsman (LeO) showed that:

• in 1 in 4 cases accepted for investigation by LeO there was evidence to suggest that first tier complaints handling was inadequate.

• around 1 in 4 complaints are regarded by LeO as premature in that the complainant has not exhausted the first-tier process before escalating their complaint; and

• Approximately 25% of firms have inadequate complaints handling procedures and/or fail to ensure that complaints are properly investigated.

Suggestions for improvement by those taking part in the Legal Service Board's research included:

• Develop a 'Welcome Pack' that could be shared at the beginning of the client provider relationship, thought to be more user friendly than a client care letter.

• Present complaints information in a more innovative way e.g., video, animation, illustration or using diagrams.

• Build the collecting and monitoring of feedback into business as usual.

• Customer service training: some suggested this could include training for all client facing staff.

One key finding was that firms did not do enough to nip complaints in the bud at an early stage and it is clearly commonsense to do so. Clients should feel sufficiently confident to speak up as soon as they have concerns and early action by way of response can prevent things escalating and the relationship with the client deteriorating.

Having a transparent complaints handling process and ensuring that clients are aware of how to complain has long been a regulatory requirement. However, the LSB evidence suggests that many firms still need to up their game in terms of how they handle complaints.

6. Well-being – how will the SRA take this forward?

Mental health and well-being issues have now become embedded in the SRA's regulatory regime with changes to the Code of Conduct which has added the following obligation:

"You treat colleagues fairly and with respect. You do not bully or harass them or discriminate unfairly against them. If you are a manager you challenge behaviour that does not meet this standard."
The new rule is accompanied by several guidance notes on how to embed the right culture within firms to ensure compliance. Key guidance can be found at https://www.sra.org.uk/sra/news/press/guidance-wellbeing

The rule is likely to become all pervasive and could emerge as part of any investigation when things have gone wrong within a firm, as well as forming specific allegations of breach by aggrieved members of staff.

At this stage it is unclear how this rule will be interpreted by the SRA in the many situations that it could potentially have application. A large part of the problem is going to be that people react differently to the levels of stress which often accompany legal practice and there will be differing views as to what might amount to bullying behaviour.

However, overall, the emphasis in all the guidance is on firms having the right workplace culture. This must start at partner level and apply throughout the firm. First and foremost, firms will need to have policies in place which demonstrate compliance and this will need to be carried through into everyday practice. Help with this can be found on both the SRA's website and also LawCare's website where there is helpful guidance for managers on the subject of bullying - https://www.lawcare.org.uk/get-information/articles/10-practical-steps-for-managers-on-workplace-bullying

Because this is relatively new territory, it will be worth watching out for evidence of how the new rule is interpreted by the SRA as cases proceed into the disciplinary process through the coming year. It is going to be particularly interesting to see how the potentially contentious obligation on managers to challenge non-compliant behaviour is to be applied.

What we do know is that these investigations will be time consuming for the SRA because victims and witnesses will be reluctant to co-operate because of the fear of ultimately having to give evidence in the SDT. As a result, the investigations will be significantly delayed and cause unfairness to those under investigation.

7. Competence

This is a subject which the Legal Services Board (LSB) gave impetus to last year with a Statement of Policy on ongoing competence. It required regulators to set standards, determine levels of competence , ensure standards are met and to take action where they are not.
Although the need for competence is enshrined in the Code of Conduct for both individuals and managers, it is stated in very broad terms. Since the LSB picked up the baton on this subject, the SRA has set about defining more clearly what is meant by competence. This started with an updated Statement of Solicitor Competence last year which sets out headings covering the following:

• Ethics, professionalism, and judgement

• Technical Legal Practice

• Working with other people

• Managing themselves and their work

The detail provided under all these headings can be accessed at https://www.sra.org.uk/solicitors/resources/continuing-competence/cpd/competence-statement/
At the beginning of this year, the SRA provided a progress report and action plan on how it was taking forward the LSB's objectives for regulators. Among the lengthy list of actions were thematic reviews to uncover competence related risks, reviews of training records, especially in already identified high risk areas such as immigration advice, and an annual report on competence in the profession.

By August 2023, the SRA had produced a further report analysing vast quantities of information collected relating to solicitor competence, including from regulatory decisions, HM Land Registry data and LeO reports. This report also makes clear that in the coming year the SRA will be focussing on residential conveyancing, probate, and immigration. In relation to these areas of work, it will be carrying out competence-based inspections and will sample training records.

Firms can expect to see much more published on the subject of competence and need to keep abreast of SRA thinking. As a minimum, they should ensure that they have systematic training reviews for all staff and records to demonstrate that this is happening.

8. SRA Accounts Rules changes

The SRA is intending to make three changes to the Accounts Rules which are currently being considered by the Legal Services Board. The deadline is 2 December 2023 so that the changes are almost certain to be approved by the LSB by the time this article is published.

• Taking money in advance of work being done – Rule 2.1 (d) – this amendment (part of the definition of client money) specifies that in order to transfer funds from client account into the firm's office account, the bill or other written notification of costs, must be for costs that have already been incurred. But, and it is a significant but, firms can still agree an alternative arrangement with clients about where client money will be held and how that money will be used – see Rule 2.3 (c). So subject to notifying client of the risks which should include agreeing for fees or monies for disbursements to be paid in advance regardless of whether the work is completed and providing clients with appropriate information. One can see that Rule 2.3 (c) "trumps" the proposed change to Rule 2.1 (d) so we end up at square one.

• Reimbursement for money spent on a client's behalf – Rule 4.4 – the change will make it clear that there is no requirement to deliver a bill or written notification of costs before moving money from client account in full or partial reimbursement of money spent by the firm on behalf of the client. So, firms will be able to reimburse themselves for example for Land Registry fees without issuing a separate invoice. Clients must, as always, be given full information about costs and this Rule does not apply unless firms have spent money in advance on a client's behalf.

• Operating a client's own account – Rule 10 - firms reported difficulties reconciling these accounts due in the main to problems accessing bank statements. The time limit for undertaking reconciliations will therefore be increased from 5 weeks to 16 weeks and will need to be signed off by a COFA or manager of the firm. Firms will also be required to maintain a central register of all clients' own accounts. The SRA will monitor the new arrangements in conjunction with Office of the Public Guadian and is likely to conduct a thematic review of this area of work within the next three years.

9. Immigration

This area of work is, and will remain, highly sensitive because of the Government's pledge to "stop the boats" and reduce immigration figures. It hit the headlines over the summer with newspapers reporting evidence of certain firms advising clients on how to fabricate evidence in relation to asylum applications. With this intense media focus, the SRA acted with unusual rapidity to intervene and close the offending three firms. The SRA also issued a Warning Notice on 27 September 2023 reminding firms of the importance of acting with integrity and honesty, upholding the rule of law and maintaining public trust and confidence. There was also a reminder about not abusing the court system by pursuing unsustainable appeals and by submitting poorly drafted applications.

This subject will inevitably remain under SRA scrutiny and is a likely topic for further thematic reviews, particularly as it has been highlighted as an area where competence issues have been identified. Firms working in this area would do well to remind all their staff about the importance of meeting SRA requirements, particularly the Principles and the relevant paragraphs set out in the Code of Conduct. These are all highlighted in the Warning Notice https://www.sra.org.uk/solicitors/guidance/immigration-work/

10. Inhouse practice

For many years solicitors employed inhouse got on with their work almost entirely untroubled by the attentions of the SRA. With increasing numbers of the profession now employed inhouse, the SRA has taken a greater interest in this form of practice. The scope of inhouse practice has also widened by changes to the rules which allow solicitors to be employed to provide unreserved legal services to the public through companies that are not SRA regulated. Previously it was only in very limited circumstances where this was permitted, such as in law centres.

The first indication that the SRA were looking more closely at inhouse practice was a thematic review, the outcome of which was reported in March 2023 - https://www.sra.org.uk/sra/research-publications/in-house-solicitors-thematic-review.

Whilst generally the outcome of this review was positive, areas of concern were highlighted. These included:

• threats to the solicitors' independence, for example where the employer wanted to suppress information or act unethically where this conflicted with the solicitors' regulatory obligations.

• inadequate time allowed to maintain competence through training;

• insufficient policies, systems, and procedures to manage risks to compliance – and inadequate time allowed by the employer to produce them.

Although generally the result of the thematic review was positive, this is undoubtedly an area to which the SRA will return, particularly to review how solicitors are faring who provide services to the public through unregulated entities. There are obvious pressures in relation to this latter form of practice where employers will want maximum return for their investment.

Finally, inhouse solicitors are not immune from the disciplinary process as was evidenced by the high-profile case of Alistair Brett, the Times Newspapers' inhouse counsel, who was suspended for acting with a lack of integrity.