DAC BEACHCROFT

THE RISK REGISTER 2021

Our Interactive Guide To The Risks Facing Law Firms Now & How To Manage Them

WELCOME

Welcome to the 2021 edition of The Risk Register – our report on current and future risks to the profession. This new edition includes the results of our 2020 survey of law firms.

When we first published The Risk Register in 2019, few could have predicted what was around the corner. The Covid-19 pandemic has proved one of the biggest challenges we have ever faced – both nationally and globally – and has created some unique challenges for the profession.

IN THIS EDITION:-

1. We examine the current claims trends we are seeing, focused largely on property lawyers. Buyer-funded developments, multiple-dwelling relief from SDLT and onerous ground rent claims continue to plague firms – and have contributed to the hardening of the insurance market, which has proved challenging for many firms.
2. We explore the impact of the pandemic on law firms and whether there are any practice areas which are particularly vulnerable to claims as a result. Our data suggests that it is too early to say with any certainty if there will be a spike in claims, but an increase in cyber-attacks is already being felt.
3. We will look at the issues which are arising now in regulatory investigations and proceedings brought by the SRA. Self-reporting can prove a headache for firms and so we consider whether the STARs have made that process simpler. We will also look at well-being, which has a new emphasis thanks to the new ways many of us are working, the impact of #metoo and #BLM, and we will consider whether firms' environmental impact is a new risk.

We hope you enjoy this edition and that our practical take on the key risk management issues faced by law firms is helpful.

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1 CLAIMS RISKS

Later in this edition we will consider some specific risks which we foresee arising from the pandemic. What about what we are seeing now?

In our last edition, we predicted that claims arising from tax avoidance, investment schemes and under settled personal injury claims would increase.

Those predictions have proved to be accurate, as well as our conclusion that property lawyers will remain the focus of claims:-

1. We ask why so-called **buyer-funded developments** are continuing to cause problems for solicitors and their insurers.
2. We look at **Multiple Dwelling Relief** and consider whether this will become a perennial problem for firms.
3. We will consider whether legislative changes might mean that **onerous ground rent claims** will come to an end.
4. We look at some particular risks arising in litigation, as **under settled or mismanaged litigation** has become a growing part of our caseloads.

BUYER-FUNDED DEVELOPMENTS

Why are buyer-funded developments still causing massive claims problems?

On 17 August 2020, the SRA issued a new 43-page report arising from a thematic review of potentially dubious investment schemes. This summarises the problems buyer-funded developments have caused the profession and its insurers:

- Losses typically more than £1m per scheme;
- 48 solicitors and two firms taken to the SDT;
- 16 strike-offs, 8 suspensions, fines of £870,000; and
- "Considerable" payments from the Compensation Fund.

The report found typical problems to arise from buyers' solicitors not acting in their clients' best interests where the firm was a "panel" solicitor for the scheme. This was said to be coupled with the compromised independence of solicitors where they had acted for the scheme promoters before acting for buyers. The report also identified attempts where firms sought to limit their retainers inappropriately in these circumstances.

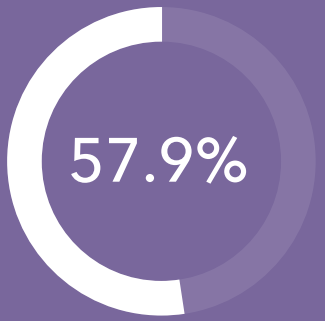
The report identifies familiar problems: investments that offer unusually high rates of reward, opaque terminology, solicitors' client accounts being used as a banking facility and no genuine legal services being provided, and firms providing credibility to a scheme.

In many respects, the problems that are reported reflect issues previously encountered, in another context. The waves of lending litigation against solicitors arising from property crashes in 2008 and the early nineties often featured problems with alleged failures to report suspicious circumstances to lenders. Buyer-funded developments have developed in light of reduced funding options, but the failure to report suspicious matters, this time to buyers, features highly in the reported problems.

The high claim volumes which have arisen from a number of failed developments have arisen at a time when domestic professional indemnity insurance has been under enhanced scrutiny in relation to its profitability and viability for insurers. Whether the result is a "harder" market or a "corrected" market, the signs are clear that there is reduced market capacity. It is therefore probably fair to say that an unhealthy claims record might be even more dangerous now than ever before.

The report and warning notice identify a plethora of problems and firms conducting conveyancing should consider the issues arising closely and ensure all staff involved are aware of the potential risks and receive adequate training.

The SRA's latest report and warning notice is a critical resource for conveyancers involved in any sort of investment scheme



Rising claims costs means it is unsurprising that 57.9% of respondents to our survey confirmed that their PI cover costs are increasing, with no respondents reporting a reduction in the cost of cover.

MULTIPLE DWELLING RELIEF

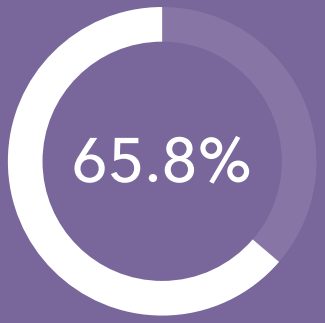
MDR claims are a continued source of frustration, but will only have a limited shelf-life

Claims involving the alleged failure to advise about Multiple Dwelling Relief (MDR) continue to be the low value, high volume scourge of Insurers and their solicitor and conveyancer Insureds. They are showing little signs of abating. If anything, there is an increasing array of Claimant firms and Stamp Duty Land Tax (SDLT) specialists becoming involved, presumably confident that there are still plenty of claims yet to be made, and willing to trawl property records for any potentially qualifying transactions.

MDR is a tax relief available against SDLT liabilities on residential property acquisitions, reducing the tax payable. Whilst initially intended to encourage and assist with the purchase of multiple investment units in one transaction (such as a number of flats in the same development), the interpretation that has subsequently been applied to the legislation and the guidance from HMRC has seen it extended to also capture houses with secondary or ancillary accommodation, including so called 'granny annexes'.

A claim to the Revenue for MDR has to be made within a strict 12 month deadline from submitting the SDLT Return, otherwise the opportunity is lost. The negligence actions we are seeing primarily involve transactions between 2012 and 2016, long after the possibility of mitigation has expired, leaving the Insured professionals as the primary target. Claims are being made in the most tenuous of circumstances, with the merest hint that there may be a part of a property that could be deemed suitable for use as a separate dwelling. The uniting factor is the absence of any specific reference to possible tax relief during the retainer, for something that was not commonly understood to be relevant or applicable at the time.

From a financial perspective, these are ordinarily low value matters, rarely exceeding £15,000, and allocated to the Small Claims or Fast Track. However, they are still economically painful, usually falling within the policy excess, and coming at a time when such unexpected cost is particularly unwelcome and can cause real hardship. Further, there has been little real consistency from the Courts. The silver lining is that it is a historical problem; there are a finite number of purchases which could be argued as potentially qualifying for MDR, and so this trend will eventually expire. In the meantime, it is sensible to carefully review terms of business to ensure any exclusions about tax issues are clear and unambiguous, and to consider whether a specific recommendation should be made about seeking specialist third party advice.



In our survey, **65.8%** of firms attributed human error as the biggest cause of claims, with lack of knowledge considered the second biggest cause at **13.2%**

CLAIMS ARISING FROM ONEROUS GROUND RENT

Will changes to legislation see an end to these claims?

As lender requirements have changed in recent years, some owners of leasehold flats and houses have experienced difficulty in selling or re-mortgaging, allegedly as a result of the onerous ground rent review mechanisms in their leases.

The leases are said to be unacceptable to lenders, which means that the available market is restricted, and the capital value is impacted. Examples of provisions now said to be onerous include those where the rent doubles or is multiplied by 150% every 10 years. Other issues include allegations that a rent uplift in line with the increase in the Retail Price Index is onerous. In some cases, the subject clauses were included in the leases from the outset but we have also seen cases where these clauses were introduced in a negotiated deed of variation when the leaseholder wanted to extend the term.

In our experience, a small number of firms are bringing a large number of claims against solicitors and conveyancers for negligence in failing to advise on onerous ground rent review clauses. Claims are typically being progressed using standard form/proforma Letters of Claim.

There is considerable pressure on the government to address the issue of onerous ground rents, and "changes" were announced by the government in early January giving leaseholders the opportunity to extend their leases and to remove/reduce any onerous ground rent (subject to a cap) . However, there is presently limited detail as to what those changes will entail. Although the government has indicated that this issue will be considered during the first parliamentary term, we anticipate that its very unlikely that new legislation will be implemented until 2022 at the earliest.

For the time being, however, signatories to the Public Pledge for Leaseholders should offer a lease variation (to an RPI based review) where the ground rent doubles more frequently than every 20 years. It seems to us that unfortunately a large number of Claimants are not prepared to await reform or seek to mitigate their alleged losses, preferring to pursue their claims now.

Notwithstanding the anticipated changes, we anticipate that volumes of claims will continue to increase with the main battleground being scope of duty and the point in time at which ground rent provisions ought to have been identified as potentially onerous. 2021 is likely to see a greater number of claims being issued and we anticipate that Claimants' solicitors will try to have claims dealt with together by way of Group Litigation Orders.

In our survey, **50%** of firms considered that real estate and conveyancing would be two of the practice areas most impacted by **Covid-19**

FIND OUT MORE:

Shorthold Tenancies

UNDERSETTLED OR MISMANAGED LITIGATION

Claims arising from litigation continue to be problematic for the profession.

This year is seeing the last of the under settled VWF claims which we had anticipated would be replaced by NIHL claims although they have not been pursued in the same volume as the VWF claims. The holiday sickness claims that the SRA produced a Warning Notice in respect of, will not be as problematic as the SRA once feared. The Warning Notice will be a factor in the reduction of claims but fewer people taking holidays as a result of COVID-19 will be the main reason.

We envisage that we will continue to see large under-settled personal injury claims being pursued often involving capacity issues, head injuries or injuries which have not improved in accordance with prognosis. We anticipate that the recent Court of Appeal case of Swift v Carpenter, could impact on professional negligence claims involving personal injury due to the new approach to be taken in respect of accommodation claims for claimants who have suffered life-changing injuries. Solicitors acting for claimants and defendants will need to re-visit their valuations of cases, withdraw inappropriate offers and update advice in order to avoid claims.

There will inevitably also be an increase in litigation claims arising from the pandemic period where Claimants desperate for cash will have settled their claims, perhaps prematurely under the pressure of that period and subsequently change their mind. The written advice and attendance notes of oral advice will become important features in such cases.

We will also see mistakes as a result of the pressures of lockdown featuring in litigation claims. With many caring for family members and children, missed deadlines and delays will inevitably be a cause of claims.

We predict that online/virtual mediations will continue to be an effective way of resolving claims and should not be feared by the profession. Mediation organisations report that generally across the board, settlement rates have been the same or better compared to in person mediations and those not prepared to engage in this form of ADR could face cost repercussions as seen in BXB v Watch Tower, DSN v Blackpool Football Club and Wales v CBRE Managed Services Ltd.

OUR SURVEY SHOWED:

2.6% of us saw litigation as being an area most impacted by COVID-19.

65% of us thought that human error was the main cause of claims.

13% of respondents thought lack of knowledge of the law was the cause of claims.

FIND OUT MORE

- Litigating during the pandemic
- Cost decisions to impact on professional negligence claims against solicitors
- Don't get caught cold by the Limitation Freeze
- Perry v Raleys
- Mediation Blog

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2 COVID-19 RISKS

Over a year since the UK's first lockdown and many solicitors continue to work from home as well as adapting to new ways to deliver services to their clients in these challenging times.

What does that mean in practice?:-

1. We will look at **risks to different practice areas** which are most susceptible to disruption arising from the pandemic. Although property lawyers have been particularly affected, private client and matrimonial lawyers, as well as litigators, are not immune.
2. Firms have had to transform themselves overnight and to modernise their ways of working. The full **impact on firms and the SRA's response** remains to be seen, but we predict that events over the last year will precipitate changes which have been coming for some time.
3. **Working from home** has kept firms moving but it will create new risks and exacerbate old ones.

PRACTICE AREA RISKS ARISING FROM COVID-19

The pandemic has given rise to additional risks for law firms as a result of changes to working practices. We predict that home working, technological barriers and furloughing will all have an impact, with some practice areas being particularly affected.

- **Conveyancing.** SDLT incentives mean conveyancers are now very busy. Home working (potentially without access to the same support as would be available in the office) and juggling fee-earning with caring responsibilities puts additional pressure on practitioners. This may lead to mistakes. There is also an increased risk of lender claims if potential fraud indicators are missed due to these pressures, or not being able to meet clients in person. Conveyancing solicitors have also had to adapt quickly to changes in rules relating to house moves. A failure to adapt to those changes could give rise to a claim.
- **Landlord and Tenant.** Where commercial tenants have been adversely impacted by the pandemic and lockdown, and are unable to pay rent, landlords may be anxious to secure possession promptly. We anticipate claims arising from notices not being served correctly, and clients alleging that they were not kept up to date with the Coronavirus Act restrictions protecting tenants from forfeiture.
- **Litigation.** Many litigators will now be used to remote hearings and mediations, but care should be taken to ensure clients are comfortable with and prepared for the logistics of remote attendance. Limitation and procedural deadlines must still be met, and additional time should be factored in as clients may have difficulties responding quickly, for example during a lockdown. There may also be claims arising from settlement advice, where clients allege that a change in their circumstances means that advice pre-dating the pandemic may no longer be appropriate.
- **Wills and Probate.** Given the risk to health, particularly for those deemed vulnerable, solicitors may have found themselves under pressure to produce Wills more quickly. To minimise the risk of claims, firms must have procedures in place to be able to action urgent instructions, in order to reduce the risk of claims from disappointed beneficiaries if a Will is not executed in time. Practitioners should take additional care – particularly when dealing with clients via video conferencing software – to be satisfied that the testator is not under undue influence, and has the necessary capacity. The temporary measures permitting remote execution of Wills may assist clients where conventional execution is impossible. However, claims may arise where solicitors are insufficiently familiar with the detailed guidance on remote execution.
- **Family Law.** Whilst Courts are still dealing with family law matters, delays have been exacerbated by Covid. To avoid complaints and potential claims, solicitors should ensure clients are kept up to date on delays, and alternative options are explored, such as mediation or negotiation if a speedier resolution is desirable. Advice on financial settlement may well need to be reviewed, especially if a client's financial circumstances have changed as a result the pandemic.

In our survey 50% of law firms considered that Real Estate and Conveyancing would be most impacted by Covid

To find out more, visit our Coronavirus Risk Management Series for Law firms pages:

- Family law
- Wills & Probate
- Conveyancers
- Litigation

COVID-19: IMPACT ON FIRMS AND THE SRA'S RESPONSE

Whilst the risk of a global pandemic might have appeared somewhere on firms' risk registers before 2020, few could have predicted the wide-ranging consequences of the Covid-19 pandemic.

No practice area has been immune to the challenge that the pandemic has presented. Property lawyers have had to grapple with the practical difficulties of dealing with transactions remotely and the changing priorities of their commercial Real Estate clients. Conveyancers have had to respond to significant changes, some of which have modernised their ways of working, and some have helped boost what might otherwise have been a flagging area of the economy, such as the temporary SDLT holiday.

Litigators have taken Court hearings and mediations online, and we expect that some of these changes will remain as practitioners come to appreciate the benefits of technology to save time and money.

Employment lawyers as well as law firms themselves have had to quickly understand and implement the UK government furlough scheme. Whilst the scheme has proved a lifeline for many firms, its impact on employee loyalty and engagement and long term ability to prevent redundancies remains to be seen.

Change inevitably brings with it some risks. We predict that furloughing will lead to an increase in claims against solicitors. The personal anxieties created by the pandemic mean that mistakes are more likely, and so-called "moments of madness", leading to disciplinary action by the SRA, will sadly increase.

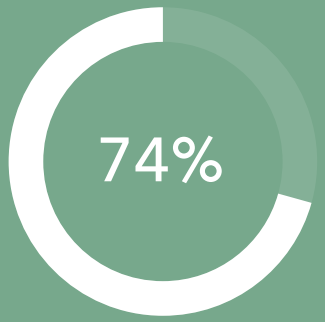
The financial pressures created by the pandemic might also lead to an increase in claims, as well as changes to the structure of the profession, as 68% of respondents to our survey felt that we are more likely to see mergers between firms increase over the next 5-10 years. Strong leadership and astute financial management is more important now than ever before.

There are some positives coming out of this crisis, however:-

- Law firms have been forced to modernise their ways of working. Investments in technology/agile working have paid off.
- Firms can recruit more flexibly, with less focus on a candidate's location.
- Estate strategies will need to be considered, as offices full of desks become less important, and collaborative, creative workspaces will become the new normal. This could lead to costs savings in the long term.

What about the Regulator's response? The SRA has promised to be pragmatic. If a practitioner has breached the rules at this difficult time, it will consider all of the circumstances and whether the individual or firm has at least tried to do the right thing. Whilst that sounds positive, lawyers should be aware that the SRA has highlighted that it does not expect standards to slip. We do not expect the SRA to show indulgence when considering self-reports and potential prosecutions in the coming months and years.

Throughout the pandemic the SRA has continued to conduct investigations, for example by way of conducting interviews remotely. We have seen no let-up in this area and we anticipate that prosecutions will continue to increase.



74% of respondents to our survey said that a reduction in work due to Covid-19 was the biggest risk facing their firm in 2020

FIND OUT MORE

- Litigation in the time of a pandemic – November 2020
- Planning for the Hybrid – the future of commercial office space
- Drafting and executing wills
- Litigating during the pandemic
- Guidance for conveyancers
- Covid-19 – impact on professional liability claims

WORKING FROM HOME

The impact of home working during the current pandemic both in terms of potential claims and the creation / retention of data at home will inevitably result in claims against solicitors.

A common theme that is emerging is supervision and the way that working from home has adversely affected our ability to interact with team members and to speak to one another informally and regularly to discuss cases, share knowledge and to absorb good working habits "by osmosis" without consciously thinking about it. We have seen a number of claims which have arisen due to the failure of supervisors to consider specific issues (such as the form of a break notice or the merits of a particular line of defence) where more regular discussions were not taking place and inexperienced fee-earners did not appreciate the significance of the issues with which they were dealing. Similarly, we are seeing claims where fee-earners have been "left to it" in advance of an approaching deadline without fully understanding the steps that needed to be taken for example in advance of an application in litigation to provide disclosure.

There are numerous positive examples of firms and their clients effectively working together and managing staff by establishing structured and where necessary daily face to face "check-ins" or strategy discussions.

As for data security issues, our clients are reporting a greater number of data breaches caused by the use of incorrect email addresses and sensitive data not being properly password protected. Email has been the preferred method of communication for some time but it is likely that breaches of this nature have increased as a result of the lack of technical assistance to turn to in the office.

Ever more convincing scams and cyber-attacks have evolved during the pandemic and we have seen that this, combined with the decrease in supervision and the advent of home working has resulted in an increase in successful attacks on our clients' systems. Indeed, in its recent thematic review, the SRA reported a 300% increase in phishing scams and stated that in the first half of 2020, nearly £2.5M held by firms had been stolen by cyber criminals (almost three times as much as in the same period in 2019).

Measures are, however, being put in place to address these issues by most firms. We are seeing an increased focus on training in the use of and dangers associated with working with sensitive data and our clients are now regularly checking and stress testing their IT systems and cloud based solutions to assess their effectiveness. There is, however, no room for complacency given the obligation on firms to report issues to the SRA when they arise even where the problem has been rectified or where professional indemnity insurers have indemnified the firm in respect of client account shortfalls.

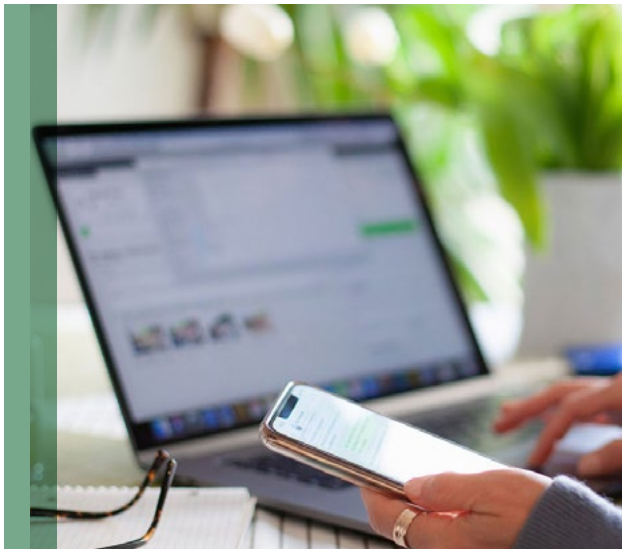
Firms should also be aware of their obligation to report serious breaches to the ICO within 72 hours if they consider that there is a risk to an individual's rights or freedoms. We will all now have to remember that post Brexit the ICO will no longer be a so called "one Stop Shop" to which firms with a cross border practice can report issues and breaches and which had the responsibility for regulating all cross-border processing and enforcing the EU GDPR. There will, therefore be no way to get round the potential obligation to notify the ICO and at least one European supervisory authority in the event of a breach which affects subjects resident in EU member states.

OUR SURVEY SHOWED:

97% of firms believed that supervision plays a part in avoiding risk.

76% of firms perceived that the threat of cyber-attacks / online fraud was increasing.

43% associated an increase in home working with an increase in data security concerns.



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3 REGULATORY RISKS

The pandemic has seen no let-up in SRA investigations and prosecutions. Although there have been further delays to already long processes, the Regulator's determination to uphold high standards in the profession is unwavering – regardless of the events of the past year.

When we issued our last edition, the new Standards & Regulations (STARs) had just come into force and the issue of unwanted sexual harassment was worrying firms.

Where are we now?

1. We look at the STARs and whether the fact that by being less prescriptive, they can create **a problem when considering self-reporting**.
2. **Supervision and well-being** have a new importance for firms, not least for regulatory reasons – we will consider why these issues should be at the top of firms' risk management strategies.
3. We ask whether **#metoo is no longer relevant and look at the impact of #BLM**.
4. We consider a new, potential risk of **environmental sustainability**.

THE STANDARDS & REGULATIONS ONE YEAR ON & THE PROBLEM OF SELF-REPORTING

The Standards and Regulations (STARs) which were introduced in November 2019 changed the way that individual solicitors and firms are obliged to self-report potential breaches of the Code to the SRA.

The new obligations require reports to be made to the Regulator on a mandatory basis in relation to certain matters, for example if a solicitor has been charged with a criminal offence or if there are serious financial issues with a firm that could threaten its ability to trade. In addition, individuals and firms are required to make reports which require the exercise of judgment and are under a duty to report not only in circumstances in which the firm or individual is aware of misconduct which is capable of amounting to a serious regulatory breach, but also if there is no or no substantial evidence of a breach but the solicitor believes that the SRA will wish to investigate.

The report must be made promptly. The case of SRA v Emily Scott illustrated the SDT's interpretation of this provision. Ms Scott was criticised for the delay of several months in submitting her report dealing with the misconduct of her principal on the basis that during the intervening period between her awareness of the misconduct and her report clients' interests continued to be adversely affected.

But what is a serious breach?

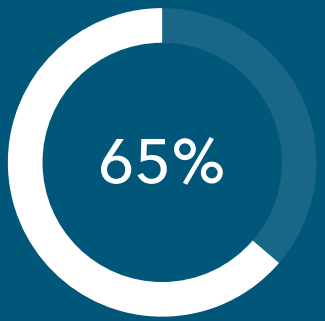
The SRA has made it clear that issues in relation to the misuse of clients' money, matters of dishonesty and violent or sexual misconduct are all matters that should be the subject of a prompt self-report. Solicitors should refer to the SRA's Enforcement Strategy for guidance on the question of what the SRA regards as serious breaches of the Code.

For less serious breaches, the SRA does allow for some measure of judgment on the part of those who are under an obligation to report and again the Enforcement Strategy provides some guidance on this issue. Questions such as the harm to the client and the latter's vulnerability as well as demonstrations of genuine remorse on the part of the subject of the report are all matters that can legitimately be taken into account when deciding whether to report actual or possible misconduct.

Most commentators agree that the new regime could well lead to many more reports given the dual nature of the obligations and the requirement to self-report at an earlier stage in the process. We presume that the Regulator has considered this and decided that this is a necessary evil if it is to ensure that the public is protected from those who breach the Code.

The obligation to self-report is just one of the many duties solicitors face and is often a source of concern for even the largest law firms. In our survey of law firms, we asked solicitors about the way in which the profession is regulated. A staggering 65% of respondents consider that the profession is over-regulated, with only 24% considering that the SRA has the balance right.

Our clients regularly instruct us to consider whether actual or potential misconduct has taken place to the extent that a self-report is required. It is unsurprising, therefore, that 38% of respondents to our survey do not feel that the STARs have made duties/ obligations clearer, with a further 35% considering that there is no difference at all. The uncertainty firms often face is clear, with 74% of those surveyed acknowledging that when they consider whether to self-report, it will depend on the individual circumstances.



65% of respondents to our survey consider that the profession is over-regulated

WORK IN PROGRESS? SUPERVISION & WELL-BEING IN LAW FIRMS

The Standards and Regulations (STARs) that were introduced by the SRA last year impose on Firms the obligation to supervise. This is an obligation that is familiar to solicitors but many commentators suggest that the SRA will interpret the concept of supervision in a broad sense that will include the obligation to ensure that Firms have regard to the well-being of its staff.

This is an issue that has been brought into sharp focus this year with the pandemic and consequent lockdown. There is no doubt that the stress suffered by some junior lawyers has increased as a result of the isolation caused by home working.

Prolonged periods of home working risks the erosion of the supervision policies that firms routinely implement and rely upon to ensure that their clients receive the service to which they are entitled. They also increase the risk that the more inexperienced members of their teams could become overwhelmed by work and could make mistakes which are more difficult to admit to whilst we are all so remote and there is little opportunity for personal interaction.

The SRA has stated that it intends to focus on this issue as it regards mental health and well-being issues as part of the supervisory process. This is no surprise given the number of lawyers who it is said are suffering from mental health issues as a result of work related stress. Some studies say that 48% of junior lawyers reported the incidence of mental health problems compared with a population average of 25%.

It is encouraging that 61% of respondents to our survey told us that their firms had taken active steps to address mental health issues to comply with the STARs. Our results show, however, that 25% of firms have not introduced any measures at all.

The SDT has also started to take a more lenient approach to young solicitors who are charged with dishonest conduct but who rely upon stress and mental health issues in mitigation of their conduct.

Only a year ago we would have predicted that any lawyer found guilty of dishonesty would have been struck off. The Judge in the SRA v James, Naylor and McGregor case referred to dishonesty as a "red line" issue.

There appears to have been something of a sea change, however, and the SDT has recognised the effect of stress and lack of training in cases such as SRA v Michelle Craven when it ordered no sanction against the solicitor despite the fact that she had charged clients for work that she had not undertaken.

Firms will need to take these issues seriously if they are to avoid the risk of claims for poor service and regulatory sanction and the consequent damage to their reputations.

58% of respondents to our survey told us that they believe the profession will be approaching well-being issues in a materially different way in 10 years' time.

FIND OUT MORE:

- Solicitors Risk alert – Covid-19
- Critical Uncertainties – Modernising the Workplace
- The SRA Standards & Regulations 2019

THE IMPACT OF #METOO AND #BLM ON LAW FIRMS

#METOO – WHERE ARE WE NOW?

Law firms can be forgiven for hoping that the regulatory risks arising from sexual harassment have receded as a result of the 'new normal'. Fewer opportunities to socialise with clients and colleagues, and working from home, might mean that we will see fewer prosecutions of solicitors arising out of their behaviour often towards their junior colleagues such as that involving Ryan Beckwith of Freshfields.

In response to our survey, **40% of respondents felt that #metoo will become a largely historic risk for the profession over the next few years**. We hope that this is correct, not just because we have been locked down during the pandemic but also because the #metoo movement has raised awareness and brought these issues out into the open. In response behavioural issues will receive far greater regulatory scrutiny.

This might explain why only **18% of respondents to our survey confirmed that their firms had introduced restrictions and controls around client entertainment, in light of #metoo**.

Sexual harassment can still, however, occur even when colleagues are not physically together and we anticipate that cases will arise where harassment has taken place using email and other forms of communication.

#BLACKLIVESMATTER (#BLM)

2020 has also seen a new global movement - #BLM. Whilst many of us might have hoped that race discrimination was a thing of the past, the #BLM movement has demonstrated that this is a problem which still exists even in professional services firms.

Firms must take steps to ensure that they address all forms of race discrimination, not only because it is the right thing to do morally, but also because getting diversity and inclusion right makes business sense, and can avoid damaging regulatory consequences. This involves more than having a diversity and inclusion policy in place – it should form part of any modern law firm's culture.

We predict that the SRA will be looking at this closely. An allegation of race discrimination should prompt a self-report in the same way as any other type of discrimination. After all, Principle 6 of the SRA Principles requires firms and individuals to act in a way that encourages equality, diversity and inclusion.

A good illustration of the consequences of poor conduct in this area is the case of the solicitor, Majid Mahmood, who made a number of anti-Semitic comments on his personal Facebook account. This led to a complaint to the SRA because his Facebook profile stated that he was a solicitor. As a result of a successful prosecution, he was suspended for 12 months and fined £25,000. This should send a clear message to the profession that this kind of conduct will not be tolerated by the Regulator.

The current regulatory regime means that it is no longer sufficient to comply with the very strict controls on the way we practise – solicitors must consider their personal conduct at all times, and not only when they are in the office to ensure that all of our colleagues are treated equally, without discrimination and with respect.

THE SRA AND SDT RESPONSE TO #BLM

The SDT has announced that it will start capturing details of those who come before it, including details of race, to assist it in reviewing whether certain sectors within the profession are treated more harshly. Critics of the SDT – membership of which is 85% white - have long suggested that ethnic minorities are more likely to be not the prosecuted.

In December, the SRA confirmed that BAME lawyers made up 26% of individuals reported to the SRA in 2018/19, 32% of which were then investigated and 35% came before the SDT. This is despite BAME lawyers comprising 18% of practising solicitors. The SRA has promised to research why so little progress has been made in this area, with no material improvement in a six year period.

SUSTAINABILITY IN LAW FIRMS – A NEW RISK?

Before any of us had heard of Covid-19, there had already been an increasing recognition by law firms of the value placed on corporate responsibility, with business decisions focused on a more inclusive and sustainable culture and purpose, rather than solely the yearly increase in profitability.

One of the ways in which firms have started to adapt to a more responsible and sustainable way of working is by considering their environmental credentials.

Climate heating and the extreme weather events it creates is an enormous issue, but there is now an increasing change in the public perception of this issue and a demand for action by individuals, both as consumers and employees. Momentum is growing fast with personalities such as David Attenborough tackling this issue head on and large household name organisations making commitments to tackling climate change.

There is no legal or regulatory obligation on law firms to behave more sustainably any more so than on any other business, and with the increase in home working, firms may feel that this issue has slipped down the agenda. We predict, however, that in common with all businesses, firms will be expected to take greater responsibility for the impact they and their employees have on the environment in the years to come. A failure to do so is likely to give rise to risk, not least in relation to reputation. Similarly, firms can expect clients and prospective employees to pay more attention to their environmental credentials.

Firms can become members of The Legal Sustainability Alliance (LSA) , which helps firms to quantify their carbon footprint and commit to reductions. DAC Beachcroft is a member of the LSA and has implemented measures to ensure that the environment is always considered as part of procurement processes, along with changes to our cultural principles so that we are all more conscious of the impact our actions and decisions can have on the environment.

Climate change is also likely to impact the advice that firms tender to their clients. That can be something as simple as advising clients fully on potential flood risks when purchasing a property, but it can be more complex, such as advising a corporate client on their disclosure obligations following the Chancellor's announcement in November 2020 that a Task Force on Climate Related Disclosures would be introduced. The Task Force will govern a number of mandatory disclosure requirements and regulations on businesses, the first of their kind in the G20.

Environmental risks have historically appeared on firms' risk registers, we suspect, in a similar way to the threat of a global pandemic. If the events of 2020 have taught us anything, it should be that we can never be complacent in relation to the unexpected risks we might face, and firms should consider sustainability as one of the key principles of effective risk management.

We predict firms will be expected to take more responsibility for the impact they have on the environment.

DAC Beachcroft has identified climate change as one of the "Critical Uncertainties" as part of our Informed Insurance campaign. Find out more here.

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