Looking to the future: phase two of our Handbook reforms

Consultation questions: Authorising firms

1a) Do you agree with our proposal to authorise recognised bodies or recognised sole practices that have a practising address anywhere in the UK?

Yes – this is sensible. For SRA administrative purposes, any address in the UK is readily accessible. It also obviates the need for debate over whether someone who lives in, say, Scotland, but sees clients through a serviced office in London has a practising address in England and Wales or whether they need to apply for a waiver.

2a) Do you agree with our proposal that the current requirement for firms to have within the management structure an individual who is "qualified to supervise" should be removed?

This is a difficult judgement call and there will always be debate about whether an additional one, two or three years practice experience before allowing solicitors to set up on their own reduces the risk of them failing financially or failing clients. The restriction was originally imposed in the 1970s because it was felt that, although newly qualified solicitors may be technically competent, there was evidence that some were unable to cope with both the administrative/compliance requirements of practice and the need to look after clients whilst they were still relatively inexperienced at both. There was also a suspicion that at least some of those who wanted to set up on their own shortly after qualification were the ones unable to get jobs because of flaws in their ability.

In proposing to remove the restriction, the SRA makes much of the obligation on solicitors to be "competent" and only to practice in areas of law where they have the required skills and competence. This is alright in theory, but when a new business is not going as well as planned it is easy to be tempted to take on work that is outside the individual's competence to try and maintain adequate cash flow. Solicitors setting up on their own with a few years practice under their belt usually do so with an established following and are less likely to be tempted to take on work they are unfamiliar with. It is a different story for those newly qualified.

Obviously, newly qualified solicitors will have very different backgrounds and some may have experience of running a business or have spent many years as a paralegal before qualifying so not everyone is in the same position. At present, those who do have the requisite skills and experience have the option of applying for a waiver. The SRA hopes that in removing the "3 year rule", it will pick up potential problems in authorisation applications. The difficulty there is that the SRA will be under an obligation to grant authorisation unless really serious issues are

identified. The reverse is true with the waiver process whereby the applicant has to demonstrate exceptional circumstances.

It is also worth reflecting on the fact that a newly qualified solicitor applying to set up on his/her own is likely to be deemed approved as the COLP and COFA under the Authorisation Rules. Should the Authorisation Rules be amended to exclude those recently qualified from the deeming process? If the SRA decides to allow recently qualified solicitors to set up on their own this needs careful thought.

Overall, we recommend retaining some restriction on newly qualified solicitors setting up on their own.

3) Do you agree with our proposal that solicitors, RELs and RFLs should not be able to provide immigration services outside of LSA or OISC-authorised firms?

Yes. The government clearly intended that immigration services should be provided within authorised firms. It is akin to a reserved legal activity.

4) Do you agree with our proposal that solicitors, RELs and RFLs should not be able to provide claims management services outside of LSA or CMR-authorised firms (or equivalent)? If you disagree, please explain your reasons why.

Yes – again, it was the government's intention that these should be provided by regulated firms.

Consultation questions: Authorising individuals

---

5) Do you agree with our proposal to allow individual self-employed solicitors to provide reserved legal services to the public subject to the stated safeguards?

No. It creates a confusing new type of practice which would allow what are essentially sole practitioners to practice without being fully regulated. The Code of Conduct for individuals would apply but not the Code for Firms (which is expressed only to apply to SRA authorised firms). Therefore, to give some examples, there would be no obligation for this type of practice to have systems and procedures, including those to identify and deal with conflicts, safeguard confidentiality and record undertakings. There will be no obligation to monitor financial stability or to ensure an orderly wind down in the event of closure of the business.

Under these proposals, those who do not want to conduct reserved legal activities would be able to have employees without limitation so could potentially be quite large firms yet they would have no obligation to have any systems and procedures. This must create significant risk for the clients. It is unclear what other Handbook obligations would apply. Presumably, the information requirements in the Information Regulations would not apply, as these appear only to apply to regulated firms. This would create a whole area of practice where no information on, for example, costs or complaints, need be provided.

The picture is further confused by different conditions applying to those who provide non-

reserved legal services and those who provide reserved legal services. The former, for example, do not appear to have any obligation to carry indemnity insurance, can hold client money and can have employees whilst the latter must have indemnity insurance and cannot have employees or hold client money.

Further confusion could be caused, for example, over who might be classified as an employee. Under the "chambers" model of sole practice with shared support services, would solicitors providing reserved legal services be able to use a self-employed IT consultant or administrative assistant – or would these be classified as employees? Would this only be possible for those providing non-reserved legal services?

Overall, we think this proposal has not been properly thought through, is too confused in terms of how this type of practice would be regulated and carries too much risk for the public.

6) What are your views on the policy position set out above to streamline character and suitability requirements, and to increase the flexibility of our assessment of character and suitability?

This is sensible. The requirement that the SRA "will refuse" an application in certain circumstances gives far too little flexibility to consider the whole, and what might be quite a nuanced, picture. The current test has created a huge amount of stress for some applicants because of the lack of flexibility which has meant that an event which may have happened decades earlier and is of no relevance now has to be treated by the SRA as likely to lead to failure of the application.

7) Do you agree with our proposed transitional arrangements for anyone who has started along the path to qualification under the existing routes when the SQE comes into force?

Yes – this is the only sensible approach which can be undertaken. Given the complexity of the new system this will enable students under the current system to qualify and in particular the 11-year transitional period appears reasonable. Given the SQE does not map against existing qualifications it appears sensible to rely on either full exemption via existing qualification route or none at all. Part exemption will be unmanageable and difficult for students and firms to understand.

8) Do you agree with our proposal to expand deeming in this way?

Yes – there do not appear to be any risks associated with this change.

Consultation questions: Specialist rules

---

9) Do you agree with our proposed streamlining of the Overseas Rules and the European Cross-border Practice Rules?

Yes – there is no overall loss of protection and the streamlining seems sensible.

10) Do you know of any unintended consequences of removing the Property Selling Rules?

It is doubtful whether many firms are even aware of the existence of these rules. As they largely duplicate what appears elsewhere in the Code of Conduct and the law there seems no reason not to remove them. The proposed guidance will help with compliance with the legal requirements which some firms may be unaware of.

11) Do you agree with our new proposed review powers?

Yes – it makes sense for all the review powers to be contained in one set of rules. However, the SRA must ensure that the spirit of its Reconsideration Policy is followed once the new rules are in place. The SRA Reconsideration Policy contains 8 grounds for reconsideration of a decision whereas the new draft Rule 4.2 contains 2 grounds – which it is acknowledged are general grounds but nonetheless the SRA should not be too prescriptive in its operation of its new review procedures.

12) Do you agree with the proposed 28 day time limit to lodge all requests for internal review?

Yes – the 28 day time limit is as good as any but there is no provision in the rules for an extension of time for review. There should be a provision that an extension can be allowed in exceptional circumstances.

Consultation questions: Our approach to enforcement

13) Do you agree with our proposed approach to enforcement?

A revised enforcement strategy is welcome. There are some sensible and solid parameters contained in the draft Enforcement Policy. However, the SRA must ensure that its frontline investigators (i.e. Forensic Investigation Officers & Regulatory Supervisors) are fully trained in all aspects of this policy. There is nothing new in the policy so they should already be operating under these parameters but this is not always the case.

Further, there needs to be greater appreciation by the frontline investigators of the meaning of the Principles and the Outcomes. The current practice (which has been in place since the 2011 Handbook was introduced) is to allege that 3 or 4 Principles and 2 Outcomes have been breached for a single set of facts. It does nothing to exacerbate the breach and results in greater costs for all parties and more work for the SDT. It is a kitchen sink approach which should be avoided.

Also, there needs to be a greater emphasis on sifting the complaints at an early stage and not investigating every single complaint in minute detail. We are aware of the tendency of firms to report administrative mistakes of an unpopular partner or fee earner and for this report to be treated as an independent report containing independent evidence when nothing could be further from the case. These reports are being used as a method of dispensing with the services of the said partner or fee earner. The SRA needs to adopt a proportionate approach and to always gauge the public interest at an early assessment before embarking upon an investigation which occupies an inordinate amount of time and cost for the SRA and for the individual concerned – which

once completed is often abandoned. As a general and final observation, the SRA should not allow itself to be led by political and media pressure. It does nothing for the reputation of the SRA. We have seen recent examples with the Leigh Day case and the SDLT cases generated by pressure from HMRC. The SRA needs to be wholly independent and must generate respect not opprobrium.