****

**Looking to the Future: flexibility and public protection**

SRA Consultation

June 2016

**September 2016**

***Introduction***

The Birmingham Law Society (‘BLS’) represents 4500 members and is the largest provincial Law Society through individual and corporate membership. Its membership consists of a broad spectrum of lawyers and practices from sole practitioners up to the largest law firms. Many, including a significant number of smaller firms, have international practices which are particularly reliant on the reputation of the solicitors’ profession. All firms are dependent on the generally held public perception that solicitors are professional in their work. A vital element of this, which goes to the heart of the solicitors’ profession, is that they are trustworthy and regulated. On the rare occasion that a solicitor breaches that trust, a client is always protected.

This response follows an open meeting to which all members were invited. It was attended by the widest possible spread of lawyers ranging from sole practitioners to partners and compliance officers of some of the largest national firms with a presence in Birmingham and other provincial centres in the jurisdiction. This response should be read in conjunction with the Society's response to the SRA's consultation, "Looking to the Future: Accounts Rules Review",

***General Comments***

We accept that the way in which people are accessing legal services is changing. Lawyers have played their part in this by way of developing innovative ways of responding to meet this demand. For instance, as a result of regulatory changes solicitors have begun in increasing numbers to embrace MDPs. Large and small firms have developed new and more flexible ways of delivering legal services making full use of modern media. It is a vibrant market. Inevitably this has been a gradual process with diversification taking place whilst maintaining the key requirement of high professional standards.

Not all legal problems require a solicitor and, as the paper recognises, there are a variety of avenues the public can access which deliver legal services of one sort or another ranging from advice lines (in particular for businesses) to specialist consultants. The not for profit sector such as Citizens Advice deals with large numbers of legal problems, increasingly so since the civil legal aid cutbacks. To relate a statistic such as only one in ten people with a legal problem chooses to consult a solicitor illustrates substantially or in part for an unmet need for services from solicitors is simplistic. Likewise, it is not surprising that businesses faced with a legal problem may, rather than consult a solicitor, choose a help-line to which they subscribe, a specialist consultancy or speak to their accountant. This simply illustrates the diversity of the legal advice market in which solicitors have a key role and play their part.

It is acknowledged that there is an unmet need in which the solicitors’ profession can play their part to fill but they are only a part, and we contend only a relatively small part of the picture when compared with the roles played by the State and others including the insurance industry. It is generally recognised that the gradual withdrawal of state funding of legal services through civil legal aid has contributed enormously to the scale of unmet need. Most recently the withdrawal of legal aid from most matrimonial work has had dire consequences for both the public who, given their circumstances, cannot afford legal advice at any price, and for the courts who are struggling to deal with complex cases where one or both of the parties are representing themselves. It is difficult to see how having solicitors working in unregulated entities will achieve anything of significance to improve that kind of situation. Businesses will be looking for profit and generally easier pickings.

At the outset it should be made clear that we have no objection *per se* to the simplification of the regulatory framework and streamlining the handbook provided adequate guidance and toolkits are also available.

***Solicitors working in unregulated entities***

Having considered the SRA’s proposals and their rationale we have grave reservations about the impact the changes might have on the public’s trust and confidence in the solicitors’ profession. The lack of adequate protection for the consumer if something goes wrong and the absence of client confidentiality are major concerns and should not be ignored. There is a strong possibility, indeed a probability in our view that there are risks of undermining the public’s trust and confidence by creating a confusing and chaotic picture of solicitors’ roles and responsibilities in the legal services market. In the proposed new world are consumers really going to be able to distinguish between a regulated solicitor in a regulated firm and his/her opposite number in an unregulated firm? There are important distinctions. We suggest very few consumers at or before the point where they give instructions will address fully or at all the essential issues of, in particular, protection if something goes wrong and confidentiality.

With justification TLS has argued that this will create a ‘two tier’ profession. We agree. The proposals could have wide ranging consequences for both the reputation of the profession as well as the public and could adversely affect the cost base of regulated firms due to the increased burden of sharing the cost regulation itself and increased contributions to the compensation fund. Other consequences would follow such as the issue surrounding professional privilege which underpins the solicitor/client relationship. Dealing with conflicts of interest presents another potential difficulty.

Difficulties have been experienced in the past with regulated firms who usually provide bulk services such as domestic conveyancing at competitive prices and who have a solicitor or small number of solicitors heading a much larger number of fee earners. Control and direction in such large organisations is a problem. It takes little imagination to see how much more difficult it would be for a solicitor who is not part of the ‘brains’ of an unregulated entity to have any control or influence on the way in which the entity conducts its business. This is a particular concern when it comes the handling of clients’ monies and assets. The difficulties are likely to be compounded many times over for the SRA when considering/taking enforcement action.

Moreover, whilst the growth in the range of organisations offering legal advice over recent years is something to be welcomed and encouraged there have also been a worrying number of unscrupulous providers particularly in the field of personal injury, claims against banks and insurance companies and even McKenzie Friends. We are fearful that were the proposal to be adopted such providers would be tempted to recruit a solicitor(s) in order to gain respectability by marketing themselves as having legally qualified solicitor(s) on their staff. The solicitor would be no more than a stooge.

## ***The proposed ethical and professional framework***

The consultation proposes the creation of two separate Codes of Conduct:

1. a Code of Conduct for Solicitors which focuses on professional standards and the behaviour expected of solicitors.
2. a Code of Conduct for Firms which focuses on the business systems and controls that firms needs to put in place.

The SRA says that *“The 'one size fits all' approach makes the current Code too long, confusing and complicated. It blurs the line between individual and organisation responsibilities, making it difficult to understand and apply”*

What the SRA fails to recognise is that the vast majority of legal practices are not separate legal entities to the individuals that own them. The most common practising models are sole practitioners and partnerships. Unless the firm is a limited company or an LLP, there is no separate ownership and therefore no separation of individual and organisational responsibilities. We have not seen any statistics produced by the SRA that demonstrate the number of firms that are separate legal entities to the individuals who are already regulated by the SRA. If, as we suspect, the numbers are low then we question why we need two Codes for this small number of firms when the existing Code for individuals and firms provides more than adequately for the regulation of the profession.

In addition, before insisting upon two separate Codes, the SRA should take heed of its own experience in trying to impose entity based regulation in the past. The SRA was keen to do so after the 2011 Code was introduced but curtailed its efforts once the difficulty of enforcing entity based regulation became evident. A limited company or an LLP as a separate legal entity can *“disappear”* because of insolvency before the SRA has chance to bring a case before the Solicitors Disciplinary Tribunal. It can merge with another company. Its assets can be sold off. That is one of the reasons why there have only been a minuscule number of prosecutions against firms brought before the SDT.

There is also an overlap between the two Codes in the areas of conflict, complaints and client information/identification. It is not clear which Code would take precedence.

Further, we question whether by focusing on *“business systems and controls”* the SRA is regulating the **professional standards** of firms or whether it is investigating the adequacy or not of the firm’s practice and risk management procedures. We fear the latter. By promoting these practice and risk management procedures to the level of professional standards, there is a risk that the SRA would seek to impose its own version of what is and what is not good practice and risk management and insist that this is objective standard. It could be an entirely subjective view and would be unsuited to investigation and enforcement by an independent regulator acting in the public interest.

The SRA’s stated aim is to “*provide more clarity to firms that we regulate about the business systems and controls that they need to have in place and what their responsibilities are as a SRA-regulated business.”* It is not necessary to have a separate Code in order to achieve this goal. The existing 2011 Code already applies to individuals and to firms. The same principle can be retained. Surely the SRA can produce a toolkit or checklist for firms as to which parts of the Code are particularly relevant to firms without the need for a separate Code if it is convinced that there is an unmet need for such a development.

The Code for firms is in our view an unnecessary and cumbersome diversion and should not be adopted.

## **Consultation questions**

**Question 1 - Have you encountered any particular issues in respect of the practical application of the test for admission (either on an individual basis, or in terms of business procedures or decisions)?**

***Response* –** None has been identified by us but we are anxious that the highest level should be maintained from the outset for anyone wishing to become a solicitor**.** This is essential in order to ensure that only those of proven integrity enter the profession in order to minimise the risks to the reputation of the profession and the public.

**Question 2 - Do you agree with our proposed model for a revised set of Principles?**

***Response* –** Save for Principle 4 we agree with the removal of the Principles dealing with proper standard of service, complying with legal and regulatory obligations/cooperation, running your business effectively etc., client money and assets as these are or will be covered elsewhere in codes or rules.

We have concerns about Principle 4 where ‘integrity’ is linked to ‘honesty’. Whereas the latter can be quite clearly identified and defined **(Twinsectra v Yardley [2002] UKHL 12)** the former is not and is capable of a wide or, indeed, a narrow interpretation. As a result, uncertainty creeps into any enforcement action that might be contemplated with fears being expressed that ‘integrity’ might be open to abuse in some prosecutions simply as a ‘catch-all’ in the event of other more specific charges failing.

It also raises the conundrum of how the SRA would resolve the issue the solicitor who acts without integrity but has not acted dishonestly. This problem is carried through to the SDT. A dishonest solicitor, almost without exception, will be struck off. Will the result be the same in a case involving the integrity of the solicitor? Surely not. The conflation of the two concepts into a single principle creates confusion where clarity is paramount.

**Question 3 -** Do you consider that the new Principle 2 sets the right expectations around maintaining public trust and confidence?

***Response* -** Yes.

**Question 4 - Are there any other Principles that you think we should include, either from the current Principles or which arise from the newly revised ones?**

***Response* –** A key requirement of the solicitor/client relationship is confidentiality. This is a recurrent issue throughout this consultation. Confidentiality is unique to the profession and lies at the heart of the legal system. It is a cornerstone of the rule of law. Accordingly, it should be enshrined in the Principles to avoid any doubt or to meet any threat from without.

**Question 5 -** Are there any specific areas or scenarios where you think that guidance and/or case studies will be of particular benefit in supporting compliance with the Codes?

***Response* –** The simplification of the rule book will require clear guidance and we have considered what might be done and had the advantage of advice from specialist practitioners who are familiar with compliance issues. It would be helpful if all guidance could be linked through electronically from the new Codes so that firms are aware that it exists and can access it as they read the Code. Guidance on the following is needed as a minimum:

* **Costs information**. This is an issue which causes real problems for firms, both in terms of complaints to LeO and disputes with the courts. Detailed guidance on this with links to guidance issued by LeO and TLS would help.
* **Conflicts of interest**. It is essential that there is guidance on this subject. This will always be a difficult issue. Many of the situations which arise in day to day practice require complex analysis and examples would help with this. There was extensive guidance in the 2007 Code which firms of all sizes still find useful. It gives useful examples of things like the “common purpose” exception and what “informed consent” might involve. It also explained the definition which was based on the common law which has not changed in substance.

Conveyancing is a high risk area where conflicts are likely when firms act for seller and buyer. Guidance on this would be helpful as the removal of the IBs which dealt with this will take away the prompt for firms to think carefully before acting for seller and buyer.

Guidance on in-house conflicts would also be useful as this is something that is not always picked up by those acting for their employer and e.g. an employee.

* **Duties of confidentiality and disclosure** and the use of information barriers. The same comments apply as in relation to conflicts. Meeting these duties is a key risk for firms and guidance along the lines of that which appeared in the 2007 would be extremely helpful.
* **Separate businesses**. There has already been helpful guidance issued by the SRA on this subject which needs to be retained and updated. Permitting firms to offer non-reserved legal services through separate businesses is a new concept and carries huge risks for clients over understanding the regulatory minefield it creates.
* **Referral arrangements**. References to the law are being removed and new firms need to be aware of the complexities of LASPO in the context of PI referrals. The SRA has already issued guidance on this subject which needs to be retained.

The importance of firms keeping their independence from referrers of business and the many risks involved around referral arrangements continue to need emphasising. We believe that there are examples of referrers who are also joint owners of ABSs putting pressure on the lawyer owners of the ABS to behave in ways which give precedence to the non-lawyer owner/referrer over the interests of the client. Guidance should make absolutely clear that this is wrong.

* **Client care.** This underpins a key Principle. The new Code is so pared back on this important subject that guidance is essential. It is high risk for firms in terms of retaining clients and keeping complaints to a minimum and referrals to LeO.

**Question 6 - Have we achieved our aim of developing a short, focused Code for all solicitors, wherever they work which is clear and easy to understand?**

***Response -*** We support the objective of the SRA but brevity also requires clarity. If too much is left to interpretation by the solicitor on the one hand and the SRA on the other, uncertainty will prevail and a lack of confidence arise. It will be vital for the guidance and toolkits to go into far greater detail to eliminate as far as possible the ‘grey areas’ (see by way of example the sort of guidance we would expect in our answer to Q5 above)

**Question 7 - In your view is there anything specific in the Code that does not need to be there?**

***Response* –** None identified.

**Question 8 - Do you think that there anything specific missing from the Code that we should consider adding?**

***Response* -** We have had the opportunity of reading TLS response and have nothing to add.

**Question 9 - What are your views on the two options for handling conflicts of interests and how they will work in practice?**

***Response* –** Our preference would be for option 1 which as far as we are aware has operated satisfactorily for several years and with which solicitors are familiar.Option 2 would create problems and introduce an additional level of uncertainty because it is not always clear when a significant risk of a conflict has crystallised into an actual conflict.

The following point has been made to us which we believe is a problem which the SRA would need to resolve. A new shortened definition of “client conflict” is proposed. The prohibition on acting only bites when the conflict arises “in a matter or a particular aspect of it” (i.e. the matter). There is, however, no reference in the standard or the definition to “related matters” which are included in the current definition of “client conflict”. This needs addressing because the court will find a conflict where the matters are related as happened in the ***Freshfields case***. This resulted in the firm being censored and prevented from using an information barrier. Unless the definition/standard is changed, standard 6.2 will allow what the law does not allow i.e. firms to act in related matters where there is a conflict. This cannot be the intention.

**Question 10 -** Have we achieved our aim of developing a short focused Code for SRA regulated firms which is clear and easy to understand?

***Response* –** Please refer to our response to Q6.

**Question 11 -** In your view is there anything specific in the Code that does not need to be there?

***Response* –** Save for our views concerning the need to have two separate codes (see our general comments) ‘No’ although it is not possible to express a firm view at this stage without more detail concerning the guidance.

**Question 12 -** Do you think that there anything specific missing from the Code that we should consider adding?

***Response* -** cf. our response to Q11.

**Question 13 -** Do you have any specific issues on the drafting of the Code for Solicitors or Code for Firms or any particular clauses within them?

***Response* -** We have had the opportunity of reading TLS detailed response with which we would agree. We have nothing to add.

**Question 14 - Do you agree with our intention to retain the COLP and COFA roles for recognised bodies and recognised sole practices?**

In responding to this question, please set out the ways in which the roles either assist or do not assist with compliance.

***Response* –** Despite certain reservations largely concerning duplication of effort, ‘Yes’. A clear distinction needs to be drawn between responsibility and liability/culpability.Provided a compliance officer has taken reasonable steps he should not find himself the subject of enforcement action, particularly where he is not the manager or owner of the business.

**Question 15** **- How could we improve the way in which the COLP/COFA roles work or to provide further support to compliance officers, in practice?**

***Response* –** It is clear from the 2012 TLS survey that there is dissatisfaction within the profession with the SRA guidance etc for compliance officers. It will be important for the SRA to provide clearer guidance in future.

**Question 16 - What is your view of the opportunities and threats presented by the proposal to allow solicitors deliver non-reserved legal services to the public through alternative legal services providers?**

***Response* –** Please see our general comments. The problem arises out of the commercial drivers over which the solicitor has no control. To date the experience of solicitors working in the unregulated environment has been confined to organisations such as Law Centres, Citizens Advice and other charities where there is a strong ethical culture, far removed from the world of business. Our fear is that solicitors who find themselves in that environment are likely to find themselves faced with difficult if not impossible choices between the demands of their paymasters and their professional obligations.

Additionally, a question arises where legal work has been carried out by non-lawyers over whom the solicitor may have little or no oversight let alone managerial responsibilities. To what extent would the solicitor be held responsible for the non-lawyers’ errors or unethical behaviour? After all arguably the work is brought into the entity as a result of it having a solicitor(s) on board. Clearly the solicitor(s) will be vulnerable to enforcement action taken by the SRA in respect their errors and behaviour.

To date the solicitors’ profession has always had a single identity which most of the public recognises even if they do not fully understand the regulatory framework which governs their activities. Even some of the most sophisticated users of solicitors’ services are probably not conscious of the restrictions and the protections afforded to them under the regulatory framework. Nevertheless, the perception is that they are required to act in their best interests, with honesty and confidentiality. It is upon this bedrock that the reputation of the profession stands both within the jurisdiction and internationally.

For the first time the proposal creates two tiers of solicitors whose status depends on whether the entity is or is not regulated. The likelihood is that this will create a great deal of confusion, particularly in circumstances where a legal practice decides to split its activities between the two types of entity. The vast majority of the unsuspecting public, notwithstanding the small print which they will have received, are unlikely to be able to draw the distinction. All they will be relying on is that they have placed their affairs in the hands of a solicitor, a brand with which they are familiar.

Accordingly, the principle threats are twofold. First, to the client who may believe he has all the protection of the regulated solicitor working in a regulated entity; almost certainly he/she will have less recourse to the protection and remedies that would otherwise be available to him. Second, there is the serious risk of damage to the reputation of the solicitors’ profession which, once lost would be very difficult to restore.

**Question 17 - How likely are you to take advantage in the greater flexibility about where solicitors can practice as an individual or as a business?**

***Response* -** N/A

***Question 18 - What are your views about our proposal to maintain the* position whereby a sole solicitor (or REL) can only provide reserved legal services for the public (or a section of the public) as an entity authorised by the SRA or another approved regulator?**

***Response* –** Agreed.

**Question 19 - What is your view on whether our current 'qualified to supervise' requirement is necessary to address an identified risk and/or is fit for that purpose?**

***Response*** - It is essential to retain the current rule. Prior to qualification solicitors will have been engaged in training consisting of a mixture black-letter law and transactional procedures. It is the experience of BLS when it was running Management Course Stage 1 that most of those attending had no experience of what was required to run a practice. The feedback was universally positive. The Society still runs a series of modular course covering the various aspects of practice management which remain well-attended and with positive feedback.

We are not sure what evidence exists for the assertion that newly qualified solicitors do not present a significant risk to the public in terms of the standard of service. It may well be in terms of delivery of the service to the client and competence there is no difference from a more experienced cohort of solicitors. That is likely to be due to the support/mentoring that they receive in their first few years. This is not the basis on which to draw the conclusion that newly qualified solicitors should therefore be permitted to set up a business on his own.

It is accepted that 3 year limit is arbitrary but we suggest it is about right for a practitioner to have the opportunity to gain the requisite skills through mentoring and formal training. Without a limit it is difficult to see how the SRA could properly satisfy itself that a candidate “has sufficient skills or knowledge in relation to the management and control of a business.” Here there can be no shortcut to experience. To remove this requirement takes an unwarranted risk with the consumer’s best interests.

**Question 20 - Do you think we should require SRA regulated firms to display detailed information about the protections available to consumers?**

***Response* -**  Yes. It should remain the position that regulated entities provide full information about their service and the protections afforded to them. Our concern is that unregulated entities will not be similarly required to provide this information, once more leaving consumers vulnerable. It would be naïve to think that that the unregulated entities would respond by matching the information requirements with which the regulated firms have to comply.

**Question 21 - Do you agree with the analysis in our initial Impact Assessment?**

***Response* –** We have had the opportunity of reading TLS response and have nothing to add.

**Question 22 - Do you have any additional information to support our initial Impact Assessment?**

***Response* -** We have had the opportunity of reading TLS response and have nothing to add.

**Question 23 - Do you agree with our approach that solicitors working in an alternative legal services provider should not be allowed to hold client money in their own name?**

***Response* -** It is our view that solicitors in an unregulated entity is likely to find themselves in an extremely vulnerable position. The entity is the body which will be physically holding the client’s money/assets with the solicitor having no effective control as to how they are kept or applied. For this reason, should the proposals go forward, contrary to our overall views concerning the proposals, we would agree with the approach.

[We have noted that as things stand solicitors operating in the not for profit sector are responsible for any money and assets which have to be held in their own name.]

**Question 24 - What are your views on whether and when in house solicitors or those working in Special Bodies should be permitted to hold client money personally?**

***Response* –** BLS has a number of in-house solicitors as members, in particular working for local authorities. We have not been able to canvas sufficient numbers to gain their views. However, we have noted TLS comments concerning the problem of in-house solicitors being able to act in reserved activities and, when acting for consumers, the tendency for their work to involve some of the most vulnerable in society. For these reasons the accounts rules should be equally applicable to them. This has not been a problem hitherto.

**Question 25 - Do you agree with our proposal that the SRA Compensation Fund should not be available to clients of solicitors working in alternative legal services providers?**

***Response* –** Yes. The compensation fund is there as a last resort with contributions coming from the regulated profession. Should the proposals be introduced it must be for the entity and/or the individual solicitor to make arrangements through insurance to protect consumers of their services. There remains the residual problem for clients of the possibility of under-insurance and, more seriously, where insurers could decline cover in the event of fraud of the entity, the solicitor or both.

**If not, what are your reasons?**

**Question 26 - Do you agree with our proposal not to make individual PII cover for solicitors a regulatory requirement on the individual solicitor?**

***Response* -** It is fundamental to the brand or perception of ‘solicitor’ that if anything goes wrong there is a remedy and that compensation will be obtained. Solicitors, in whatever entity they are practising should have in place PII cover to the minimum prescribed level provided either by their entity or themselves. Failure to make this a requirement will not only leave the client vulnerable but also the solicitor who, it is suggested, may well be leading or be part of a team over whose work he has no direct control or influence.

**Question 27 - Do you think that there are any difficulties with the approach we propose, and if so, what are these difficulties?**

***Response* -** Please see our response to Q26. The most obvious difficulty is that without insurance the consumer may be left without any remedy at all or perhaps an inadequate remedy (due to any limitation that the entity may have agreed with the client and/or limited insurance cover). Assuming the obligation for the solicitor to have PII cover were to be retained then the issue becomes one for the insurance market. PII insurance is competitive but seldom cheap. A number of factors are taken into account in setting a premium including, claims record, type of work, turnover, size of staff and membership of panels and so on. Add to this the fact that the solicitor is operating in an unregulated environment it is likely that insurers will, at best, be cautious and, at worst, may be reluctant to offer any terms or such punitive terms as to make it very difficult to effect cover. Contrary to what is being stated in the paper we believe that by comparison the cost of insurance is likely to be higher than for regulated solicitors. Furthermore, insurers will insist on all the usual exclusions which the compulsory scheme for solicitors prevents.

**Question 28 - Do you think that we should retain a requirement for Special Bodies to have PII when providing reserved legal activities to the public or a section of the public?**

***Response* -** Yes.

**Question 29 - Do you have any views on what PII requirements should apply to Special Bodies?**

***Response* –** No.

**Question 30 - Do you agree with our view that it is not desirable to impose thresholds on non-SRA regulated firms, which are mainly or wholly owned by SRA authorised solicitors?**

***Response* –** It is the firm view of BLS that all solicitors providing legal services whether they be reserved activities or non-reserved activities should be regulated to the same level to avoid confusion and any possible exploitation arising out of the absence of regulation. To that extent this question and Q31 is otiose.

**Question 31 - Do you have any alternative proposals to regulating entities of this type?**

***Response* -** Please see our response to Q30.

**Question 32 - Do you have any views on our proposed position for intervention in relation to alternative legal services providers, and the individual solicitors working within them?**

***Response* -** Any intervention concerning a solicitor in such an organisation would be extraordinarily difficult. There is the obvious problem of identifying those documents/records etc. which are held by or on behalf of the solicitor access to which the SRA would be entitled and those which belonged to the entity. It does not take much imagination to realise that the resultant muddle could easily become a nightmare especially where the entity refuses to co-operate.

**Question 33 - Do you agree with our proposal that all work within a recognised body or an RSP should remain regulated by the SRA?**

***Response* –** Yes, otherwise there would be a fractured and totally confusing regulatory regime.



**President**

**Birmingham Law Society**

**21 September 2016**